Neutral Citation Number: [2025] EWCA Civ 459

Case No: CA-2024-000892

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
JUSTIN TURNER K.C., JANE BURGESS AND DEREK RIDYARD
[2024] CAT 18

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2025

Before:

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

- -

Between:

JUSTIN GUTMANN	**Respondent**
- and -	
(1) APPLE INC	**Appellants**
(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED	
(3) APPLE RETAIL UK LIMITED	

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Lord Wolfson KC and Lucinda Cunningham (instructed by **Covington & Burling LLP**) for the **Appellants**
Nicholas Bacon KC (instructed by **Charles Lyndon Limited**) for the **Respondent**

Hearing date: 2 April 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 16 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Sir Julian Flaux C:

Introduction

1. This appeal is pursued by the defendants (to whom I will refer collectively hereafter as "Apple") to collective proceedings in the Competition Appeal Tribunal ("CAT"). The appeal is against the class representative ("CR") in respect of the judgment of the CAT dated 12 March 2024 concerning funding issues. It concerns two grounds of appeal, Grounds 2 and 3, in relation to those funding issues. A third ground of appeal, Ground 1, which concerns the consequences of the judgment of the Supreme Court in *R (on the application of Paccar Inc and others v Competition Appeal Tribunal ("PACCAR")* [2023] UKSC 28; [2023] 1 WLR 2594, was stayed, along with other appeals concerning the consequences of *PACCAR*, although the stay was lifted by Order of the Court of Appeal of 4 February 2025. The appeals in respect of those issues are due to be heard in June 2025.

2. Ground 2 concerns the powers of the CAT at the conclusion of the collective proceedings to make an order that the funder's fee or return be paid out of the damages awarded to the class in priority to the class and the ability of class representatives to enter into litigation funding agreements ("LFAs") contemplating such orders. Apple contends that the CAT does not have jurisdiction to make such an order. Ground 3 contends that the LFA in the present case created sufficiently perverse incentives that the CAT could not properly authorise him to act as the class representative because, it is contended by Apple, the LFA requires the CR to argue against the interests of the class he represents in favour of paying extraordinary sums to the funder which, *ex hypothesi*, belong to the class.

Background

3. By its judgment dated 1 November 2023 ([2023] CAT 67) the CAT certified the proceedings, subject to reviewing the terms of the LFA which the CR indicated was to be renegotiated in the light of the decision of the Supreme Court in *PACCAR*. In that case, the majority of the Supreme Court (Lady Rose JSC dissenting) held that the LFAs in question were damages-based agreements ("DBAs") under section 58AA of the Courts and Legal Services Act 1990 since the funder was providing "claims management services" within that section and, in consequence, the LFAs were unenforceable.

4. The LFA in the present case was revised in the light of the decision in *PACCAR* and it was the terms of the revised LFA which were considered by the CAT in the judgment under appeal.

The judgment under appeal

5. Having referred to the decision in *PACCAR*, the CAT noted at [7] that the courts had observed that class actions necessarily require third party funding and that the placing of unnecessary hurdles in the way of funding may undermine the ability of meritorious claims to be brought or increase the cost of funding. It noted, however, that the interests of the litigation funder are not the same as those of the class, citing [83] from the judgment of the Court of Appeal given by Green LJ in *London and South Eastern Railway Ltd and others v Justin Gutmann* [2022] EWCA Civ 1077:

> "By way of preface to our conclusions we acknowledge that it is important for the CAT to exercise close control over costs. There are conflicting considerations at play. On the one hand to enable mass consumer actions to be viable at all will invariably necessitate the assistance of third-party funders (see the discussion in Le Patourel (ibid) at paragraphs [75] – [80]) and the CAT must therefore recognise that litigation funding is a business and funders will, legitimately, seek a return upon their investment. On the other hand there is a risk that the system perversely incentivises the incurring or claiming of disproportionately high costs. And there is also the risk, highlighted in Canadian literature, that third-party funders have an incentive to sue and settle quickly, for sums materially less than the likely aggregate award. This, if true, risks undermining important policy objectives behind the legislation which include properly rewarding the class and creating ex ante incentives upon undertakings to comply with the law."

6. The CAT noted at [8] that a way to align the interests of the funder with those of the class was for the funder's return to be a proportion of the return to the class, but an agreement to that effect was an impermissible DBA. Since *PACCAR*, LFAs have been put in place where returns are linked to multiples of the initial outlay, but as observed by Green LJ this does perversely incentivise the funder whose financial incentives may be best served by reaching an early settlement for modest damages. The CAT pointed out that there are nevertheless safeguards within the legal framework in which class actions are conducted to minimise the impact of this potential conflict of interest.

7. As the CAT said at [9], the initial safeguard is a suitable class representative in receipt of legal advice who will act in the best interests of the class in negotiating an appropriate and competitive LFA. Additionally, the CAT is required to certify the class action and as part of that exercise it will consider the proposed funding arrangements. The CAT then cited from the judgment of the CAT in *Gormsen v Meta Platforms Inc* [2024] CAT 11:

> "34. We are very grateful to Meta for raising this point. We accept entirely that funding gives rise to at least two issues in relation to which the Tribunal must exercise great care: (1) First, there is the question of whether – in terms of straightforward allocation – a funder is taking more from the class than they properly should. (2) Secondly, there is a danger of perverse incentives arising; or (to put it more accurately) in a conflict between funders' interests and class interests manifesting itself. The problem, as we see it, is that funders are (as the law presently stands) precluded from aligning themselves with the class: they cannot, without more, lawfully, seek a return that is based on the damages recovered by the class. To this extent, therefore, the "perverse incentives" are imposed on funders.
>
> 35. Both of these points arise against a context of commercial – and largely confidential – negotiation between the PCR and the funder, into which the Tribunal should be slow to venture. The

> collective actions regime in this jurisdiction depends on funders being ready and willing to assume the very considerable financial risk in funding litigation that is, on any view, large, complex and enormously expensive. It is not for this Tribunal, on certification, to review the commercial arrangements that have been reached between the class representative and the funder. That was a point made by Mr Bacon, KC, for the PCR, and in substance we agree with it: the return to the funder, and questions of costs generally, are controlled by the Tribunal on settlement or judgment, and the Tribunal will be astute to ensure that a system intended to further access to justice does exactly that, and does not become a "cash cow" either for lawyers or for funders.
>
> 36. That being said, there do come points where funding arrangements contain provisions that are sufficiently extreme to warrant calling out or in extremis a blanket refusal to certify…."

8. The CAT endorsed the comments in *Meta* that it should be slow to venture into the detailed negotiations that have given rise to the LFA save where the provisions are sufficiently extreme to warrant calling out.

9. At [11] the CAT noted that additional safeguards could be written into an LFA by ensuring that important decisions in the litigation are not made by the funder. It was expressly provided in paragraph 10.1 of the LFA in this case that the CR and solicitor acting on his instructions have independent control over the conduct of the proceedings and in section 16 that any disputes between the funder and the CR are to be referred to an independent KC. The CAT noted at [12] that, importantly, it had a supervisory role in determining how the proceeds are to be distributed at the end of the proceedings which means that the CAT can revisit then whether it is prepared to endorse the payment of the agreed sums to the funder. As the CAT said:

> "At this stage it may have better visibility as to the proportionality of the Funder's fee in relation to the damages awarded and the complexity of the proceedings and can, if necessary, require further evidence to be presented in relation to the appropriateness of the Funder's fee."

10. The CAT then set out the terms of the funding arrangements under the LFA in some detail. It is not necessary to repeat all that detail in this judgment, other than to note that, as the CAT said in [16], the Funder's Return is calculated not as a percentage of the damages awarded but by reference to a multiple of the capital committed. The CAT then set out the two possibilities identified in Schedule 2 to the LFA with respect to the Funder's Return in Table 1 and Table 2. Table 1 provides for the calculation of the Funder's Return in accordance with Priorities Waterfall 1 (as varying multiples of Committed Capital depending upon when recovery is made) if the CAT approves the payment of costs, fees and disbursements otherwise than from, in effect, undistributed damages. Table 2 provides for the calculation of the Funder's Return in accordance with Priorities Waterfall 2 (again with varying multiples depending on when recovery is made) if the CAT does not approve the payment of costs, fees and disbursements otherwise than from, in effect, undistributed damages. As the CAT noted in [19], under

Table 1, repayment of the funder's outlay and the funder's fee and payments to solicitors and counsel take priority over the payment of damages to Class Members. As the CAT said: "This gives rise both to the question of whether this is permissible as a matter of law and whether it is appropriate." It then went on to consider those questions.

11. At [20] it quoted the general power in Rule 104 of the Competition Appeal Tribunal Rules 2015 ("the CAT Rules") to order recovery of costs in proceedings before the CAT, noting at [21] that this was a broad power but that it was doubtful whether it extended to the CAT ordering payment of a fee to a funder. Such a fee may be irrecoverable as "costs and expenses" as a matter of law in English proceedings and Rule 104 is directed to *inter partes* payments of costs, not to payments of a fee from the CR on behalf of the class to the funder.

