

<p>1 Thursday, 23 July 2015</p> <p>2 (10.20 am)</p> <p>3 Submissions by MR DE WAAL</p> <p>4 LORD NEUBERGER: Mr de Waal.</p> <p>5 MR DE WAAL: My Lords, I will be principally referring to</p> <p>6 four files in my submissions. The consumer core volume</p> <p>7 which have a blue cover, the consumer authorities</p> <p>8 bundles H and J.</p> <p>9 LORD NEUBERGER: Thank you.</p> <p>10 MR DE WAAL: And a further document filed last week by my</p> <p>11 instructing solicitors with a white cover headed,</p> <p>12 "Additional documents British Parking Association</p> <p>13 approved operator scheme", that deals with all the laws</p> <p>14 relating to penalties.</p> <p>15 LORD NEUBERGER: I am afraid before you start on your</p> <p>16 submissions we do require some assistance on the correct</p> <p>17 analysis of the arrangement embodied in the notice in</p> <p>18 paragraph 4 of the statement of agreed facts and the</p> <p>19 consequence of Mr Beavis coming on to the car park and</p> <p>20 then leaving his car there for two hours.</p> <p>21 There is a degree of uncertainty and inconsistency</p> <p>22 of view as to what the correct analysis might be and</p> <p>23 then the consequences on the argument relating to</p> <p>24 penalty and the regulations.</p> <p>25 MR DE WAAL: My Lord, yes.</p> <p style="text-align: center;">Page 1</p>	<p>1 Appeal, reference 6973, raised the question on whether</p> <p>2 the relationship between the motorist and ParkingEye,</p> <p>3 the operator, might be better analysed in terms of the</p> <p>4 licence to use the car park subject to certain</p> <p>5 conditions and the conditional payment.</p> <p>6 Now, that argument was not pursued by ParkingEye</p> <p>7 then and it is not pursued today and there is good</p> <p>8 reason for that, which I will take you to when I have</p> <p>9 dealt with the question that is on point.</p> <p>10 Of course, if that analysis was correct, then one of</p> <p>11 two things might result. One is that there was simply</p> <p>12 a licence and that the charge in any event is</p> <p>13 unenforceable. The other is that the charge is a core</p> <p>14 term as opposed to a collateral term.</p> <p>15 As to the first point, certainly it was an agreed</p> <p>16 basis in the lower courts that this was a contract but</p> <p>17 we say that was correct.</p> <p>18 We say it is correct because there is consideration</p> <p>19 passing to the land owner, British Airways Pension Fund,</p> <p>20 from the fact that the motorist parks there. Because</p> <p>21 motorists park in the retail park, they are attracted</p> <p>22 into the shops, that is a benefit to the retailers and</p> <p>23 benefit to the land owner, who leases the land on what</p> <p>24 terms we do not precisely know.</p> <p>25 So, the first submission, we say, is that it is</p> <p style="text-align: center;">Page 3</p>
<p>1 LORD NEUBERGER: The point is touched on in the judgment of</p> <p>2 Lord Justice Moore-Bick below.</p> <p>3 MR DE WAAL: My Lord, I had certainly intended to start by</p> <p>4 saying something about how parking on private land is</p> <p>5 regulated and business --</p> <p>6 LORD NEUBERGER: It is more the nature of the contract</p> <p>7 arrangement. What is it? Because on one view there is</p> <p>8 a contract whereby you can stay there for two hours for</p> <p>9 nothing and then you can stay there thereafter for £85.</p> <p>10 In which case it's a simple contractual arrangement</p> <p>11 where the law of penalties does not come in. There are</p> <p>12 other possible correct analyses.</p> <p>13 If we were to give a judgment that starts off by</p> <p>14 saying, as the Court of Appeal does, "This is the agreed</p> <p>15 basis and here are our conclusions", it seems to us that</p> <p>16 we will simply be inviting further litigation on the</p> <p>17 same point when other people who park or other</p> <p>18 companies, or possibly even ParkingEye itself would say</p> <p>19 that is the wrong basis on which the thing proceeded.</p> <p>20 So, we have to give a definitive answer and the</p> <p>21 definitive answer depends in part on the proper analysis</p> <p>22 of the arrangement, so we cannot duck it, I am afraid.</p> <p>23 MR DE WAAL: I will go straight to that my Lord.</p> <p>24 As Lord Neuberger observed, Lord Justice Moore-Bick</p> <p>25 at paragraph 23 and 24 in his judgment in the Court of</p> <p style="text-align: center;">Page 2</p>	<p>1 properly analysed as a contract for that reason.</p> <p>2 LORD MANCE: It is the other side of the problem, the deal,</p> <p>3 that is the problem.</p> <p>4 Is it a contract if you say: I will give you the</p> <p>5 benefit of parking on this piece of land and the</p> <p>6 consumer or the user says in return: all right I will</p> <p>7 promise to leave within two hours? Is that a contract</p> <p>8 at all?</p> <p>9 And of course, then this there is a further</p> <p>10 question, which might arise in this case on the way it</p> <p>11 was analysed below, if the consumer or user adds to that</p> <p>12 statement: and of course if I breach my commitment to</p> <p>13 return within two hours I will pay you this figure, £85.</p> <p>14 Would that turn it into a contract if it was not already</p> <p>15 one? And there is a basic point on the law of contract</p> <p>16 on the first question, whether an agreement to do</p> <p>17 something which you are in law, anyway, bound to do</p> <p>18 because you are getting no more than a licence is in</p> <p>19 fact an agreement.</p> <p>20 MR DE WAAL: My Lord, we would say the promise to leave is</p> <p>21 adequate consideration.</p> <p>22 LORD MANCE: By itself? Yes.</p> <p>23 MR DE WAAL: It is adequate consideration because on the</p> <p>24 rationale underlying the parking scheme, there is a need</p> <p>25 for turnover of vehicles in the park.</p> <p style="text-align: center;">Page 4</p>

<p>1 LORD MANCE: Your case is you are adding something to the 2 law, namely something which is enforceable in the 3 sumpsit, in the old terms, or in the contract in modern 4 law. 5 Can I ask you, Lord Justice Moore-Bick didn't seem 6 to think it made any difference, if you look at the last 7 two sentences of paragraph 24, whether you analyse the 8 position as one of contractual breach or whether you 9 analyse it as an agreement simply to pay £85 if you 10 stayed longer than two hours, without any element of 11 breach in staying longer than two hours. 12 But surely, it makes a lot of difference because if 13 it is simply an agreement to pay £85 if you stay longer 14 than two hours, and that is enforceable as a contractual 15 promise, contrary to what he says here, it would be 16 enforceable if the sum were £85 million. 17 MR DE WAAL: My Lord, I agree with my Lord's observation 18 about that, but I have an answer to that. And the 19 answer to that, it is not open to ParkingEye to make 20 that submission on the facts and it is not open to them 21 to do that because of their contract with the land owner 22 and it is a very fact specific point that I will come 23 to. 24 LORD TOULSON: Before you do, going back to part of your 25 answer to Lord Mance you said that there is sufficient</p> <p style="text-align: center;">Page 5</p>	<p>1 end of the licence makes the licence contractual. 2 MR DE WAAL: My Lord, on the particular facts of this 3 case -- 4 LORD NEUBERGER: You cannot say, "On the particular facts of 5 this case", either a promise to leave is sufficient 6 consideration or it is not. Why do the facts of this 7 case matter? 8 MR DE WAAL: My Lord -- 9 LORD NEUBERGER: If you need something else then it suggests 10 that it is not enough. If you don't need something else 11 then it is enough. 12 MR DE WAAL: My Lord, I would respectfully submit that the 13 promise to leave is indeed of value. 14 LORD NEUBERGER: So, if the promise to leave is of value, 15 then why is not every gratuitous licence, provided it is 16 for a period, not ungratuitous. 17 In other words, if I say you can come here for 18 a year or a day or a week, or an hour, and you come, 19 that is a contract, according to you. Because you have 20 impliedly agreed to go at the end of the period I have 21 spoken about. 22 MR DE WAAL: One would, I think, have to make a distinction 23 between the kind of licence that took place in 24 a domestic context such as my Lord, Lord Toulson -- 25 LORD MANCE: There has to be an intention to create legal</p> <p style="text-align: center;">Page 7</p>
<p>1 consideration in itself in the implied promise to leave 2 at the end of the period of a licence. That promise 3 being derived from the fact that the notice says you are 4 only allowed to park here for two hours. 5 MR DE WAAL: My Lord, yes. 6 LORD TOULSON: Would that convert every gratuitous licence 7 into a contractual licence? 8 MR DE WAAL: It obviously depends on the terms of the 9 particular licence and the promise that is given. 10 LORD TOULSON: Anybody who says, "You can come and stay in 11 my house for one night", or, "You can come on to this 12 land for one hour", anybody taking up that offer would 13 be entering into a contract on your submission. 14 MR DE WAAL: My Lord, no. Because on that kind of licence, 15 as my Lord describes it, there is no consideration 16 passing. If I -- 17 LORD TOULSON: The consideration you were advancing a moment 18 ago, which is why I am concentrating on this aspect of 19 consideration, consideration is the implied promise to 20 leave at the end of the licence. 21 MR DE WAAL: My Lord, there are two aspects to it, one is 22 the value -- in fact three -- one is the value to the 23 land owner of attracting motorists. 24 LORD TOULSON: I am dealing at the moment with this one item 25 because you said: on its own, a promise to leave at the</p> <p style="text-align: center;">Page 6</p>	<p>1 relations. 2 MR DE WAAL: The example Lord Toulson gave to me, was 3 somebody going to stay in someone's house where there is 4 plainly no intention to create legal relations, but 5 a licence in, as it were, a consumer context would be 6 different. 7 LORD NEUBERGER: Yes, I see. 8 MR DE WAAL: In those circumstances, I would submit that the 9 promise to leave is of value. 10 LORD NEUBERGER: Okay. 11 MR DE WAAL: That is on the specific point that my Lord, 12 Lord Toulson, is referring me to. There is the other 13 point which you have about the value to the land owner 14 and, of course, there is the other point, which 15 I believe my Lord, Lord Mance, raised which is the 16 promise to perform the secondary obligation -- 17 LORD NEUBERGER: To pay £85? 18 MR DE WAAL: To pay £85 and the fact that that is open to 19 challenge as a penalty does not mean it is not in 20 principle a promise of some value. 21 LORD NEUBERGER: The problem you might have with the £85 is 22 this: if I say that you can trespass on my land provided 23 you pay me £85, that is not a trespass, it is a licence. 24 It might be said. Simple contract. Calling it trespass 25 does not alter the fact. It might be said that I am</p> <p style="text-align: center;">Page 8</p>

<p>1 agreeing to you being here provided you pay me £85.</p> <p>2 MR DE WAAL: My Lord, I would accept that submission.</p> <p>3 LORD NEUBERGER: Well, no, don't be too ready. It may be</p> <p>4 wrong because if I give you a licence to be there for</p> <p>5 £85 I cannot remove you. But I think you would say that</p> <p>6 you are a trespasser after the two hours --</p> <p>7 LORD CARNWATH: Would you?</p> <p>8 LORD NEUBERGER: -- but, and therefore I can remove you</p> <p>9 because you are not a trespasser, I cannot ask you to go</p> <p>10 and it seems to be timeless on the face of it. So, if</p> <p>11 I cannot find you, if you put your car there and fly off</p> <p>12 to Hong Kong or Abu Dhabi or wherever and disappear, it</p> <p>13 seems I cannot determine the licence, if it is</p> <p>14 a licence.</p> <p>15 So presumably, you would say it is a trespass</p> <p>16 because I can remove you, but you agree to pay £85 and</p> <p>17 that is therefore a penalty.</p> <p>18 If it is a contractual arrangement and it is</p> <p>19 a licence there is no breach, is there, because it is</p> <p>20 a simple contract? You will stay there for £85. It is</p> <p>21 a licence.</p> <p>22 MR DE WAAL: My Lord, on the trespass analogy, obviously,</p> <p>23 that assumes that the relationship is a relationship</p> <p>24 between a landowner and a person who comes on to the</p> <p>25 land, which are not, obviously, the facts of this</p> <p style="text-align: center;">Page 9</p>	<p>1 addressing the board on the question of penalties but by</p> <p>2 looking at what is payable in respect of damages for the</p> <p>3 tort of trespass.</p> <p>4 LORD NEUBERGER: You would say it is not purely tort, as</p> <p>5 with a lease. If a tenant stays beyond the end of his</p> <p>6 term, (a) he is in breach of the implied obligation to</p> <p>7 give up possession and (b) he is liable for trespass.</p> <p>8 Obviously you don't get damages for both, but they are</p> <p>9 both there. You would say it is trespass and is it is</p> <p>10 failure to vacate. And it is failure to vacate that is</p> <p>11 caught by the rule against penalties.</p> <p>12 MR DE WAAL: My Lord, yes.</p> <p>13 LORD TOULSON: Taking Lord Mance's question one stage</p> <p>14 further, can an agreement crystallising damages for</p> <p>15 a tort form the consideration for a contract?</p> <p>16 LORD NEUBERGER: Your answer to that is (a) yes and (b) it</p> <p>17 doesn't matter because this is also damages -- or rather</p> <p>18 penalty, you would say, for failure to do that which you</p> <p>19 are obliged to do, namely to give up, vacate the</p> <p>20 premises of the matter of the licence. Your contractual</p> <p>21 obligation to vacate after two hours.</p> <p>22 LORD MANCE: But that assumes that the promise to give up</p> <p>23 would by itself be sufficient consideration. I suppose</p> <p>24 Lord Toulson's question only arises if you need --</p> <p>25 LORD TOULSON: It seems to me that your point is rightly</p> <p style="text-align: center;">Page 11</p>
<p>1 particular case.</p> <p>2 On that analogy, then, when one is trespassing when</p> <p>3 the permission to stay on the land is withdrawn. And in</p> <p>4 that event whether or not the land owner stipulates</p> <p>5 a charge is not relevant because the damages are</p> <p>6 assessed on an institutional basis. So, a land owner</p> <p>7 could stipulate a charge of £85 or so and it would not</p> <p>8 make a difference.</p> <p>9 On the contracting licence point, if the</p> <p>10 arrangement, which it is not here, is an arrangement</p> <p>11 that you can stay on my land for two hours and after</p> <p>12 that there is a fee payable, then it becomes a core</p> <p>13 term.</p> <p>14 LORD TOULSON: It becomes a what? I just didn't hear your</p> <p>15 last word.</p> <p>16 MR DE WAAL: Then it becomes a core term.</p> <p>17 LORD TOULSON: A core term, thank you.</p> <p>18 LORD MANCE: It obviously is not an agreement that they can</p> <p>19 park for four years or indefinitely for £85, so it is</p> <p>20 obviously not that sort of agreement.</p> <p>21 It is a one off charge for, effectively, a trespass</p> <p>22 after two hours.</p> <p>23 Does the rule against penalties apply to contractual</p> <p>24 agreements crystallising liability and tort?</p> <p>25 MR DE WAAL: My Lord, the way to answer that is not by</p> <p style="text-align: center;">Page 10</p>	<p>1 made that an agreement to pay a certain sum by way of</p> <p>2 financial recompense, call it what you will, for a tort</p> <p>3 can form the consideration for an contract.</p> <p>4 In which case on that analysis, the permission was</p> <p>5 limited to two hours but the agreement to pay an agreed</p> <p>6 sum in the event of trespass by continuing could provide</p> <p>7 consideration for that contract, for that licence, and</p> <p>8 therefore make what would otherwise be gratuitous</p> <p>9 contractual.</p> <p>10 MR DE WAAL: My Lord, in principle but again not on the</p> <p>11 facts of this particular case because of the basis of</p> <p>12 ParkingEye's arrangement with the land owner,</p> <p>13 British Airways Pension Fund.</p> <p>14 LORD NEUBERGER: One or two of us have asked questions and</p> <p>15 one or two of us have not. I think we have one or two</p> <p>16 more questions on this and then we will let you get on</p> <p>17 with it.</p> <p>18 It may be that you and, indeed, the other advocates</p> <p>19 involved may want to put in brief submissions on this in</p> <p>20 writing after the hearing. I think that would be fair</p> <p>21 because you may have been taken somewhat by surprise by</p> <p>22 this.</p> <p>23 But anyway, I think Lord Sumption has a question.</p> <p>24 LORD SUMPTION: Mr de Waal, I would like to put to you</p> <p>25 an alternative hypothesis which is a great deal simpler</p> <p style="text-align: center;">Page 12</p>