12. At [22] the CAT discussed the position of the class representative under Rule 78 of the CAT Rules in these terms:

> "Under Rule 78 of the Tribunal Rules the Tribunal may authorise a class representative to bring collective proceedings. That class representative is required to act fairly and in the interest of the class, and is required to have a plan for "a method for bringing proceedings on behalf of representative persons" (Rule 78(3)(c)). The powers of the class representative are not specified but acting as a class representative necessarily requires the making of decisions on behalf of the class, which will impact the success of the claim and the damages that members of the class will receive. A class representative will, during the course of collective proceedings, be making crucial decisions relating to the manner in which the claim is fought, the legal advisers to be used, how the claim is to be funded and the quantum of damage to be claimed. A representative must necessarily, subject to the supervision of this Tribunal, have been granted the power to make these important decisions in the litigation, including the decision of what arrangements are appropriate for the funding of the litigation."

13. At [23] the CAT noted that the issue which falls for determination is whether Parliament intended the power of the class representative to enter an LFA to be curtailed beyond the requirement of acting fairly and in the interests of the class. The CAT concluded: "Other than the illegality of entering into a DBA, we see no reason for reaching a conclusion that it did."

14. The CAT then considered section 47C of the Competition Act 1998 ("CA 1998") which deals with damages and costs in collective proceedings, citing (2) to (6):

> "(2) The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person.
>
> (3) Where the Tribunal makes an award of damages in opt-out collective proceedings, the Tribunal must make an order

> providing for the damages to be paid on behalf of the represented persons to—
>
> (a) the representative, or
>
> (b) such person other than a represented person as the Tribunal thinks fit.
>
> (4) Where the Tribunal makes an award of damages in opt-in collective proceedings, the Tribunal may make an order as described in subsection (3).
>
> (5) Subject to subsection (6), where the Tribunal makes an award of damages in opt-out collective proceedings, any damages not claimed by the represented persons within a specified period must be paid to the charity for the time being prescribed by order made by the Lord Chancellor under section 194(8) of the Legal Services Act 2007.
>
> (6) In a case within subsection (5) the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings."

15. The CAT noted at [25] that this was reflected in Rule 93 of the CAT Rules dealing with distribution of the award, which provides:

> "**Distribution of award**
>
> 93.—(1) Where the Tribunal makes an award of damages in opt-out collective proceedings, it shall make an order providing for the damages to be paid on behalf of the represented persons to— (a) the class representative; or (b) such person other than a represented person as the Tribunal thinks fit.
>
> (2) Where the Tribunal makes an award of damages in opt-in collective proceedings, it may make an order as described in paragraph (1).
>
> (3) An order made in collective proceedings in accordance with paragraphs (1) and (2), may specify— (a) the date by which represented persons shall claim their entitlement to a share of that aggregate award; (b) the date by which the class representative or person specified in accordance with paragraph (1)(b) shall notify the Tribunal of any undistributed damages which have not been claimed; (c) any other matters as the Tribunal thinks fit.
>
> (4) Where the Tribunal is notified that there are undistributed damages in accordance with paragraph (3)(b), it may make an

> order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the collective proceedings.
>
> (5) In exercising its discretion under paragraph (4), the Tribunal may itself determine the amounts to be paid in respect of costs, fees or disbursements or may direct that any such amounts be determined by a costs judge of the High Court or a taxing officer of the Supreme Court of Northern Ireland or the Auditor of the Court of Session.
>
> (6) Subject to any order made under paragraph (4), the Tribunal shall order that all or part of any undistributed damages is paid to the charity designated in accordance with section 47C(5) of the 1998 Act(a) and a copy of that order shall be sent to that charity."

16. The CAT said at [26] that the scope of section 47C of CA 1998 had been considered in *Merricks v Mastercard* [2017] CAT 16, where Mastercard had argued that the power of the CAT to order the payment of costs and expenses did not extend to the payment of a fee by a third-party funder, relying on the jurisprudence of the courts. The CAT had held that the section was not so limited, stating at [115] and [119]:

> "115. Sect 47C CA introduced new and distinct provisions concerning the costs of collective proceedings. We see no reason to give the words used a special meaning or to treat them as terms of art governed by jurisprudence on very different statutory provisions. In the ordinary sense, if a third party agrees to provide substantial monies in order to fund litigation, the payment which has to be made to that third party in consideration of this commitment, whether out of the damages recovered or otherwise, is a cost or expense incurred in connection with the proceedings…
>
> 119. For the Applicant, it was emphasised that payment of the fee charged by the funder was essential for the operation of the Funding Agreement. Clearly, no commercial funder would provide substantial funding and assume the significant financial risk of major litigation without consideration, and the structure of the collective proceedings regime for opt-out proceedings was to enable that consideration to be paid out of the unclaimed damages awarded to the class of claimants. The Applicant could not be expected to assume an independent personal liability to the funder for its fee. The statute should accordingly be given a purposive interpretation to encompass a funding structure such as the present. In that regard, we were referred to a range of extra-judicial material which recognised the importance of third party funding in enabling access to justice."

17. At [27] the CAT said that it was therefore clear that the CAT had the power to order the payment of a funder's fee out of unclaimed damages, but that the CAT had not decided in *Merricks* whether the funder's fee could be paid otherwise out of damages. The CAT then cited what Lord Sales JSC said in *PACCAR* at [98]:

> "As the appellants point out, according to the procedural rules in the Tribunal and by virtue of the Competition Act 1998 the funder of opt-out proceedings always takes the risk that all of the damages recovered will be distributed to members of the class with the result that there will be nothing left to pay its fee and also takes the risk that the Tribunal might decline to exercise its discretion to order a payment in favour of the funder."

18. The CAT said at [29]:

> "Lord Sales was plainly contemplating an arrangement whereby the funder would only have the opportunity to pay a funder's fee out of unclaimed damages. But by the use of the phrase "always takes the risk" in combination with the observation and "also takes the risk that the Tribunal might decline to exercise its discretion" he was not, in our view, deciding that there was no power for the Tribunal to sanction payment of a funder's fee out of damages which had not achieved the status of being "unclaimed". That is not a matter which was argued in *PACCAR*."

19. It continued at [30], that its interpretation of section 47C(6) was that it provides a power for the CAT to pay unclaimed damages to the CR in respect of all or part of the costs and expenses incurred by the CR as an alternative to their passing to a charity. In the absence of (5) and (6) it might be thought undistributed damages would have to be returned to the defendant. The section is silent as to whether damages may be paid by the CR to the funder. The CAT noted at [31] that, if the legislature had intended that costs or a funder's fee could not be paid out of damages, there is no reason why it would not have stated this. It also noted that section 47C(3)(b) plainly contemplates that the CAT can order the payment of damages to such other person as it sees fit and it saw no reason why that power could not extend to litigation funders in appropriate circumstances. The CAT concluded: "Section 47C(3)(b) is consistent with the view that a class representative has (again subject to supervision by the Tribunal) the power to agree to pay a proportion of damages to a litigation funder."

20. The CAT recorded at [32] that Apple also contended that, in opt-out proceedings where members of the class have no control over the proceedings, it was necessarily wrong to deprive them of damages in order to meet the fee of a funder. The CAT considered that whilst questions of proportionality and fairness arise, there was nothing plainly wrong with proportionate sums being paid to a funder from damages, stating: "Most litigants in complex proceedings, even if they are entirely successful, will recover only a proportion of their costs from a costs award in their favour and will inevitably have to look to the damages recovered to meet the shortfall."

21. At [33] the CAT noted that if a collective proceedings claim is successful, the class will be awarded costs and damages, but the costs award is unlikely to cover the entirety of

the sums paid out by the funder. In those circumstances, the CAT said it was difficult to see why: "there should be an impediment to a Tribunal ordering that a proportion of damages should cover costs which have been paid by the Funder in the event there are insufficient unclaimed damages to meet the shortfall." The CAT cited the observations of Green LJ (giving the judgment of the Court) in *BT Group plc v Le Patourel* [2022] EWCA Civ 593 ("*Le Patourel"*) at [99]:

> "99. Finally, we address for the sake of completeness an issue that arose briefly during the hearing concerning whether an order for an account credit provides opportunity for the class representatives and funders to be paid. The concern has arisen because the only occasion where costs are expressly dealt with in the context of the opt-out/opt-in regime is in relation to the allocation of undistributed damages to charity. Here the law empowers the CAT to make provision for costs in favour of the representatives out of the sum otherwise to be paid to charity: see s 47C(6) CA 1998 and r 93(5). We detect no difficulty here. It would defeat the purpose of opt-out proceedings, which might routinely require third party funding, if costs orders could not be made in any case where an account credit was the chosen means of achieving distribution. As to this the CAT has a wide discretion to make any case management order it sees fit and it is within its power to ensure that funders and representatives are paid. It also has a broad discretion to make orders as to costs under r 98 which applies to the collective action regime. The Tribunal could for instance make a sequential order that: (i) there be an award of damages; (ii) costs be defrayed from the award (before or after the damages are paid to the representative or authorised third party); and (iii) the residue is then to be distributed according to whatever method is considered by the CAT to be most appropriate be that a fixed sum, an account credit or by some other sensible means. We record that Ms Ford QC for BT did not seek to argue that if an account credit was, in the event, made by the CAT that this gave rise to any difficulty as to costs."

22. As the CAT noted at [34], this passage was not expressly addressing the payment of a funder's fee above what has been paid out to fund the litigation, but the reference to: "its power to ensure that funders and representatives are paid" was not excluding such payments. The CAT recorded that Apple contended that this was *obiter* and the reference to "costs" in Rule 98 could not include a reference to reimbursement of costs from damages, so that in that respect the Court had erred. The CAT said that, even if that were correct, it did not meet the fact that there was a power to award damages to "such other person" under Rule 93(1) and section 47C(3)(b) of CA 1998.

23. The CAT's conclusion on the question whether a funder's fee could be paid out of damages is at [35]:

> "We conclude there is a power for this Tribunal, at the conclusion of proceedings, to make an order that a funder's fee

> be paid out of damages awarded to the class and that it is not impermissible for a class representative to enter into a litigation funding agreement which contemplates this. There is no express prohibition under the Act or the Tribunal Rules which prevents this. Self-evidently a funder must be paid for the risk it takes. If a reasonable return is dependent upon the happenstance of whether there are sufficient unclaimed damages that has the potential to increases the risk for funders and consequently the cost of litigation funding. Insofar as an express power to make such a payment to a funder is required, that power is provided by section 47C(3)(b) of the Act."

24. The CAT then turned to consider whether the mechanisms in the LFA were inappropriate, whether the funder's return was excessive and disproportionate and whether the LFA creates a risk of conflicts of interest between the funder and the CR. The CAT noted at [36] that, under the LFA, at the stage which the proceedings have reached, the agreement was that the funder was entitled to a return of 3.8 x Committed Capital which, given that the Committed Capital is £18,587,324.16, represents an uplift of £70 million. That was a large sum, but the CAT did not at this stage conclude it was "sufficiently extreme to warrant calling out" or that this was of itself a reason for refusing to certify the proceedings. The CAT continued: "That is not to say that this fee will not be subject to scrutiny by this Tribunal at the conclusion of these proceedings, in the light of a better understanding of the reason for this fee, the market, and the proportionality of the fee in relation to the damages to be paid."

25. The CAT recorded the argument of Ms Lucinda Cunningham for Apple that the CR had no right to contract to alienate a part of the damages which would otherwise be distributed to class members, which made him unsuitable as a fiduciary. It was suggested that the priorities waterfall in Schedule 3 to the LFA makes payment to the class subordinate to what Apple contended will be exorbitant profits. Mr Nicholas Bacon KC for the CR pointed out that, although the LFA contained such a provision, it in no way bound the hands of the CAT, which had a complete discretion as to the priorities and the sums to be awarded and the LFA would not create a presumption in favour of the funder.

26. The CAT pointed out at [38] that the priorities may be relevant in the event that there are insufficient unclaimed damages to meet the funder's fee, for example if the litigation has been relatively unsuccessful and the total award of damages is small relative to the funder's fee. In those circumstances, the CAT may well refuse to give absolute priority to the funder. In another case there might be a large award of damages where an efficient method has been devised for making payments to the class, so that unclaimed damages are relatively small. If that were the position, there might be good reason for giving priority to the funder to claim all or part of the fee prior to distribution to the class. A further example is where a fee is determined to be proportionate, but the funder submits that it should not need to wait until it is known what damages remain unclaimed before receiving any payment. Given these different potential circumstances, and in the light of Mr Bacon KC's acceptance that Schedule 3 does not set up any presumptions which impact the CAT's discretion, the CAT did not consider the terms of the LFA inappropriate.

27. At [40] the CAT said it also attached weight to the fact that Table 1 and Priorities Waterfall 1 are only one aspect of the LFA. The LFA specifically contemplates that the CAT may not agree to the costs and fee being paid out of damages, engaging Table 2 and Priorities Waterfall 2, in which case the question of the priority of the funder over the class does not arise.

28. As for conflicts between the funder and the class, the CAT said at [41] that, up to a point, these were inevitable in any LFA. It considered that the protection written into the LFA, coupled with the supervisory jurisdiction made the potential conflict manageable. The CAT concluded, having reviewed the LFA that it would certify the proceedings. The CAT subsequently granted permission to appeal on all three grounds.

Summary of the parties' submissions

29. The principal submission of Lord Wolfson KC on behalf of the appellants in relation to Ground 2 was that the CAT had no jurisdiction under section 47C CA 1998 or the CAT Rules to certify proceedings where the LFA would permit the funder to be paid in priority to the class. The LFA is contrary to statute and unenforceable. Apple seeks an order that the CAT's decision to certify the CR's CPO application be quashed.

30. Lord Wolfson KC identified five points which he said were common ground:

(1) The revised LFA was premised on the CA 1998 permitting payment to the funder from damages before distribution to the class. In the original LFA there had been no obligation on the CR to argue that the funder be paid from the proceeds before the class. Lord Wolfson KC said that no explanation had been provided for this change.

(2) The CR's claim would continue to be funded even if the funder could only be paid from undistributed damages. He referred to Table 2 in Schedule 2 of the LFA which deals with the situation where the funder's fee and return can only be paid out of undistributed damages in contrast to Table 1 where the funder can be paid direct from the damages award. He asked the Court to note that the "delta" as he described it between the multiples in the two Tables was not great, so that it was not a situation where commercially the funder was saying that it was taking a huge risk if it could only be paid from undistributed damages.

(3) Initially the CR himself only contemplated that the funder's return would be paid from undistributed damages. Lord Wolfson KC referred to a paragraph from the CR's first witness statement. He said again that the CR had not provided an explanation as to why the amendment to the LFA was made which obliged the CR to prioritise the interests of the funder over those of the class. It was not suggested that funding was not available in the market on any other basis.

(4) The funder's return constitutes an "expense" within section 47C(6) CA 1998 or a "fee or disbursement" within Rule 93(4) of the CAT Rules and that is what the CAT can order to be paid to a CR from undistributed damages.

(5) As the CAT noted, all the cases in which there has been any discussion of the issue presently being considered including the judgment of this Court in *Le Patourel* have been *obiter*.

31. He submitted that the statute, taken with the CAT Rules provides a complete code. On the plain and ordinary reading of section 47C CA 1998, the CAT does not have jurisdiction to order that the funder's return be paid out of the damages award in priority to the class. The underlying policy behind the section is to provide compensation and redress for loss suffered by the class and there is a balance to be struck between ensuring that the proceedings are conducted in the best interests of the class which should prevail over the interests of the funder, but at the same time recognising that the funder is entitled to a return after class members have been given the opportunity to claim damages. This necessarily means the funder bearing the risk that there is no sufficient part of the undistributed damages available to pay its return in full. Lord Wolfson KC submitted that the Act had been formulated on the basis that the take-up by the class will be relatively low so that, even if the funder is paid at the back end from undistributed damages, there will be enough for the funder to get paid. That was evident from this case since the delta between the multiples under Tables 1 and 2 was small. The funder was saying that it was content to take the commercial risk of only being paid from the back end.

32. Lord Wolfson KC submitted that, under section 47C(3), once there is an opt-out aggregate damages award, the CAT must order that the damages be paid on behalf of the represented persons. The word used is "must", so it is a duty on the CAT, not discretionary like under sub-section (6). The damages must be paid to the CR or some other authorised person, which meant someone like a claims administrator, in order to facilitate payment of the award to the class. He submitted the award was in effect paid to the CR or that other authorised person on trust for the class and nothing in sub-section (3) allows the award to be paid for the benefit of someone other than the represented persons, i.e. the class, for example to a funder. He submitted that the represented persons have no contractual relationship with the funder, which is an important point of distinction between opt-out and opt-in proceedings. The monies are paid to the CR or that other authorised person for purpose of distribution to the class. The word "to" in (3) before (a) and (b) should not be read in an expansive way so that the sub-section requires payment of the damages to the CR but what the CR does with the damages, in the sense that he can pay the funder in priority to the class, is a matter for the CR.

33. Sub-section (5) then provided that any unclaimed damages must be paid to the charity i.e. the Access to Justice Foundation, with an exception in (6) that the CAT may instead order that all or part of the unclaimed damages be paid to the CR to cover costs and expenses, which include the funder's fee. If Parliament had contemplated that funders could be paid directly out of damages prior to distribution, the statute would have said that all or part of the damages can be used to pay expenses and sub-section (6) would have been worded very differently. If the intention had been that sub-section (3) permitted payment to the funder in priority to the class, sub-sections (5) and (6) are difficult to understand in the way they are set out.

34. Lord Wolfson KC referred to Rule 93 of the CAT Rules headed "Distribution of award". Rule 93(1) is materially identical to section 47C(3), save that it uses "shall" rather than "must". Rule 93(4) corresponds to section 47C(6) except that it uses the phrase "undistributed damages" rather than "damages not claimed" and "costs, fees and disbursements" rather than "costs and expenses" and Rule 93(6) then corresponds with section 47C(5).

35. He also referred to the CAT Guide to Proceedings 2015, specifically the first two sentences of [6.84] in the section headed "Distribution of damages":

> "In most cases, the Tribunal will order that the damages be paid to the class representative so that the representative manages the distribution to the class or the represented persons. In opt-out proceedings, the Tribunal is required to order that any damages be paid to the class representative or another person the Tribunal thinks fit: Rule 93(1)"

[6.87] to [6.90] then deal with undistributed damages and the rival possibilities of payment to charity and payment to the CR to cover costs, fees and disbursements. He noted that where the CAT is determining whether and if so what payment should be made to the CR for costs, fees or disbursements, the Access to Justice Foundation is given permission to address the CAT on the determination.