<p>1 and does not involve asking about how long you can stay 2 and whether you are a trespasser and whether you can be 3 removed. 4 What we are basically concerned with is: is this 5 a charge for parking, which is how it is described, or 6 is it a fine or a penalty for breach? Is the contract 7 not at least arguably that made at the outset, you enter 8 the car park and the contract is that you undertake 9 in consideration of being allowed to stay for up to two 10 hours. The contract is that if you stay for anymore 11 than two hours you pay a parking charge of £85. 12 Now, that is perfectly consistent with your being 13 liable to be removed after two hours because you don't 14 have permission to be there. But the charge for being 15 allowed to stay at all, even for five minutes, is that 16 if you stay for two hours and five minutes you pay £85. 17 MR DE WAAL: My Lord, that would be the logical extension of 18 Lord Justice Moore-Bick's analysis -- 19 LORD SUMPTION: Indeed it would. 20 MR DE WAAL: -- in the Court of Appeal. But it does not 21 reflect a proper analysis of the contract between 22 ParkingEye and Beavis. And again, for reasons I will 23 come on to, it is not an argument that is open to 24 ParkingEye before the board. Not because it was not 25 taken below but because its contract with the</p> <p style="text-align: center;">Page 13</p>	<p>1 LORD NEUBERGER: So, how can it be relevant to the 2 construction of the contract between Mr Beavis and 3 ParkingEye? 4 MR DE WAAL: My Lord, it is relevant to the arguments 5 available to ParkingEye on this appeal in relation the 6 point which my Lords are referring to me as to whether 7 this can be properly understood as a contract. 8 LORD NEUBERGER: Very well, okay. 9 MR DE WAAL: The reason it is relevant is because 10 clause 3.8.1/1. 11 LORD NEUBERGER: Towards the bottom of the second column 12 MR DE WAAL: As my Lord, Lord Clarke, said, it is very fine 13 print, so I will read it out to you. It says: 14 "The conditions or restrictions on parking control 15 including but not limited to the time limits to be 16 notified for free parking or paid parking via the 17 signage or grace period contract parking shall be 18 jointly agreed between the parties. ParkingEye are 19 hereby authorised to issue the parking charges should a 20 breach of these conditions and restrictions occur and 21 collect such parking charges by any method up to and 22 including legal proceedings." 23 So, that contract contemplates that the charges will 24 be levied in the event of breach. It doesn't 25 contemplate that there will be a charge in the way of</p> <p style="text-align: center;">Page 15</p>
<p>1 Pension Fund does not permit it to raise that point. 2 LORD SUMPTION: Whoever the parties to this contract were, 3 it is surely common ground that the terms are set out in 4 the notice and what the notice says is, "Failure to 5 comply ie staying more than two hours, will result in 6 a parking charge of £85". It is a parking charge. 7 LORD NEUBERGER: The fact that there may be an agreement by 8 one of them with a third party that one of them doesn't 9 know cannot be a relevant factor, can it? 10 I cannot say this contract means X between you and 11 me because of a deal I had with someone else you don't 12 know about. 13 MR DE WAAL: May I take you to this particular contract 14 since I have referred to it three times? That is at 15 7066 in the report. In the consumer core bundle. 16 LORD SUMPTION: 7066? 17 MR DE WAAL: 7066. I am going to read it out to you because 18 it is very small print. 19 LORD NEUBERGER: Give me the page again. 20 MR DE WAAL: 7066. This is the contract between 21 British Airways Pension Fund and ParkingEye and it is 22 a redacted version of the contract. 23 LORD NEUBERGER: Was this available to Mr Beavis when he 24 entered into the arrangement? 25 MR DE WAAL: My Lord, no.</p> <p style="text-align: center;">Page 14</p>	<p>1 consideration. 2 LORD CLARKE: But that is a question of construction of the 3 terms of the arrangement between the parker and 4 ParkingEye. 5 MR DE WAAL: My Lord, yes. But its relevance is the 6 relevance I explained a moment ago. Its relevance is to 7 the arguments which were available to the ParkingEye. 8 LORD SUMPTION: Suppose the position was that there was 9 a complete inconsistency between the terms of the notice 10 presented to Mr Beavis and this clause; why would that 11 make a difference to what the terms with Mr Beavis were? 12 MR DE WAAL: My Lord, I accept -- 13 LORD SUMPTION: There may be a row as a result between 14 ParkingEye and British Airways Pension Fund, but so 15 what? 16 MR DE WAAL: I, of course, accept that in analysing the 17 contract between Mr Beavis and ParkingEye, one looks at 18 that objectively and looks at what appears to have 19 been -- 20 LORD SUMPTION: Is your submission that there is a rule that 21 a party may not advance a construction of the contract 22 with Mr Beavis which is inconsistent with some other 23 private law obligation is he has concluded with 24 a different party? 25 MR DE WAAL: My submission is not that there is no such rule</p> <p style="text-align: center;">Page 16</p>

<p>1 but my point is that that is not an argument they are 2 advancing or contending -- 3 LORD NEUBERGER: We have to get on with this, but I think -- 4 LORD MANCE: I just want to draw attention to one point as 5 a matter of correction of what we may have been saying 6 or thinking. 7 Subject to a question whether it is legible, if you 8 look at the foot of the notice at 7068, it is not 9 a question of implied agreement, it is actually 10 a question of express agreement because the end of the 11 second line says: 12 "Parking is at the absolute discretion of the 13 [something] by parking within the car park motorists 14 agree to comply with the parking restrictions. Should 15 a motorist fail to comply with the car park 16 restrictions, the motorist accepts they are liable to 17 pay a parking charge and their name and address will be 18 requested by the DVLA." 19 Which I suspect is a rather important point from the 20 point of view of enforcement. 21 MR DE WAAL: The word my Lord reads, restrictions is in fact 22 regulations. 23 LORD MANCE: Regulations, yes. 24 MR DE WAAL: But that is supportive of the argument that the 25 contract between ParkingEye and Mr Beavis mirrors the</p> <p style="text-align: center;">Page 17</p>	<p>1 the little small print: 2 "ParkingEye is solely engaged to provide a traffic 3 maximisation scheme. We are not responsible for car 4 park surface, other motor vehicles, damage or loss." 5 LORD NEUBERGER: The motorists will see the camera at the 6 bottom immediately next to the padlock, won't he? 7 MR DE WAAL: It is not clear to the motorist whether he can 8 park in a parking space for two hours or he has to leave 9 the car park within two hours of entering. 10 There is inconsistency in that and therefore it is 11 possible to end up paying a penalty charge even if you 12 have not been parked for two hours. 13 LORD MANCE: No motorist thinks they can drive around the 14 car park for two hours and then say, "We can park for 15 another 2 hours". We are all familiar with car parks 16 where you have a ticket at the entrance and so on. 17 MR DE WAAL: This is not such a one. But I will come back 18 to the -- 19 LORD NEUBERGER: I think on the nature of the arrangement, 20 the centre and the right seems, from my perspective, to 21 have been more vocal than the left. Not a political 22 statement. But I think you had better move on with your 23 submissions now, but as I say, if anyone has anything 24 they want to say about this, I think they should, by 25 next Thursday, any written submissions sent to the other</p> <p style="text-align: center;">Page 19</p>
<p>1 contract between ParkingEye and the landowner because it 2 is saying: if you don't complete -- 3 LORD MANCE: But if we just look at this it is an express 4 agreement, if you read those. 5 LORD CARNWATH: Where are the regulations? 6 MR DE WAAL: My Lord, I think by regulations here they are 7 talking about the regulations governing the car park not 8 any statutory regulations. 9 LORD CARNWATH: But presumably there is a document of 10 regulations? 11 MR DE WAAL: This is all there is. 12 LORD CARNWATH: The regulations are what is stated above. 13 MR DE WAAL: My Lord -- 14 LORD CARNWATH: I see. 15 MR DE WAAL: -- whilst you are on this page, might I just 16 draw your attention to the rather larger writing in this 17 notice, because it is relevant to submissions I am going 18 to make later on on unfair terms: 19 "Two hour maximum stay." 20 It says at the top and a little lower down it says: 21 "Parking limited to two hours, no return within one 22 hour." 23 The point is here that there is a concealed trap for 24 the motorist because the parking is governed by cameras 25 at the entrance and exit to the car park, as it says in</p> <p style="text-align: center;">Page 18</p>	<p>1 side on this issue, because it may be important. 2 We do think that we have to decide rather than 3 proceed on the basis of an agreement, as to what the 4 nature, proper legal analysis of this arrangement is. 5 MR DE WAAL: To summarise my position before I move on then 6 it is and can only be a contract providing for free 7 parking with a secondary obligation to pay what we say 8 is a penalty on breach. 9 That is apparent from the analysis of the notice 10 my Lords have taken me to and the consideration is the 11 promise to leave and the benefit to the landowner in the 12 motorist parking on the car park. 13 LORD SUMPTION: Why does the consideration not at least 14 include the £85? 15 LORD NEUBERGER: I think we have been over this. I think 16 for the moment we should -- 17 MR DE WAAL: My Lord, the parties will undoubtedly take up 18 the board's offer to provide written submissions. 19 LORD CLARKE: When you do, would you be kind enough to 20 produce a more legible copy of the small print at the 21 bottom of page 7068. Because as far as I can see, this 22 document contains all the terms of the contract. May be 23 we have that already? 24 MR DE WAAL: My Lord, it is set out in the agreed facts. 25 LORD CLARKE: Thank you very much.</p> <p style="text-align: center;">Page 20</p>