36. Lord Wolfson KC submitted that the Act, the Rules and the Guide to Proceedings do not permit or contemplate a payment to the funder prior to distribution to the class. There is no procedure for it and no entitlement for the class to be heard. To the extent that the CR would be asking the CAT to sanction payment to the funder, there would be the odd position of the CR advocating for the funder to be paid in priority to the class.

37. He accepted that if sub-section (6) were not there, there would be nothing in the statute providing for payment to the funder, even though it would have always been known that litigation funding would be required for collective proceedings, but because (6) was there, Parliament had turned its mind to when the funder gets its money, namely at the back end. This was a policy decision that, if anyone ends up holding the baby, it will be the funder.

38. Green LJ raised with Lord Wolfson KC that the Rule dealing with collective settlements at Rule 94(8) and (9) did contemplate that, in determining whether to approve a collective settlement, the CAT had to determine whether the terms of the settlement are "just and reasonable" and in doing so will take account of all relevant circumstances, including at (9)(a): "the amount and terms of the settlement, including any related provisions as to the payment of costs, fees and disbursements" which was separate from (9)(g): "the provisions regarding the disposition of any unclaimed balance of the settlement", suggesting that payment of costs, fees and disbursements will be dealt with separately from the unclaimed balance. Green LJ asked why, on Apple's case, the funder should be in a better position in the case of a collective settlement than in relation to a claim for damages. Lord Wolfson KC submitted that the position in the case of a settlement was quite different. The sum of money in a settlement was not damages but a sum being paid to settle a claim and the Rules give the CAT a broad jurisdiction in the case of settlements including in relation to payment of the funder.

39. Lord Wolfson KC then took the Court to the consultation on options for reform of Private Actions in Competition Law and the Government Response in January 2013 which preceded the enactment of section 47C by the Consumer Rights Act 2015. In the Executive Summary of the Government Response, it was said that one of the reforms that the Government was proposing to introduce was a limited opt-out collective actions regime in competition law. It was said of this:

> "Breaches of competition law, such as price-fixing, often involve very large numbers of people each losing a small amount, meaning it is not cost-effective for any individual to bring a case to court. Allowing actions to be brought collectively would overcome this problem, allowing consumers and businesses to get back the money that is rightfully theirs – as well as acting as a further deterrent to anyone thinking of breaking the law."

Lord Wolfson KC emphasised the reference to consumers getting back money that is rightfully theirs.

40. He took the Court to the section of the Government Response which discussed what to do with unclaimed sums, noting that various different options had been discussed including cy-près and reversion to the defendant. He noted in particular [5.70]:

> "The Government has therefore decided that any unclaimed sums must be paid to the Access to Justice Foundation, though leaving defendants free to settle on other bases, including on a cy-près or reversion-to-the-defendant basis, subject to approval by the CAT judge."

41. He submitted that this demonstrated that it was envisaged there would be unclaimed sums which should go to charity so 100% take-up was not envisaged and also that the Government did not consider the funder's return in terms. The principal aim of the proposed regime was compensation to class members and nothing in the response supported the CR's position on this appeal.

42. Lord Wolfson KC submitted that low take-up was an accepted feature of this regime. He referred to the recent decision of the CAT in *Mark McLaren Class Representative Ltd v MOL Europe (Africa) Ltd* [2025] CAT 4 where at [86] the CAT said:

> "Although we acknowledge that, in percentage terms, the take-up in most cases is not going to be particularly high, it is in the public interest to encourage substantial numbers of Class Members to take up their entitlements. However, even where there is a small take up, substantial payments to charity from unclaimed sums can assist in providing a positive outcome."

43. The current CR was aware of this from the other case in which he was CR: *Gutmann v First MTR South-Western Trains Limited* [2024] CAT 32 where in the judgment approving the collective settlement the CAT said at [89]-[90]:

> "…It is noted that the CR gives the range of 10 to 20 per cent take-up based on North American experience but, quite frankly, no one knows for sure what that is likely to be.
>
> 90. When one looks at the consumer class actions experience in North America, an analysis of settlement campaigns issued by the Federal Trade Commission in September 2019 entitled: 'Consumers and Class Actions: A Retrospective and Analysis of

> Settlement Campaigns' suggests that take-up rate could be lower than the 10 per cent figure given by the Settling Parties…"

44. Lord Wolfson KC also referred to the decision of the Supreme Court in *Merricks v Mastercard* [2020] UKSC 51; [2021] 3 All ER 285, where in the judgment of the majority, Lord Briggs JSC at [3] identified three key features of collective proceedings, the second of which was:

> "the remedy sought may, but need not always, be the award of what are called aggregate damages. This type of damages provides just compensation for the loss suffered by the claimant class as a whole, but the amount need not be computed by reference to an assessment of the amount of damages recoverable by each member of the class individually."

45. Lord Wolfson KC also referred to [45] and [58] of that judgment drawing the distinction between awards of damages in ordinary civil litigation and aggregate awards in collective proceedings. The same point was made by Lords Sales and Leggatt JJSC in the minority judgment at [149]:

> "We think it clear that, under the legislative scheme, where an aggregate award of damages is made, that award is the means by which compensation is achieved: that is to say, by providing compensation for loss suffered by the class of represented persons as a whole."

Accordingly, the comparison with what happens in non-collective proceedings was not helpful. Lord Wolfson KC noted that, in his supplemental skeleton Mr Bacon KC had referred to solicitor's liens and funder's fees in private litigation, but he submitted that that was all beside the point.

46. Lord Wolfson KC submitted that the Act, Rules and Guide to Proceedings provide "guiderails" for the exercise by the CAT of discretion of any significance relating to the collective proceedings regime and it would be remarkable if the Rules were giving the CAT a discretion as broad and fundamental as contended for by the CR without any guiderails to assist it. He noted that, as Lord Briggs JSC had said in *Merricks* at [27], Rules 75 to 81 made detailed provision for the commencement and certification of collective proceedings. He submitted that the notion that some broad unrelated provision in the Rules could be used as a hook for this fundamental point was inconsistent with the statutory scheme.

47. Green LJ drew attention to Rules 2 and 4. Rule 2(2) provides: "These Rules are to be applied by the Tribunal and interpreted in accordance with the governing principles set out in Rule 4, which contains express provisions on ensuring proportionality and justice and fairness in relation to costs. He suggested that this gave the CAT a broad overarching power including in relation to determination of whether to make a CPO under Rule 77 to ensure that anything in relation to costs is fair, proportionate and meets the principle of justice. Lord Wolfson KC submitted that the governing principles were not a power or separate font of jurisdiction. It was a bootstraps argument to say that because the CAT needs to bear in mind the principle of justice, it can do anything which it thinks is just. He could see that this sort of argument about the governing principles

could be used if there were not the express statutory provision in section 47C(6) dealing with costs and expenses but given the presence of (6) there was no need to stretch the jurisdiction in (3) as the CR sought to do.

48. Lord Wolfson KC referred to what was said by Jenny Willott MP, Parliamentary Under-Secretary of State when the introduction of subsection (6) was being proposed in the Bill which became the Consumer Rights Act 2015: "the amendment will mean that legal costs can be recovered only after consumers have claimed their redress". He also referred to [98] of the majority judgment of Lord Sales JSC in *PACCAR*:

> "…As the appellants point out, according to the procedural rules in the Tribunal and by virtue of the Competition Act 1998 the funder of opt-out proceedings always takes the risk that all of the damages recovered will be distributed to members of the class with the result that there will be nothing left to pay its fee and also takes the risk that the Tribunal might decline to exercise its discretion to order a payment in favour of the funder. UKTC is the proposed representative in the opt-out proceedings and, if those proceedings succeed, will obtain an award of damages on behalf of the class represented. Distribution of the damages is governed by rule 93 of the Tribunal Rules. Members of the class who claim their share of the damages in time are to be paid; but it is in the nature of opt-out proceedings brought on behalf of a wide class of people, many of whom may be unaware of or uninterested in the proceedings, that there may be a substantial amount which is not collected. Rule 93(4) enables the Tribunal to order payments out of undistributed damages in respect of the representative's costs, fees and disbursements and it has been established that this also permits payment of a funder's fee: *Merricks v Mastercard Inc* [2017] CAT 16; [2017] 5 CMLR 16, paras 117 and 127."

49. He emphasised the two references to the funder always taking the risk that all the damages are distributed to the class and that the CAT will decline to exercise its discretion to order a payment in favour of the funder. He also referred the Court to the article by Professor Rachael Mulheron KC on Third Party Funding and Class Actions Reform in 2015 (131 LQR 291). At 295, the author said:

> "Moreover, even if the representative claimant is awarded an aggregate assessment of damages…that representative claimant receives the aggregate sum on behalf of the entire (and unidentified) class. The representative cannot just give away a portion of each class member's damage to a third party, such as a Funder, without a pre-established legal right to do so."

50. He submitted that the point she was making was that because there is no contract between the funder and the class, the CR cannot say it will pay the damages to the funder and in doing so it is discharging the contractual obligations of the class to the funder. At 307-310 she identifies difficulties with the funder having what she terms a first charge over the damages award.

51. Lord Wolfson KC then dealt with the decision of this Court in *Le Patourel* in relation to which the CR was contending that this Court had approved the jurisdiction of the CAT to order the payment of the funder from the award of damages before distribution. He submitted that the Court had not done so, as there was no argument on the jurisdiction point and what was said was *obiter* and was about the possibility of an innovative method of distribution to the class in due course by way of account credits. He submitted in relation to [99] of the judgment (quoted at [21] above) that it wrongly treated the funder's return as a cost within Rule 98, but Rule 104 expressly defined costs as *inter partes* costs which do not include a success fee of any kind: see *McLaren* [2024] CAT 47 at [25] to [29].

52. In relation to account credits, he submitted that, even if that method of distribution were deployed, there would be unlikely to be 100% payment out because people will have died or cannot be found, although he accepted there was a higher risk in such a case that there would not be enough left undistributed to pay the funder in full. However, that was a risk baked into the regime as *PACCAR* had noted, which Parliament had allocated to the funder. He accepted that Parliament had not been contemplating when section 47C came into force cases of a high take-up of damages or of account credits but what the Court cannot do is, in effect, reverse engineer the situation and rewrite the statute so as to permit the funder to be paid first. Rather Parliament has to be asked to amend the statute.

53. Lord Wolfson KC dealt in more detail with collective settlements. He submitted that the key difference between a settlement and a damages award was that in the case of a settlement there was no determination of the extent of the loss suffered by the class or even whether there was an infringement of competition law. Therefore, the whole issue of full compensation does not arise. Rather there is a complex judgment to be made as to whether it is a just and reasonable settlement in all the circumstances. It is not surprising that the Act and the Rules are different and give the CAT a much wider latitude than in the case of a damages award.

54. He accepted that in collective settlement cases, Parliament is giving the CAT an overall discretion but in damages cases, Parliament was saying that where there is an order for payment of damages, that is the sum that the CAT has ruled is compensation in damages for the class as their redress, the money, should be used for that purpose. It was only where there were unclaimed damages after that purpose had been carried out that the funder should be paid.

55. Lord Wolfson KC then turned to the other ground of appeal currently before the Court, Ground 3, which is that the LFA in the present case created sufficiently perverse incentives that the CAT could not properly authorise the CR to act as the class representative. He submitted that the CR has taken on an unfettered contractual obligation to take all reasonable steps to realise the funder's return in full and not take any action which prejudices the interest of the funder. This was an arrangement which no reasonable CR should have committed himself to because it is not in the interests of the class for the funder to be paid early out of the gross pot. There is silence from the CR as to whether, as Lord Wolfson KC put it, this arrangement was the only game in town.

56. He took the Court to the recent decision of the CAT in *Christine Riefa Class Representative Limited v Apple Inc* ("*Riefa*") [2025] CAT 5 and, in particular, the

principles in relation to scrutiny of the funding arrangements for the purposes of the authorisation condition set out in [31]. He emphasised (5) and (6):

> "(5) An important protection for potential class members is that the PCR will properly act in the best interests of the class including when agreeing any funding arrangements, and in managing the proceedings going forward including ongoing interactions with funders. That requires the PCR to be sufficiently independent and robust.
>
> (6) In forming its view as to the ability of the PCR to act fairly and adequately in the interests of potential class members the Tribunal will consider all relevant circumstances, including the question of how the PCR has satisfied itself that the funding arrangements reasonably serve and protect those interests."

57. As Lord Wolfson KC pointed out, in that case the CR gave evidence and was questioned by the CAT as to her understanding of her obligations under the LFA. Its conclusion was at [106]:

> "…in order to meet the authorisation condition, the PCR – whose representative is in this case its sole director, Prof Riefa – must demonstrate that it has a clear view of the interests of the class and can engage robustly and independently with advice received. In order to do so it must at the very least have a good understanding of (a) the effect of the terms being offered, and (b) the overall context in which it is being advised, including the position of its legal advisers, and the risks of any conflicts of interest arising from that position. In our view, the evidence of Prof Riefa falls well short of demonstrating a good understanding of either of those things."

58. He submitted that (i) the burden is on the CR to satisfy the CAT that the manner in which they have approached the funding arrangements demonstrates sufficient regard for the interests of the class members; (ii) the CR must demonstrate a clear view of the interests of the class; and (iii) the CR must demonstrate a good understanding of the effect of the terms of the LFA. He submitted that the CR in the present case could not demonstrate these matters. There was no evidence that he had sought independent advice. However, in his submissions, Mr Bacon KC pointed out that this was factually incorrect: the CR had sought the advice of an independent KC.

59. Lord Wolfson KC submitted that the CR had not satisfied the authorisation conditions because he had not demonstrated that he is able to act properly as a class representative. However, as Green LJ pointed out the CAT found otherwise and Apple had to persuade this Court that the CAT had erred in law in doing so. Lord Wolfson KC submitted that the CAT had dealt with this issue of whether the CR had demonstrated that he could properly act as a class representative very shortly at [36] to [42] of the judgment, so it had exercised its discretion without regard to fundamental points, in particular the nature of the contractual obligations in the LFA. The fact that the CAT has complete discretion at a later stage as to the priorities and sums to be awarded, referred to at [37]

was an insufficient safeguard since there would be nobody before the CAT advocating the interests of the class since the CR had aligned himself with the funder.

60. On behalf of the CR, Mr Bacon KC submitted that the key paragraph of the judgment was [35] quoted at [23] above. He submitted that this was entirely correct. Self-evidently the funder must be paid for the risks it takes. If a reasonable return were dependent on the happenstance of whether there were sufficient unclaimed damages, that would potentially increase the risk for funders and thus the cost of litigation funding. In so far as an express power to make payment to a funder from the damages award is required, it is to be found in section 47C(3)(a) and/or (b) supplemented by the Rules.

61. He pointed out that, although Apple's appeal had focused on whether funders could be paid in advance of the class, the principle was equally applicable to solicitors and barristers working under conditional fee agreements for which they charge a success fee or ATE insurers providing adverse costs cover, all of which fall within "costs, fees and expenses". It was important to have this wider context in mind. He also pointed out that, absent pro bono litigation, there is not a single area of litigation in this jurisdiction where a successful claimant is not expected to pay the costs of pursuing the claim, either from the proceeds or from some other source. Apple's argument would create an exception to this. The logic of the argument, as Lord Wolfson KC accepted, is that if distribution were close to 100% there is no jurisdiction for the lawyers, funders and ATE insurers to be paid, since his case is that they can only be paid from unclaimed damages. This would drive a coach and horses through well-established principles and would have been very clearly identified within the legislation if it had been intended. The idea that the more successful the lawyers had been in recovering and distributing damages, the less likely they were to recover their fees would have been perverse and if it had been intended would surely have come up in the consultation process.

62. He also reminded the Court that the regime creates both opt-out and opt-in processes with the CAT deciding which is appropriate. A peculiar aspect of Lord Wolfson KC's submissions is that he is bound to accept that, if one goes for the opt-in option, everyone gets paid, whereas on his case, if one goes for the opt-out option, there is a significant risk that not everyone gets paid. It cannot have been the intention of Parliament that payment of the lawyers and funders should depend upon the structure of the process by which the damages are sought to be recovered.

63. The other point he emphasised is that it cannot possibly have been intended by Parliament that, if there was a settlement in an opt-out case, the lawyers, funders and ATE insurers would have the right to be paid from the damages, but if there was a judgment they would not. That makes no sense at all. He noted that Lord Wolfson KC accepted that, in the case of a settlement, the CAT had jurisdiction to agree that a proportion of the settlement sum go to the funder or lawyers. However, this jurisdiction was not expressly spelt out in section 49A CA 1998 which dealt with collective settlements. Rule 94(4)(b) of the CAT Rules contemplates that an application for approval of a collective settlement will "set out the terms of the proposed collective settlement, including any related provisions as to the payment of costs, fees and disbursements". Rule 94(9) then provides:

> "(9) In determining whether the terms are just and reasonable, the Tribunal shall take account of all relevant circumstances, including—
>
> (a) the amount and terms of the settlement, including any related provisions as to the payment of costs, fees and disbursements;"

The Rules thus clearly contemplate a settlement under the terms of which the funder and lawyers are to be paid out of the overall sum and, as I pointed out in argument, if that is permitted by the Rule, even though section 49A is silent on the point, settlement on that basis must be within the scope of the section, otherwise the Rule would be *ultra vires*.

64. Mr Bacon KC submitted that the passage from the article by Professor Mulheron KC quoted at [49] was wrong. It seemed to be predicated on the proposition that the CR does not have a representative capacity for the class itself whereas he does. Contrary to her article, there is a pre-established legal right to pay a proportion of the award to a third party. There is such a right in favour of funders and lawyers in the terms of LFAs entered by CRs. The CR does not itself have a claim but represents the class which has the claim and everything the CR does in executing LFAs or conditional fee agreements or ATE policies it does on behalf of the class and it binds the class to the terms of those agreements. Were it otherwise an intolerable position would be reached where the CAT would approve the various agreements only to be told at the end that none of them has had any legal effect because the class is not bound by them. The suggestion by Lord Wolfson KC in relation to Ground 3 that there is no-one to represent the class at the distribution stage is simply wrong: the CR represents the class. The LFA contains at [10.4(j)] an express requirement on the CR to act "fairly and justly in the best interests of the Class Members".