5 (Pages 17 to 20)

<p>1 MR DE WAAL: In some detail at page 6968, my Lord. 2 My Lord, what I sought to do was to say something 3 briefly about how parking on private land was regulated 4 and operated since it was clear that what the three 5 matters which weighed heavily in the mind of the Court 6 of Appeal in deciding that the parking charge of £85 7 imposed by ParkingEye should be enforced against 8 Mr Beavis. And those three matters were firstly 9 a reading of section 56 and schedule 4 of the Protection 10 of Freedoms Act, which led them to the conclusion that 11 Parliament had not regarded charges of this kind, 12 deterrent charges, as unenforceable. 13 Secondly, the conclusion that there are obvious 14 benefits to both consumers and retail business in having 15 free or cheap parking available close to shops for 16 limited periods which could only be achieved if there 17 was some mechanism for ensuring that those that make use 18 of the facilities do not abuse them by overstaying. And 19 that could not be achieved unless the charges were 20 sufficient as to act as a deterrent and to justify 21 collection. 22 Thirdly, the conclusion that the charge of £85 23 reduced to £50 was not manifestly excessive having 24 regard to the level of charges imposed by local 25 authorities.</p> <p style="text-align: center;">Page 21</p>	<p>1 for immobilising vehicles. 2 If I turn on to schedule 4, which is on the next 3 page, paragraphs 1456/11 and 12 are irrelevant. I don't 4 need to take my Lords to those other than to identify 5 that paragraph 1 says that: 6 "The schedule applies where the driver of a vehicle 7 is obliged to pay a charge and the charge has not been 8 paid in full. In that event the rest of the regulations 9 provide for a mechanism for the operator to obtain the 10 details of the registered keeper from the DVLA and levy 11 the charge on the detail." 12 My Lord, those sections plainly say nothing at all 13 about whether a charge at a particular level is approved 14 or not and that is also clear from the gloss in the 15 notes at 7333. 16 Internal page 45, commentary on schedule 4 at 17 paragraph 218, which explains that paragraph 1 18 introduces the scheme as provided for in schedule 4 and 19 that the scheme provides subject to certain conditions 20 being met (Inaudible) hire of the vehicle may be made 21 liable for any unpaid parking charge. A little lower 22 down: 23 "The scheme is based on the legal analysis that the 24 driver of a vehicle by parking on private land either 25 expressly or implicitly accepts the landowner's offer to</p> <p style="text-align: center;">Page 23</p>
<p>1 For your Lordship's note, I am paraphrasing the 2 judgment of the Court of Appeal, which is in the 3 consumer core at 6964, at paragraphs 28, 30 and 26 4 respectively. 5 My Lord, the first and third of those conclusions 6 about the Protection of Freedoms Act and the charges 7 imposed by local authorities are demonstrably wrong and 8 the second was made in the absence of any evidence at 9 all. 10 Might I go first of all to the Protection of 11 Freedoms Act which is in file J at page 7307. 12 My Lord, this Act only applies to England and Wales, 13 it doesn't apply to Scotland. Section 56 is 14 concerned -- which you find at page 7317 -- and only 15 concerned with what is known as "Keeper liability", that 16 is the mechanism by which a parking charge may be 17 recovered from a registered keeper of the vehicle. 18 My Lords, will recall that prior to the Act keeper 19 details could be detained from the DVLA, but if a keeper 20 did not accept liability or give driver details the 21 operator could do nothing. 22 And section 56 was the quid pro quo abolition of 23 wheel clamping or more precisely making wheel clamping 24 an offence. And if you turn back one page to 7315 you 25 will see under section 54 there is an offence created</p> <p style="text-align: center;">Page 22</p>	<p>1 park, prohibition on parking agrees to comply with any 2 terms and agreements. If the drivers breach the vehicle 3 can be ticketed." 4 And so forth. 5 That is the first point that one simply cannot 6 discern from anything in section 56 or schedule 4 7 and approval by parliament that charges of this kind are 8 available. 9 LORD HODGE: What do you mean by, "Of this kind"? 10 MR DE WAAL: A charge of £85 reduced to 50. 11 LORD HODGE: Can you not at least infer from parliamentary 12 sanction of charges for unpaid parking a view that 13 deterrents is being authorised in the public interest? 14 MR DE WAAL: My Lord, one would expect that one statute were 15 to provide what would now be the sole exception in 16 contract law to the principle, as it stands at the 17 moment, that deterrent penalties are an unlawful one, 18 would express something expressly stated in that to make 19 that clear. One would not expect that just to go by the 20 by or to be read into it. 21 LORD HODGE: That does seem to be the purpose of these 22 charges. Wheel clamping was designed as a means of 23 regulating private car parks, that is being rendered 24 illegal, Parliament has authorised in its place a regime 25 of charges subject to appeals.</p> <p style="text-align: center;">Page 24</p>

6 (Pages 21 to 24)

<p>1 I would have thought that there is nothing implicit 2 in what Parliament has done, that the charges can only 3 be measured by the loss which the operator of the car 4 park suffers. 5 MR DE WAAL: My Lord, my point is there is nothing one way 6 or the other, but what it doesn't say, what the Court of 7 Appeal read into it, which is the point my Lord is 8 raising with me -- 9 LORD HODGE: Yes. 10 MR DE WAAL: -- is that a charge of any kind is available. 11 Because if that proposition were right, then a car park 12 operator could charge not just £85 but £500 or £1,000. 13 LORD HODGE: In theory, but were it to do so it would be 14 subjected to parliamentary regulation, wouldn't it? 15 MR DE WAAL: My Lord, yes, but, with respect, that point 16 does not provide an answer to the point that there is 17 simply nothing in there which says anything about the 18 charges, it is -- 19 LORD HODGE: You are arguing from silence. 20 LORD MANCE: At the end of paragraph 18 in your present 21 case. 218 on 7333. 22 MR DE WAAL: Forgive me, is that regulation? 23 LORD MANCE: No, I am looking at the parliamentary 24 explanatory notes, at the end of 218 it says: 25 "The schedule envisages a situation where a vehicle</p> <p style="text-align: center;">Page 25</p>	<p>1 What do you say? How does this help you? 2 MR DE WAAL: It helps me, firstly, because of the express 3 reference to the sum in the nature of a fee or a charge 4 and trespass or tort, a sum in the nature of damages. 5 And secondly, it helps me because of the commentary 6 that my Lord, Lord Mance, has taken me to. 7 But most importantly, it helps me because if one 8 were to expect that Parliament were intending to, in 9 this very limited sphere, authorise the position of 10 penalties, one would expect Parliament to say so 11 expressly. 12 This would provide an exception to the law as it, at 13 least then, stood. 14 My Lords, moving on -- 15 LORD MANCE: It says in the subsection 2 on 7318: 16 "The definition of parking charge includes a sum of 17 which adequate notice was given to drivers." 18 MR DE WAAL: "In the nature of damages." 19 LORD MANCE: "In the nature of damages", yes. 20 MR DE WAAL: My Lord, just to explain the procedure, there 21 is a statutory instrument which you have at 7336: the 22 road vehicles registration and licensing registration 23 regulations. Regulation 27 on 7339, 1E permits the 24 Secretary of State to make particulars of the register 25 available to:</p> <p style="text-align: center;">Page 27</p>
<p>1 can be ticketed for charges due under the terms of that 2 contract or for the pre-estimated damages resulting from 3 the trespass." 4 So, that envisages that a scheme whereby you will 5 have something like you are contending for here, but you 6 say they are not pre-estimated damages because they are 7 penal. 8 MR DE WAAL: My Lord, yes. 9 LORD NEUBERGER: You have to get out of the schedule, you 10 cannot just say, "Because that is the way it happens to 11 be expressed in the notes". 12 As a matter of common law, subject to penalty, the 13 penalty point, a person can impose whatever charges he 14 likes and if you accept them, you are bound by them. 15 LORD SUMPTION: Well, the note reflects the definition of, 16 "Parking charge". 17 LORD NEUBERGER: You have the definition of parking charge 18 in subparagraph 2 on 7318. 19 And then, you go back to the top of the page: 20 "A result of trespass or other (Inaudible) means 21 a sum in the nature of damages." 22 That is where you have those. What is it you say? 23 You have parking charge defined at the bottom of 24 7317 and 7318. I think that has what Lord Mance is 25 referring to in the notes.</p> <p style="text-align: center;">Page 26</p>	<p>1 "(e) Any person who can show to the satisfaction of 2 the Secretary of State that he has a reasonable cause 3 for wanting the particulars to be made available to 4 him." 5 My Lords, those include members of unauthorised 6 trade association and since this time last year the DVLA 7 has refused to provide that information to anyone who is 8 not such a member of an ATA that has been the subject of 9 an unsuccessful judicial review by a certificated 10 bailiff. That is a case ParkingEye put in front of you; 11 Daff. 12 British Parking Association, my Lord, is a member of 13 the ATA and it has a code of practice. That code of 14 practice was referred to at trial, but not in the Court 15 of Appeal, and it is referred to in the respondent's 16 case before you. 17 Because it was not in the statement of facts and 18 issues I asked for it to be put before you and it is the 19 white document. And there is a very important paragraph 20 here which again supports the submission that penalties 21 are not contemplated by the Act. And it is 22 paragraph 19.5 of this code of conduct, which is on 23 internal page -- 24 LORD NEUBERGER: What is the status of the code of conduct? 25 MR DE WAAL: It has no statutory status, but it is the way</p> <p style="text-align: center;">Page 28</p>