65. He noted that in the *McLaren* settlement judgment ([2025] CAT 4), the CAT had made the point that there were different stresses and strains on a CR, the different issues come to a head when everyone is before the CAT seeking to have their first or second dibs, but this is the natural consequence of the system set up and perfectly manageable. The CAT had made clear that it relied on full and frank disclosure to the CAT of the relative prioritisation between the class members and stakeholders i.e. for example lawyers and funders. This was a reference to [65] of that judgment. Furthermore, as that judgment makes clear, it is ultimately for the CAT to determine what should happen. Mr Bacon KC submitted that the same approach should be taken whether what the CAT is considering is a settlement or a distribution following a damages assessment by the CAT. The idea that there should be two lines of jurisprudence is unthinkable and unprincipled. He agreed with me that it was just semantics to suggest, as Apple did, that a settlement sum was not damages but some sort of pot of money and he noted that, in the settlement cases, the CAT made express reference to "the damages" being agreed in a particular sum. No argument had been put forward by Apple to justify any difference of approach between settlement and distribution after judgment.

66. In relation to the jurisdiction to order payment to the funder before distribution of an award to the class, Mr Bacon KC supported the CAT's conclusion that this fell within section 47C(3)(b): "an order providing for the damages to be paid on behalf of the represented persons to…such person other than a represented person as the Tribunal thinks fit". The words were extraordinarily broad so that whoever the CAT thinks

should receive some or all of the damages, that person can be the recipient. However, he submitted (3)(a) was likewise applicable: payment to the CR enables the CR to distribute the damages in accordance with the CR's obligations under the LFAs and CFAs, subject always to the CAT's supervisory jurisdiction.

67. He submitted that what followed in subsections (5) and (6) was dealing with a completely separate point, what to do with undistributed damages, a problem which arises in opt-out cases because a lot of people who are within the class do not even know the litigation is going on despite the CAT doing all it can to make the public aware of the proceedings. Here Parliament was seeking to address what happens to unclaimed money, which was not a problem in conventional litigation. What Lord Wolfson KC was seeking to do was draw from what goes on with unclaimed damages and infer what deals with claimed damages, creating a world where there was a prospect of the funder and lawyers not getting paid in full, assuming their fees are found by the CAT to be fair and reasonable.

68. Mr Bacon KC disputed Lord Wolfson KC's assertion that when the Consumer Rights Act 2015 was being debated and passed, everyone in Parliament was proceeding on the basis that in opt-out cases there would be limited take-up of damages. It would have been curious and unwise, without the benefit of any experience, to have proceeded on any sort of hypothesis. Furthermore, this statute cannot be interpreted on the basis of what people thought might happen on distribution.

69. In relation to the decision of this Court in *Le Patourel* Mr Bacon KC referred to [33] where, in considering section 47C the Court said:

> "The Act however does not indicate how, once the money is in the hands of the representative or authorised third person, the damages are thereafter in practical terms to be distributed to the class."

70. He also referred to [36] where the Court noted the general principles in Rule 4 submitting that these smoothed the edges as to the jurisdiction of the CAT ensuring that account is taken of proportionate costs, proportionate behaviour, fairness, justice and reasonableness, ingredients of the justice system which are familiar and which are matters for the CAT not the CR.

71. He also noted [39] where the Court emphasised the broad discretion conferred on the CAT and [41] where in dealing with Rule 93 the Court said:

> "Rule 93 addresses distribution of an award of damages but does so only selectively. It caters for the start of the process and one eventuality that might arise at the end but otherwise is silent as to how an award is to be distributed, leaving it to the broad discretion of the CAT to regulate all matters in between."

Having set out the provisions of Rule 93, the Court then said at [44]:

> "The Rules leave all other matters relating to distribution to the Tribunal to supervise by way of case management decisions. Rule 93(3) confers a broad power on the CAT to exercise control

> over the distribution process by ordering "any … matters as the Tribunal thinks fit"."

72. Mr Bacon KC submitted that the importance of these passages was to answer Lord Wolfson KC's submission that case management was one thing, but having a jurisdiction over damages to prioritise funders over the class was another. The CAT and the Court of Appeal in that case were exercising their jurisdiction under these broad case management powers. Whilst the approval of a jurisdiction in the CAT to order an account credit might not feel like case management, that was how this Court treated the exercise of discretion in that case. Mr Bacon KC submitted that when it came to how the damages were to be apportioned as in the present case, the position was no different.

73. He drew attention to [91] where the Court dealt with the argument of BT that it would be *ultra vires* for the CAT to order anything other than the distribution of a fixed fungible sum by way of damages and said, in dismissing that argument:

> "If BT is correct in a case with a large class, distribution could take years and entail the incurring of costs which would have to be deducted from the damages to be paid to the customer and would have the effect of reducing the ultimate aggregate sum to be distributed. In the present case the class comprises about 2.3 million customers; the damages claimed approach £600m. The average claim will be between £148 and £333. If customers prove hard to contact and/or then engage in correspondence about the claim including seeking proof that it is genuine and/or further correspondence about the method of payment, the administrative costs could rapidly eat significantly into the sum to be paid."

As Mr Bacon KC said, the Court was there clearly contemplating that the costs of distribution, which would include legal costs, would be deducted from the damages before distribution.

74. In relation to [99] of the judgment which I have quoted at [21] above, he submitted that the analysis of the Court about the CAT's powers to order payment of costs from the damages prior to distribution was not dependent upon Rule 98 dealing with costs. As the Court said in the previous sentence to that referring to Rule 98: "As to this the CAT has a wide discretion to make any case management order it sees fit and it is within its power to ensure that funders and representatives are paid." Accordingly, there was a wide discretion to order payment of costs and the funder's return to the funder and lawyers in priority to the class. This is exactly what is happening in the settlement cases.

75. In relation to Ground 3, Mr Bacon KC submitted that, if the CAT has the jurisdiction to distribute damages to funders and lawyers in priority to distribution to the class, there can be absolutely nothing wrong with the CR entering into a LFA which makes provision for that to happen. That is what the present LFA did, but importantly always subject to the CAT's supervisory jurisdiction in determining the appropriate order to make. There is no question of the CR fettering the class entitlement by agreeing the provisions of the LFA, as Lord Wolfson KC suggested. Under the LFA the funder's return is only recoverable with the approval of the CAT. The CR is not acting against the interests of the class in ensuring that the interests of the various parties, including

the funder, are brought to the attention of the class. The CR is, as Mr Bacon KC put it, the facilitator for ensuring that the right outcome is secured, not just for the class but for those who assisted the class in bringing the claim to a successful conclusion. The submission by Lord Wolfson KC that in seeking an order that the damages be utilised to discharge funding fees, the CR was somehow acting contrary to the interests of the class, was a terrible one. The class would not succeed and recover damages at all without the assistance of the lawyers and funders in the first place.

76. He emphasised the importance of the supervisory jurisdiction of the CAT to ensure that whatever order is made takes account of the potentially competing interests of the class and of the funders and lawyers so that a fair, just solution is reached.

77. Finally in relation to Ground 3, Mr Bacon KC said he was taken by surprise by the criticisms made by Lord Wolfson KC in his oral submissions of the CR. He had relied on *Riefa* which, as Mr Bacon KC said was a case of a class representative in unhappy circumstances about whose independence the CAT was concerned and it was miles away from the present case. He submitted that Lord Wolfson KC's submissions sounded very like a re-hearing of the certification in the Court of Appeal which was unacceptable.

Discussion

78. Ingenious though the arguments on jurisdiction advanced by Lord Wolfson KC were, I am unable to accept them. Payment of the funder's return and lawyers' fees from the award of damages in priority to payment to the class is clearly permitted under section 47C(3)(a) and (b) CA 1998. Sub-section (3)(a) contemplates that the CAT will make an order for the damages to be paid on behalf of the represented persons (i.e. the class) to the CR. It does not prescribe what the CR does with the damages once received and accordingly it would be open to him to pay the funder and the lawyers, subject always to the control of the CAT under its supervisory jurisdiction. Sub-section (3)(b) contemplates that the CAT will make an order for a proportion of the damages to be paid on behalf of the class to such third party as the CAT thinks fit. These are wide unrestricted powers given to the CAT which can clearly include payment to the funder or the lawyers of a proportion of the damages in priority to the class. There is no basis for limiting the scope of "such person other than the represented person" to a claims administrator or similar as Lord Wolfson KC suggested. Whilst what this Court said in *Le Patourel* at [99] was *obiter*, it was clearly correct in concluding that: "the CAT has a wide discretion to make any case management order it sees fit and it is within its power to ensure that funders and representatives are paid".

79. Apple sought to argue that if payment was made to the funder or the lawyers (whether by the CAT or by the CR) it would not be "on behalf of [the class]" because there is no contractual relationship between the funder or the lawyers and the class. That argument is misconceived: the CR represents the class and acts on their behalf, and any agreements he makes with the funder or the lawyers, including the LFA and any CFA are made on behalf of the class. The Introduction to the LFA states:

> "INTRODUCTION
>
> The Class Representative is bringing (or intends to bring) the Proceedings on behalf of the Class Members against the

> Defendant in respect of the Claim. The Solicitor is acting for the Class Representative in connection with the Claim and in accordance with the Solicitor Agreements. The Funder is a provider of litigation finance managed and advised by Balance Legal Capital LLP. The Class Representative wishes to obtain funding from the Funder for the costs of pursuing the Claim including the costs of an ATE Policy, and the Funder has agreed to fund the Claim and the costs of an ATE Policy on the terms of this Agreement. The Class Representative considers, having taken legal advice, that it is in the best interests of the Class Members to enter into this Agreement and progress the Claim."

80. It is clear from this provision that in bringing the proceedings the CR is acting on behalf of the class and that in entering the LFA he is acting on behalf of the class. It follows that, if in due course the CR pays the funder and the lawyers out of the damages award in priority to the class, he will be doing so on behalf of the class within the meaning of sub-section (3) and will bind the class to the terms of the various agreements he enters on behalf of the class. I agree with Mr Bacon KC that, to the extent that Professor Mulheron suggests the contrary in her article in the Law Quarterly Review, she is wrong. Contrary to the article, there is a pre-established legal right to pay a proportion of the award of damages to a third party such as a funder or the lawyers, both by the provisions of section 47C(3)(b) and by the terms of the LFA.

81. There is nothing surprising or unusual about the CAT ordering payment to funders or lawyers from the award in priority to the class. Subsection (3) is predicated on the CAT having entered judgment in favour of the class so that there has been a successful outcome to the proceedings, which have only been possible because the funder was prepared to fund them on the terms of the LFA, which entitles the funder to its return in the event of a successful outcome, subject always to the amount that it recovers by way of return being approved by the CAT. Lord Wolfson KC's submission that enabling the funder to obtain its return in priority to the class was contrary to the purpose of the collective proceedings regime (as set out in the Government response to the consultation before the legislation was passed) of enabling class members "to get back money which is rightfully theirs" is misconceived. The Government response was not contemplating that funders and lawyers would not be entitled to make an appropriate recovery of costs, fees and disbursements incurred in collective proceedings from a damages award where the commercial reality is that those proceedings could not have been pursued and brought to a successful conclusion without the benefit of litigation funding. The supervisory jurisdiction of the CAT will ensure that what is recovered is not excessive.

82. The wide powers conferred on the CAT by section 47C(3) are reflected in the CAT Rules. These include not just Rule 93 which deals with distribution of an award but, as Green LJ pointed out in argument, Rules 2 and 4 which impose a free-standing duty on the CAT to apply the general principles set out in Rule 4. The general principles give the CAT broad overarching powers to ensure that costs and expenses are dealt with fairly and proportionately and in accordance with the principles of justice. This would include ordering that the funder and the lawyers are paid in priority to the class, a form of order which might be particularly necessary where the CAT considers that the take-up of the damages award by the class may be high because, for example, the CAT is

proposing to order distribution by way of an account credit, which was a course which this Court considered in *Le Patourel* at [99] would be open to the CAT. In those circumstances, contrary to Apple's submission, the funder and the lawyers could not be properly and appropriately remunerated from unclaimed damages under section 47C(6).

83. Contrary to Lord Wolfson KC's submissions, the wide power of the CAT under section 47C(3) and the CAT Rules to order payment to the funder and lawyers in priority to the class is not in any sense fettered or restricted by the presence of section 47C(6). As Mr Bacon KC submitted, subsections (5) and (6) are dealing with a completely separate point from (3): what to do with unclaimed damages in opt-out cases where the take-up may well leave an unclaimed balance, as noted in the two judgments of the CAT quoted at [42] and [43] above. As Birss LJ pointed out in argument, the reason for requiring more detailed provisions in the statute and in the Rules in relation to unclaimed damages is precisely because, unlike in the case of the distributed damages, there is no person to agree how the unclaimed damages should be distributed.

84. Nothing in subsections (5) and (6) suggests that the recovery of costs, fees and disbursements which the CR intends to pay to the funder or the lawyers is limited to the residual unclaimed damages after distribution of the award to the class. I consider that, if it had been intended by Parliament that the funder's return or lawyers' fees could not be paid out of the damages award in priority to the class, section 47C would have said so expressly in terms as it does in subsection (8) which provides that damages based agreements are unenforceable and as it now does by the amendment introduced in subsection (1) by the Digital Markets, Competition and Consumers Act 2024, providing that the CAT may not award exemplary damages in collective proceedings.

85. Apple's case on jurisdiction creates obvious anomalies between opt-out proceedings where the CAT awards damages at the end of the proceedings and both the position in opt-in proceedings and the position where, in opt-out proceedings, the CAT approves a settlement. Lord Wolfson KC accepted that in the case of opt-in proceedings, there is a contractual relationship between the members of the class and the funder under the relevant LFA from which it follows that the CAT can order the payment of the funder's return, from an opt-in award of damages in priority to the class. The discrepancy between the opt-in and the opt-out position which Apple's argument involves is difficult to justify, particularly since the powers of the CAT under the statute are identical in both regimes: see section 47C(3) and (4) quoted at [14] above and Rule 93(1) and (2) quoted at [15] above. In any event, as I have already concluded at [79]-[80] above, contrary to Apple's case, the opt-out class is bound by the terms of the LFA entered by the CR on its behalf.

86. In the case of a settlement in opt-out proceedings, Lord Wolfson KC accepted that in approving a settlement the CAT has a power to approve settlement terms under which the funder and the lawyers will be paid some or all of their costs and fees from the overall settlement sum before any distribution to the class takes place. This acceptance of the position in the case of a settlement is obviously correct given the terms of Rule 94(4) and (9): see [63] above. Furthermore, in two judgments of the CAT which have considered settlements in opt-out collective proceedings, the CAT has recognised that it has jurisdiction to order payment of costs, fees and disbursements (which would include the funder's return) from the settlement sum.

87. In *Gutmann v First MTR South-Western Trains Limited* [2024] CAT 32, there was a provision in the settlement for "Ringfenced Costs" in respect of the CR's costs, fees and disbursements to be paid prior to distribution: see [13(2)] of the judgment. The CAT recognised that there were potential conflicts of interest between the class and the lawyers and funders but determined that the CR and the lawyers had done their best to represent the interests of the class. At [42] to [47] of the judgment, the CAT said this about the significance of the settlement process:

> "42. So why do we have this settlement approval process? Well, it is largely because we have these apparent conflicts of interest. The CR here, Mr Gutmann, is the champion of the class. He has an overriding obligation and interest to ensure that the class is properly represented, and good claims are pursued for the benefit of the class. He has to enter into arrangements with lawyers, experts and funders - as a result of which he judges there is the best chance for them to obtain damages so that class members are compensated as fully as possible, taking into account the inherent risks in litigation.
>
> 43. …Here, the parties are all represented by very capable and experienced lawyers. There is no question in our mind that, whilst there is a conflict, they have done their best to serve the interests of the class over and above their own interests.
>
> 44. Here the conflict is more acute, given the existence of a partial conditional fee agreement ("CFA"), under which the lawyers are being paid [∀] per cent of their usual rates on an ongoing basis but, if they are successful, they get paid more usual rates. This type of arrangement is not unusual.
>
> 45. But the ethical obligations as counsel and solicitors, as officers of the court, mean that they must promote the interests of the class members. The Tribunal appreciates that lawyers can be remunerated in different ways, be it a flat rate, a full CFA, or a partial CFA. There are other possibilities. It is not just a question of the lawyers, there are the funders: they put their capital at risk, they fund the case and without the funders, many of the cases for collective settlement proceeding cases will not be able to get off the ground. Lawyers will not take on cases like the present without some form of payment, and funders are central to providing the capital for this (see, for example, Gutmann CA at [83]).
>
> 46. Funders generally operate on a portfolio basis and will only fund cases if they expect to make a reasonable return over that whole portfolio. The fact that they may want a higher return than would seem justified on an individual case is to be explained by the fact they have a book of claims, of which some will bear fruit and others will not bear fruit. The ones that do not bear fruit will make a loss and funders need to be able to make up for that loss in other cases that are successful.

> 47. The Tribunal recognises that funders and funding are integral to the viability of the three claims being brought by the CR, as recognised by the Court of Appeal in Evans v Barclays Bank [2023] EWCA Civ 876 at [130]."

88. The CAT went on to say at [53]:

> "Because of the conflicts we have identified, it is all the more important that we have full and frank disclosure of all the material before the Tribunal, so the Tribunal is in the best possible position to ensure that any settlements and distribution plans are fair and reasonable for the class members. Not just fair and reasonable for the class representatives themselves and for the defendants, but we will not ignore the interests of others such as the lawyers, the experts and the funders, because we have an interest not just in this case but in future cases. If the lawyers and the funders are not going to get a return in this case, then they may be deterred from acting in further cases."

The CAT approved the settlement including the Ringfenced Costs on the basis that the sum in question was a reasonable figure on the basis that the actual costs were substantially more: see [62].