<p>1 in which the parking operators, who are a member of this 2 association, regulate themselves. 3 LORD NEUBERGER: Very well. 4 MR DE WAAL: What 19.5 says is -- 5 LORD NEUBERGER: Which page? 6 MR DE WAAL: It is internal page 12. 7 LORD NEUBERGER: Thank you. 8 MR DE WAAL: Left-hand column. 9 LORD MANCE: In which bundle? 10 MR DE WAAL: It is not in bundle, my Lord. It is in 11 a separate file called, "Additional Documents". 12 LORD NEUBERGER: 19.5, page 12, first column, yes. 13 MR DE WAAL: 19.5 says this: 14 "If the parking charge the driver has been asked to 15 pay is for a breach of contract or act of trespass, this 16 charge must be placed on the genuine pre-estimate of 17 cost that you suffer. We would not expect this to 18 amount to more than £100. If the charge is more than 19 this the operators must be able to justify the amount in 20 advance." 21 Two points about that, clearly what the operators 22 contemplate having been given a steer by Parliament is 23 that the charge must be a genuine pre-estimate of costs. 24 Secondly, whilst I accept the charge of £100 is at 25 first glance helpful to ParkingEye, it was not said by</p> <p style="text-align: center;">Page 29</p>	<p>1 In Chelmsford, where this car park is situated, the 2 local authority charge for overstaying is £50 reduced to 3 £25 if paid promptly, so effectively on a prompt payment 4 basis, half. 5 You have that in the statutory instrument, which you 6 find at page 7290: 7 "The civil enforcement of parking contraventions 8 order 2007." 9 Over the page at 7291, paragraph 2: 10 "Penalty charges and parking contraventions must be 11 set for higher level contraventions than level specified 12 in column 2 and for all other contraventions at a level 13 specified in column 3 at the band selected for higher 14 level contraventions." 15 And if you look at table 1 and 3, low level penalty 16 charge: £50. Then moving across to 5, low level penalty 17 charge paid early: £25. That is a charge that local 18 authorities charge everywhere outside London. 19 So, for your Lordship's note, in the outer London 20 boroughs that 50 is increased to 60 and in inner London 21 boroughs and Croydon to 80 with a comparable reduction 22 of 50 per cent. 23 LORD NEUBERGER: Give us those figures again, please. 24 MR DE WAAL: 60, my Lord, for the outer borough and 80 for 25 the inner boroughs and Croydon with a comparable</p> <p style="text-align: center;">Page 31</p>
<p>1 ParkingEye in this case, and was not a finding in the 2 Court of Appeal, that their loss is £100. The case, as 3 you are well aware, is put purely on the basis that it 4 is a deterrent, but a legitimate deterrent. 5 My Lords, moving on, there is a non-strategy appeal 6 service for parking on private land, the appeal service 7 is POPLA, which is funded by approved operators, which 8 include ParkingEye. It is more in the nature of an ADR. 9 If you look at their website you can see that 10 55 per cent of appeals are allowed, but it is directed 11 to investigating whether the parking charge is properly 12 incurred. It is not concerned with the reasonableness 13 of the amounts or the mitigating circumstances. 14 Therefore, my Lord, if a driver or a keeper wishes 15 to challenge the charge he must rely on the courts and 16 argues, as Mr Beavis has done, up to and before you, 17 that it is a penalty or an unfair term. 18 That makes good the point that I respectfully submit 19 cannot discern support for penalty parking charges in 20 public policy. 21 The second point is about the charges imposed by 22 local authorities which, again, the Court of Appeal 23 found gave me some assistance. They said it was not 24 manifestly excessive in comparison with those charges. 25 In fact, that is not correct as a matter of fact.</p> <p style="text-align: center;">Page 30</p>	<p>1 discount, 50 per cent. 2 LORD NEUBERGER: If the charges in this case had been as set 3 under this statutory instrument you say there would not 4 have been a penalty. 5 MR DE WAAL: My Lord, we don't say that, we say they would 6 still have the penalty. 7 LORD CLARKE: They have nothing to do with damages, have 8 they? 9 MR DE WAAL: Nothing to do with damages. 10 LORD CLARKE: None of these have anything to do with 11 damages, it is just a charge. Everybody knows that. 12 MR DE WAAL: That takes me to my next point, my Lord. Local 13 authority penalties and penalties that local authorities 14 are permitted to impose by statute are not, in my 15 submission, legitimate comparison for the Court of 16 Appeal to have taken. 17 There is clearly a public interest in permitting 18 local authorities to charge penalties and for example 19 one thinks of a different -- 20 LORD CLARKE: Your definition of a penalty is what? 21 MR DE WAAL: A penalty is a charge in the nature of 22 a deterrent which bears no relation to a genuine 23 pre-estimate of loss. 24 LORD CLARKE: That is your sole definition of it, is it? 25 LORD SUMPTION: You have first have to decide, have you not</p> <p style="text-align: center;">Page 32</p>