89. In *Mark McLaren Class Representative Ltd v MOL Europe (Africa) Ltd* [2024] CAT 47, the CR made an application to the CAT for an order that the costs and part of the damages paid to it by one of the defendants pursuant to a settlement agreement be used to cover a portion of the CR's costs, fees and disbursements owed to the funder, the ATE insurers and the CR's solicitors and counsel. At [21] of that judgment, the CAT said:

> "In cases where there is a successful outcome, whether by way of settlement or judgment against defendants, it is for the Tribunal to determine how any damages are to be dealt with in terms of distribution to class members, and payments of costs and expenses, including any return for funders. How that exercise is to be carried out is very much fact and case specific, and the Tribunal would endeavour to act fairly to all those concerned, mindful of the incentives and the need for a funding market for collective proceedings. Funding will dry up if funders are unable to recover their costs and disbursements and make a profit even on cases where there is a successful outcome overall. The importance of funders to collective proceedings and of proceedings being economically viable for them has been repeatedly remarked upon in the authorities, including *O'Higgins v Barclays Bank plc* [2023] EWCA 876 at [129]; *Consumers Association v Qualcomm* [2022] CAT 20 at [100]; and *UK Trucks Claim Limited v Stellantis* [2022] CAT 25 at [110]."

90. The CAT went on to consider various of the Rules pursuant to which a power to permit the CR to pay third parties such as funders from the settlement proceeds, alighting on Rule 53(2)(n) relating to the CAT's general case management powers, which provides:

> "53. -- (2) The Tribunal may give directions - […]
>
> (n) for the award of costs or expenses, including any allowances payable to persons in connection with their attendance before the Tribunal."

91. At [52]-[53] the CAT concluded that it did have jurisdiction to make such an order, although it declined to do so in the circumstances of that case:

> "52. The question is whether the phrase "award of costs or expenses" in subparagraph (n) is sufficiently broad to constitute the payment of stakeholder entitlements, including payments to funders. It is clearly desirable that a narrow interpretation is not given to this wide case management provision, particularly given the Tribunal's views on the other provisions relied upon in the RCA. There should be an ability for the Tribunal as part of its case management powers to permit the CR to pay third parties, like funders, without whom collective proceedings cannot be brought. [The CAT then cited [99] of the judgment of this Court in *Le Patourel*]
>
> 53. Although there is no similar account relationship in this case, there is a need to ensure that funding remains attractive to stakeholders for these types of cases going forward. A construction of "costs or expenses" which permits the Tribunal to approve payments to funders outside the context of damages awards by the Tribunal is appropriate, but going forward changes to the Rules should be considered as part of the current review of the Rules. Even if a payment to a funder may not be a cost in the same sense as in rule 104(1), it does amount to an expense."

92. In the later *McLaren* settlement judgment ([2025] CAT 4), £8,750,000 of the overall settlement figure of £24,500,000 was earmarked for costs, fees and disbursements with the Damages sums being ringfenced: see [12] of the judgment. In the event, the CAT was not prepared to direct payment to the funder and lawyers at that stage because it considered that the application was premature, but it recognised that it had the jurisdiction and discretion to make such an order if appropriate, saying at [98]:

> "This Settlement Tribunal is not prepared to direct payment to the stakeholders at this stage, largely for the reasons given in the previous Judgment of the Tribunal in relation to the application for payment to stakeholders from undistributed damages in the related CSAV settlement proceedings ([2024] CAT 47). That Judgment recognised that the Tribunal does have discretion to direct stakeholder payment prior to distribution of the damages and that there was a benefit in allowing stakeholders to recoup

> part of their outlay, replenish provisions and reduce their risk exposure and duration in respect of the ongoing proceedings against non-settling defendants. In the particularities of the structures of these settlements, as noted above, the amount for costs, fees and disbursements are segregated from the damages sum such that it is not a question of payment from undistributed damages, as in the previous Judgments, in these circumstances."

93. As noted at [53]-[54] above, Lord Wolfson KC sought to justify the disparity between cases of settlement and cases where the CAT delivered a judgment for damages which his case involves, on the basis that settlements were somehow different because they did not involve determination of the extent of the loss and so involved not payment of damages, but of a pot of money. In my judgment, the supposed distinction lacked any coherence. In both the case of a settlement and an award by the CAT at the end of collective proceedings, what the CR receives is "damages". As the CAT said in the first sentence of [21] of the *McLaren* judgment quoted at [89] above: "In cases where there is a successful outcome, whether by way of settlement or judgment against defendants, it is for the Tribunal to determine how any damages are to be dealt with in terms of distribution to class members, and payments of costs and expenses, including any return for funders." (emphasis added).

94. I agree with Mr Bacon KC that the idea of two lines of distinct jurisprudence, one for awards by the CAT and one for settlements is unthinkable and unprincipled. Furthermore, as Green LJ pointed out in argument, if the distinction which Apple seeks to draw were correct, there would be a powerful disincentive for the funder to pursue a case to judgment (even if that judgment was of maximum benefit to the class) since it could only be paid out of unclaimed damages, whereas if the case settles earlier for a lesser sum the funder will get paid. The only real answer Lord Wolfson KC had to that point was that settlements are different. However, for the reasons I have given, they are not.

95. So far as the other points made by Lord Wolfson KC are concerned, I do not consider that there is anything in the reliance on what Jenny Willott MP said in Parliament. As Mr Bacon KC pointed out in his skeleton argument, to the extent that she was saying that legal costs would only be recoverable after consumers had claimed their redress, that was not what the Consumer Rights Act eventually provided. Furthermore Rule 104(2) of the CAT Rules provides: "(2) The Tribunal may at its discretion, subject to rules 48 and 49 [not relevant for present purposes], at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings." As Mr Bacon KC said, this would permit the CAT to order that legal costs be recovered before distribution.

96. Lord Wolfson KC also relied on passages from the judgments of the Supreme Court in *Merricks* and *PACCAR*. So far as the passages from *Merricks* (see [44]-[45] above) are concerned, those were simply not considering at all the jurisdiction of the CAT to approve payments to lawyers and funders from damages prior to distribution. So far as what Lord Sales JSC said in [98] of *PACCAR* (quoted at [48] above) is concerned, I agree with what the CAT said about this at [29] of its judgment (quoted at [17]) above, namely that he was only contemplating an arrangement where the funder could only obtain the funder's fee out of unclaimed damages. As Mr Bacon KC pointed out in his skeleton argument, that is not surprising since the funding agreement entered by UKTC

in the opt-out claim in *PACCAR* expressly provided that the funder's fee could be paid only from undistributed damages. So far as one can tell, there was no consideration at all in *PACCAR* of whether the funder could be paid from the damages award in priority to the class.

97. In all the circumstances, I have concluded that the CAT does have jurisdiction to order that the funder's fee or return can be paid out of the damages awarded to the class in priority to the class. Whether or not such an order should be made would be a matter for the CAT in the exercise of its supervisory jurisdiction, in the event that it made an award of damages in favour of the class.

98. Once it is recognised that the CAT has such a jurisdiction, I agree with Mr Bacon KC that there can be absolutely nothing wrong with the CR entering into a LFA which makes provision for that to happen. Despite Lord Wolfson KC's attempt to argue the contrary, once Ground 2 of the appeal fails, Ground 3 is indeed hopeless.

99. As Mr Bacon KC pointed out, the arrangement made in the LFA was importantly always subject to the supervisory jurisdiction of the CAT to determine what is the appropriate order to make. Contrary to Lord Wolfson KC's submissions, the CR had not fettered the class entitlement to damages by agreeing the terms of the LFA. Any issue as to the reasonableness of the funder's return is to be addressed at the time of distribution. The position of this CR, who is the same CR as in *Gutmann v First MTR South-Western Trains Limited*, and the conflicting interests that may arise are essentially as described in the passages from the judgment in that case quoted at [87] and [88] above.

100. The suggestion that at the distribution stage there will be no-one to represent the class because the CR has aligned himself with the funder is wholly misconceived. As already noted there is a specific provision in [10.4] of the LFA that the CR will act "fairly and justly in the best interests of class members" and as the CAT said in *Gutmann v First MTR South-Western Trains Limited* at [42]: "[The CR] is the champion of the class. He has an overriding obligation and interest to ensure that the class is properly represented". To the extent that conflicts of interest may arise, there is no reason to suppose that the CR will not address those appropriately with the assistance of his advisers and following the guidance from the CAT in exercising its supervisory jurisdiction. The criticisms of him which Lord Wolfson KC advanced towards the end of his submissions were unheralded in his skeleton argument and unwarranted. As Mr Bacon KC correctly pointed out, the CAT has certified the collective proceedings subject only to the issues about the LFA.

101. Lord Wolfson KC sought to draw a comparison between the CR in the present case and the CR in *Riefa*, suggesting that the problems with the CR in that case were somehow replicated here. There is no basis for that comparison. It is clear that the CR in that case unfortunately demonstrated her unsuitability to act as a CR, but as Mr Bacon KC said, that is a million miles away from the present case, which involves an established and experienced CR against whom, once Ground 2 is dismissed, there is no conceivable basis for criticism.

102. For all these reasons, this appeal must be dismissed.

Lord Justice Green

103. I agree.

Lord Justice Birss

104. I also agree.