<p>1 which of the two categories envisaged in the schedule to 2 the 2012 Act it falls into. Because that schedule 3 envisages two possibilities: one is that it is a charge 4 and the other is that it is a pre-estimate of damages. 5 So, I understand your points that if it is 6 a pre-estimate of damages it is an extravagant one, but 7 the first stage is you have to show that it is not 8 a charge. 9 MR DE WAAL: I need to demonstrate on the -- this goes back 10 to the point which my Lord, the board, raised with me 11 when it started today, about the proper analysis for the 12 contract, and I will come back to that in branching(?) 13 rather than now. 14 LORD MANCE: Can I ask you one point, you said the appeal 15 procedure does not include any compassionate or 16 discretionary, mitigating grounds. We don't actually 17 have the appeal procedure, it seems to be something 18 called POPLA -- Parking on Private Land Appeals -- and 19 they seem to have a code of practice which operates, it 20 says states its own remit and jurisdiction. Shall we 21 not, perhaps, just look at the POPLA code at some point 22 to show what its jurisdiction is? 23 MR DE WAAL: My Lord, we can certainly provide you a copy, 24 but the only submission I make about that is it is not 25 statutory. My submission is made in response to the</p> <p style="text-align: center;">Page 33</p>	<p>1 with the reason that the comparison with local authority 2 charges or penalties is not apt. 3 Firstly, of course, it is a matter of fact that they 4 are half of what ParkingEye seeks to charge. 5 But secondly, it is not a legitimate comparison in 6 the first place and, for example, I know that if 7 I submit my tax return, or my VAT return, I will be 8 subject to a fine and penal interest. But nobody 9 suggests that is a good reason for enforcing penalties 10 between private parties. So, one should simply discount 11 the analogy with local authority parking when looking at 12 this afresh as a matter of principle. 13 I move finally to the third point. My Lords, 14 I suspect you are in the relatively unusual position of 15 leaving appeals from small claims track and of course 16 there is no disclosure, so there is very little 17 evidence. 18 The evidence, all the documents that you have are in 19 the statement of facts and issues. There is no real 20 evidence about the different practice of parking 21 operators and how parking operators run their business 22 in this country. 23 Clearly there was some anxiety, if I can put it like 24 that, on the part of the Court of Appeal because if 25 parking charges were not allowed there would be what is</p> <p style="text-align: center;">Page 35</p>
<p>1 suggestion made by the respondent in this case that 2 there is some force that there is some kind of public 3 policy supporting these charges and they refer to these 4 schemes. And the point I make in response is this is 5 non-statutory, that it is not open to supervision by the 6 courts POPLA can do what it likes. But, yes, of course, 7 we will find and make a copy available. 8 LORD TOULSON: Am I right in understanding that the Act may 9 have a tangential relevance to the case for reasons 10 relied on by the Court of Appeal and which you say were 11 unsound. But it is no more than tangential. The act 12 does not seek to regulate what a landowner may seek to 13 raise by way of a charge from somebody who parks there. 14 It comes into play where charges are due and haven't 15 been paid in full and provides a means of recovery from 16 the keeper. 17 MR DE WAAL: Yes, that is the point. That is all that it 18 does. It is a procedural mechanism for recovering 19 charges which have not been paid from the driver from 20 the keeper. What we say is, it doesn't deal with the 21 question of whether the charges are reasonable and if 22 the charges cannot be recovered from or should not be 23 recovered from a driver as a penalty, they should not be 24 recovered from the keeper. 25 My Lord, the point I was moving on to, just dealing</p> <p style="text-align: center;">Page 34</p>	<p>1 described by a fairly ugly word in the industry as 2 carmageddon. 3 My Lord, what we say is that I make that point with 4 half an eye on my Lord, Lord Hodge, because the 5 Protection of Freedoms Act does not apply in Scotland 6 and it is apparent that there have not been disastrous 7 consequence in Scotland. 8 My Lords, that in itself, absent any kind of enquiry 9 or consultation, is no justification for rewriting the 10 law on penalties. There was simply no evidence for the 11 court to come to the conclusion that they needed to 12 reintroduce -- 13 LORD NEUBERGER: Your point is that if prima facie it is 14 a penalty, there may be an argument that it is not 15 because it was justified because of their business model 16 or the way things worked, but that was for them to prove 17 and they didn't prove it. 18 MR DE WAAL: Not only that, but that it would be a matter 19 for Parliament to legislate on having regard to 20 considerable consultation. 21 We have set out in our case at paragraph 21 some of 22 the issues that Parliament might want to consider. I 23 will not take you to that now, but if one is going to 24 reintroduce punitive damages into an area of public 25 life, one should not do that on the basis of what one</p> <p style="text-align: center;">Page 36</p>

<p>1 parking operator submits on no evidential basis.</p> <p>2 If there is going to be any kind of social</p> <p>3 justification on the law of penalties, there needs to be</p> <p>4 widespread consultation and not only that, there are</p> <p>5 plenty of different ways of running a car park other</p> <p>6 than that chosen by ParkingEye in this particular case.</p> <p>7 For example, car parking in large retail parks is</p> <p>8 often completely free. 20 miles away from Chelmsford is</p> <p>9 a big retail park called the Lakeside retail park where</p> <p>10 parking is free. It is within knowledge of the parties</p> <p>11 that other car parks owned on other land owned by the</p> <p>12 British Airways Pensions Fund, who own retail parks with</p> <p>13 free parking. Motorway parking you might be charged £10</p> <p>14 or £12.</p> <p>15 There are other examples, perhaps, even within the</p> <p>16 experience of the court where one goes to a shopping</p> <p>17 centre, parks in a car park, takes a token, the token is</p> <p>18 validated at a shop. Or if you don't go shopping you</p> <p>19 put it into a machine and pay some money with a credit</p> <p>20 card or coins and put the token back into the machine.</p> <p>21 There was no investigation or explanation of the</p> <p>22 alternative models either at trial or in the Court of</p> <p>23 Appeal. That is the first point.</p> <p>24 Secondly, there was no evidence at all that if these</p> <p>25 charges were not enforced, turnover of vehicles would</p> <p style="text-align: center;">Page 37</p>	<p>1 would be one way of organising it.</p> <p>2 The point I am making is, firstly, that there are</p> <p>3 different ways of organising car parking which were not</p> <p>4 explored in evidence.</p> <p>5 Secondly, there was no evidence that it was</p> <p>6 absolutely necessary to allow this deterrent to stand to</p> <p>7 avoid --</p> <p>8 LORD CLARKE: If it is £5, £5, £50 you couldn't complain,</p> <p>9 could you? Or £65 for that matter. I mean, you might</p> <p>10 not go and park there, but you would not have any</p> <p>11 regrets.</p> <p>12 MR DE WAAL: The short answer is that, both in terms of the</p> <p>13 law of penalty and in terms of the regulations, one</p> <p>14 cannot challenge core terms and consideration of prices</p> <p>15 is the core term and one accepts that.</p> <p>16 LORD CLARKE: That is the essential law of it.</p> <p>17 MR DE WAAL: Yes, but there is a point about this and it is</p> <p>18 a point my Lord, Lord Mance, made yesterday and I think</p> <p>19 it is page 5. Perhaps I could just remind myself and</p> <p>20 read out to you the relevant bit of the transcript.</p> <p>21 LORD NEUBERGER: Where are we looking?</p> <p>22 MR DE WAAL: The transcript of yesterday.</p> <p>23 LORD CLARKE: Speaking for myself I had not been aware there</p> <p>24 was a transcript of yesterday.</p> <p>25 LORD NEUBERGER: We weren't given the usual warning that</p> <p style="text-align: center;">Page 39</p>
<p>1 grind to a halt, business would suffer and ParkingEye</p> <p>2 would lose its contract with the landowner.</p> <p>3 It might be said, one does doesn't know that the</p> <p>4 reverse is the case, that if customers who overstayed by</p> <p>5 one minute are charged a penalty, they will take it out</p> <p>6 on the retailers, they will not be sophisticated, they</p> <p>7 will not understand the relationship between the car</p> <p>8 parking operator, the landowner and the retailer; the</p> <p>9 retailers might lose good will.</p> <p>10 A slightly more sinister way of looking at this</p> <p>11 contract is what ParkingEye have done is, in fact, found</p> <p>12 a way of monetising free parking to the benefit of the</p> <p>13 landowner who, as my Lord is aware because it came out</p> <p>14 at trial, is paid £1,000 a week by ParkingEye so they</p> <p>15 can set up their cameras and fine people who overstay.</p> <p>16 LORD CLARKE: If the form of the contract where £10 for the</p> <p>17 first time, £10 for the next hour, £25 for the third</p> <p>18 hour and £35 for the fourth hour, there would be no</p> <p>19 objection to it?</p> <p>20 MR DE WAAL: No.</p> <p>21 LORD CLARKE: It entirely depends on this being a breach of</p> <p>22 the contract.</p> <p>23 MR DE WAAL: My Lord, yes. One is used to parking in car</p> <p>24 parks, short stay car parks, where you know that if you</p> <p>25 stay more than 6 hours the charges escalate and that</p> <p style="text-align: center;">Page 38</p>	<p>1 everything we were saying would be taken down and used</p> <p>2 in evidence.</p> <p>3 FOURTH DEFENCE: I suspect you have it online, but I will</p> <p>4 not trouble you to find it online.</p> <p>5 LORD NEUBERGER: As we are being filmed I don't suppose we</p> <p>6 can object. Okay.</p> <p>7 MR DE WAAL: This was during Mr Bloch's submissions about</p> <p>8 drafting.</p> <p>9 The question about whether by clever drafting one</p> <p>10 could make what would otherwise be a collateral</p> <p>11 secondary obligation or primary obligation. And</p> <p>12 Lord Mance said this:</p> <p>13 "There is a conceptual and perhaps psychological</p> <p>14 difference between making something a primary obligation</p> <p>15 and attacking it in as a consequence of a breach which</p> <p>16 actually may be an area of contract that receives</p> <p>17 slightly less attention perhaps, people are not thinking</p> <p>18 of non-performance."</p> <p>19 Coming back to the point my Lord, Lord Clarke,</p> <p>20 makes, as my Lord rightly says, you might be discouraged</p> <p>21 from parking in the car park if the charges are £5 for</p> <p>22 the first hour, £5 for the second hour and £50 for the</p> <p>23 third hour. But if you go to a car park, as Mr Beavis</p> <p>24 did, and it says, "Park here for free for two hours, and</p> <p>25 there is a parking charge of £85 if you breach the</p> <p style="text-align: center;">Page 40</p>

<p>1 terms", people don't think they are going to breach. 2 But people do breach and the entrepreneurial genius 3 behind ParkingEye has worked out that he can set up 4 a business, he can pay the landowner for the right to 5 set up his car parks and sufficient people will make 6 that error of judgment for him to pay his overheads and 7 to make in 2013 over £1 million profit and sell his 8 business to Capita for £54 million.</p> <p>9 That, my Lord, is relevant when one comes to look at 10 the unfair terms, as well. Because there is some 11 analysis, which we don't know, some algorithm, some 12 research, we of course we have no control over, no 13 knowledge of, which suggests that if you set up 14 a business like this, you are going to make 15 a substantial profit because no one thinks they are 16 going to breach or very many people think they are going 17 to breach.</p> <p>18 So, the Court of Appeal judgment for those three 19 reasons should not stand. And at paragraph 22 of our 20 case, which is 6914, we set out reasons that 21 a consultation might take into account when deciding 22 whether there was any kind of social justification for 23 these penalties.</p> <p>24 LORD SUMPTION: You may be intending to deal with this at 25 some stage, in which case I don't wish to take you out</p> <p style="text-align: center;">Page 41</p>	<p>1 LORD SUMPTION: But it explains why, or it may explain why 2 the 85 is being charged at all. 3 MR DE WAAL: It may explain it? 4 LORD SUMPTION: This is a scheme which has been authorised 5 by the landowner. The landowner derives an advantage 6 from it, not financial, but in terms of regulating the 7 use of his car park. ParkingEye as the agent derives 8 a financial advantage. 9 MR DE WAAL: Both derive a financial advantage. 10 LORD SUMPTION: Of course, you are quite right. 11 MR DE WAAL: The landowner is paying. 12 LORD SUMPTION: Yes. 13 LORD TOULSON: Interestingly, Mr de Waal, the note of this 14 indicates why somebody is going to be charged £85, what 15 it is triggered by, doesn't indicate what for. It is 16 described as, "Parking charge". Now, that could be 17 charging if you don't go at the end for the two hours 18 you have had. 19 It could, in theory, be charge for staying on, 20 charge for your usage beyond the permitted time. The 21 problem about that is, that the biggest, boldest letters 22 of the whole notice are, "Two hour maximum stay". It is 23 very difficult to read into that any permission to stay 24 beyond two hours. Is one driven to say that the parking 25 charge is not for the benefit of an extended stay, it is</p> <p style="text-align: center;">Page 43</p>
<p>1 of your order, but you may recall that one of the 2 questions discussed yesterday in the context of the 3 Cavendish appeal was whether there may not be 4 circumstances in which even on the footing that this is 5 a clause which regulates the consequences of breach, as 6 opposed to the consideration, even on that footing, 7 a contracting party may have an interest, a legitimate 8 interest, extending beyond compensation for his actual 9 loss.</p> <p>10 One of the questions that arises here is whether the 11 landowner may not have an interest in authorising 12 ParkingEye to charge £85 because he has an interest not 13 simply in the recovery of any actual financial loss, but 14 also in regulating his car park so that space is 15 available for use by shoppers.</p> <p>16 Now, I simply put that forward as an argument. It 17 arises out of yesterday.</p> <p>18 Do you have any submissions to make on that point? 19 MR DE WAAL: My Lord, one accepts that there can be 20 legitimate interests in, for example, protecting trade 21 practices or protecting good will, which is how the 22 argument went yesterday. But in the example my Lord 23 posits to me, my Lord is introducing a third party who 24 is not party to the contract between Beavis and 25 ParkingEye. The legitimate interests of a landowner.</p> <p style="text-align: center;">Page 42</p>	<p>1 for not leaving on time? 2 MR DE WAAL: My Lord, yes. 3 LORD NEUBERGER: Therefore it is a penalty, because if it 4 is capable of being a penalty -- otherwise you would 5 have to say you have a licence to be there, which means 6 it has to be revoked. But if you are a trespasser then 7 you cannot be paying for it. 8 MR DE WAAL: My Lord, yes. 9 LORD NEUBERGER: Does that mean you can be sued for 10 trespass, as well, without having to pay the £85? 11 MR DE WAAL: Forgive me. 12 LORD NEUBERGER: Does that mean you can be sued for trespass 13 as well as having to pay the £85? 14 MR DE WAAL: In theory you can be sued for trespass. I 15 mean, not on the particular facts of this case because 16 ParkingEye is not the landlord. But if one posits 17 a situation where the landowner is the person who is 18 enforcing the parking, then the landowner could sue for 19 trespass and selection claim compensatory or 20 restitutionary damages. 21 There is a section in our case on damages for 22 trespass simply because the point was picked up by 23 Sir Timothy Lloyd in his judgment in the Court of 24 Appeal, when he said: one could look at this 25 as a damages for trespass on a restitutionary basis --</p> <p style="text-align: center;">Page 44</p>

<p>1 those are my words not his -- but he says: actually, 2 that wouldn't work because it needs to be a deterrent. 3 And we simply put those submission in because, we say, 4 one solution to this problem, which is the difficulty 5 of -- I accept the difficulty of assessing the loss to 6 the landowner is to approach it on the kind of 7 restitutionary or quasi restitutionary way one 8 approaches damages for trespass and say you look at 9 benefit to the parker. And therefore you charge the 10 parker a sum equivalent to what he would have had to pay 11 in a comparable car park in the same locality or 12 a comparable time. That is a way which solves the 13 problem in a practical way.</p> <p>14 My Lord, just to round up my introductory remarks, 15 which have taken me the rather greater part of the time 16 allotted to me, there is no discernible public policy 17 statute or non-statute that justifies parking charges.</p> <p>18 There is no remedy other than at common law or by 19 reference to the regulations which helps Mr Beavis, and 20 therefore it is necessary for the courts to intervene.</p> <p>21 And secondly, if there is to be some departure from 22 principle in the way of social justification, that there 23 ought to be some consultation about it.</p> <p>24 My Lord, in the remaining 25 minutes, I ought to say 25 something about penalty and the regulations.</p> <p style="text-align: center;">Page 45</p>	<p>1 The second addresses a possible redefinition of the 2 law as propounded by my Lord, Lord Toulson, in argument 3 yesterday. I will quote that: 4 "A clause which in the case of a breach imposes 5 a financial sanction manifestly disproportionate to the 6 interests legitimately protected by the contract." 7 And the third and final fall back position is even 8 if the house were to decide to modify or abrogate the 9 law, you should not do so in respect of 10 take-it-or-leave-it consumer contracts.</p> <p>11 My Lord, primary submission, nothing wrong with the 12 law, not gone unconsidered by the law commission, stood 13 the test of time, there is no real problem with it. To 14 abolish the doctrine would be to offend the compensatory 15 principle, it would be to create a new category of 16 punitive damages when the last two categories of damage 17 were abolished some years ago. Breach of promise fell 18 away in 1970 and <i>Addis v Gramophone</i> held that exemplary 19 damages couldn't be given for wrongful dismissal.</p> <p>20 Secondly, it is plain on the authorities as they 21 stand at the moment, that the concepts of both 22 commercial justification and extravagant and 23 unconscionable are rooted in the compensatory principle 24 and we refer the court again to Mr Justice Colman in 25 <i>Lordsvale</i>. I don't believe I need to take you to it</p> <p style="text-align: center;">Page 47</p>
<p>1 I start in this case from it being common ground 2 that the parking -- subject to the point which is raised 3 with me at the beginning of my submissions -- but 4 I start at least with the common ground that the parking 5 charge was a deterrent and I rely on the principle 6 referred to a number of times before my Lords that such 7 a charge is unconscionable and extravagant and one which 8 no court ought to allow to be enforced. Which is 9 a quotation from Lord Halsbury in <i>Clydebank</i>.</p> <p>10 And I respectfully adopt the observation, I think it 11 was from my Lord, Lord Sumption, early on on the first 12 day, that "Unconscionable" is Edwardian English for 13 "Outrageous".</p> <p>14 My Lord, in passing, my learned friend Ms Smith, on 15 behalf of Cavendish, submitted yesterday, and when you 16 do get a transcript, or rather on the first day -- it is 17 day one page 111, when you do get a transcript -- that 18 the definition of unconscionability was procedural, that 19 it was akin to duress. I would say that cannot be right 20 since the law already provides a remedy for duress and 21 undue influence in making contracts voidable and if she 22 was right there would be no need for the common law. 23 So, unconscionability must be substantive.</p> <p>24 We have three submissions, the first is that there 25 is nothing wrong with the law.</p> <p style="text-align: center;">Page 46</p>	<p>1 because you have been taken to it so many times, but it 2 is bundle A14, page 112, where Mr Justice Colman 3 explained that the small increase in interest rates 4 could be explained as commercially justifiable provided 5 always that the dominant purpose is not to deter the 6 other party from breach.</p> <p>7 It is clear, we say, from the authorities that 8 commercial justification is rooted in the predominant 9 purpose test. There is no, we say, third way, no 10 intermediate term and there is a helpful analysis of 11 that in the article by Professor Baron(?), which 12 my Lord, Lord Toulson, directed the parties' attention 13 to in the week before this hearing, 2008 <i>EWA Law Review</i>, 14 page 52 onwards, which is in a supplemental bundle 15 somewhere.</p> <p>16 That is commercial justification.</p> <p>17 Extravagant and unconscionable is also we say is 18 rooted in the compensatory principle and referring to 19 proposition (a) in <i>Dunlop</i>. And undoubtedly in this 20 case, the 85 or the 50 is extravagant in comparison with 21 the greatest loss which conceivably could be proved to 22 have followed from the breach.</p> <p>23 My Lord, I have already anticipated the submission 24 on trespass that I have made to you about restitutionary 25 damages about solving the problem and that is the</p> <p style="text-align: center;">Page 48</p>

12 (Pages 45 to 48)

<p>1 primary submission.</p> <p>2 Then we go on to consider what the position might be</p> <p>3 if the board were minded to update and redefine the test</p> <p>4 in the way that Lord Toulson propounded yesterday.</p> <p>5 Again, when you get a transcript day 2, page 60:</p> <p>6 "A clause which in the case of breach imposes</p> <p>7 a financial sanction manifestly disproportionate to the</p> <p>8 interests legitimately protected by the contract.</p> <p>9 The first question is: what is the ParkingEye's</p> <p>10 legitimate interest? And as we are aware, it has</p> <p>11 devised a model that all of its profits and overheads</p> <p>12 are derived from those who failed to leave the car park</p> <p>13 within 2 hours of arrival.</p> <p>14 Is that a commercially legitimate interest? Well,</p> <p>15 what we say about this is that plainly the subject</p> <p>16 matter of the contract is lawful and profit is a proper</p> <p>17 motive, but it is contrary to accepted standards of</p> <p>18 commercial morality or good faith if, unknown to the</p> <p>19 consumer, the contract will only be profitable for the</p> <p>20 supplier if the customer breaches his primary obligation</p> <p>21 thus allowing the supplier to enforce the secondary</p> <p>22 obligation to pay damages.</p> <p>23 LORD CARNWATH: I don't understand that, you are not getting</p> <p>24 any money out of the first two hours, so it is pretty</p> <p>25 obvious that it is coming from something else.</p> <p style="text-align: center;">Page 49</p>	<p>1 should be a signal to the court that it is not the sort</p> <p>2 of contract that anyone should have a legitimate</p> <p>3 interest in maintaining and a fortiori, one should not</p> <p>4 reintroduce, as it were, the penalty charge for the</p> <p>5 benefit of ParkingEye in these particular circumstances.</p> <p>6 LORD SUMPTION: When you refer to the, "Actual loss", what</p> <p>7 do you say would be the measure of that loss at common</p> <p>8 law?</p> <p>9 MR DE WAAL: My Lord, the measure of the loss, we would say,</p> <p>10 would be the loss to the ParkingEye as agent for the</p> <p>11 landowner of being able to, as it were, allow someone</p> <p>12 else to occupy --</p> <p>13 LORD NEUBERGER: It is either the going rate for such</p> <p>14 parking or it is the benefit to the person who has</p> <p>15 parked. I mean it is -- the Ashman case. I saw he had</p> <p>16 been covered.</p> <p>17 MR DE WAAL: Yes.</p> <p>18 LORD HODGE: You are treating ParkingEye as being the</p> <p>19 landowner's agent.</p> <p>20 LORD NEUBERGER: For this purpose.</p> <p>21 MR DE WAAL: For this purpose, and I think it was</p> <p>22 established below that that was the proper relationship</p> <p>23 between the two parties, my Lord.</p> <p>24 LORD HODGE: Yes, the contract in 3.8 seems to say that,</p> <p>25 they are agent, but then of course they have boilerplate</p> <p style="text-align: center;">Page 51</p>
<p>1 MR DE WAAL: It is obvious, but we would say in response to</p> <p>2 that, if the test were to be: is that a legitimate</p> <p>3 interest to protect by the imposition of a penalty</p> <p>4 charge? We would say that such a contract which is</p> <p>5 simply based solely on making a profit on breach falls</p> <p>6 the wrong side of the line.</p> <p>7 LORD CARNWATH: You have to take into account all the people</p> <p>8 that get free parking, they do pretty well out of it --</p> <p>9 MR DE WAAL: My Lord, we don't. Forgive me, I didn't mean</p> <p>10 to put that so abruptly. Every single contract has to</p> <p>11 be considered in isolation. We are looking at the</p> <p>12 contract between Mr Beavis --</p> <p>13 LORD CARNWATH: No, you say we have to look at the business</p> <p>14 model and how that operates, which means looking at the</p> <p>15 whole thing.</p> <p>16 MR DE WAAL: We look at the whole thing in terms of</p> <p>17 legitimacy, but if we are looking at whether something</p> <p>18 is a penalty, we are looking at particular contract</p> <p>19 between Beavis and ParkingEye, and not other</p> <p>20 considerations such as the fact that other people may</p> <p>21 get free parking subsidised by the fact that certainly</p> <p>22 a number of people are in breach.</p> <p>23 My Lord, the first submission is really this: if the</p> <p>24 retention of the contract relies on pursuing charges</p> <p>25 which are in excess of ParkingEye's genuine loss, that</p> <p style="text-align: center;">Page 50</p>	<p>1 at paragraph 22 saying they are not.</p> <p>2 LORD NEUBERGER: It could be slightly circular, couldn't it,</p> <p>3 because if you could show the car park after two hours,</p> <p>4 in most car parks of this sort, was £85 because that was</p> <p>5 the going rate round the place, would that stop it being</p> <p>6 a penalty?</p> <p>7 MR DE WAAL: My Lord, if --</p> <p>8 LORD NEUBERGER: If all private car park operators charged</p> <p>9 that sort level, would that not be the going rate?</p> <p>10 MR DE WAAL: The short answer to that, in fact, is they</p> <p>11 don't, so it would not produce a problem in practice.</p> <p>12 In relation to problem in principle, if the universal</p> <p>13 scheme in England were that then of course that would be</p> <p>14 the right answer.</p> <p>15 LORD NEUBERGER: If a surveyor or judge decided that was the</p> <p>16 going rate, it is what car parks all charged after</p> <p>17 people overstayed, would that stop it being a penalty?</p> <p>18 That is really the question I am putting to you.</p> <p>19 MR DE WAAL: My Lord, it would not stop it being a penalty</p> <p>20 on the restitutionary basis but it would still remain</p> <p>21 a penalty on the basis that it is manifestly in excess</p> <p>22 of the loss.</p> <p>23 LORD SUMPTION: On the hypothesis that has been put to you,</p> <p>24 it would not be.</p> <p>25 Suppose that the going rate was £85, then that</p> <p style="text-align: center;">Page 52</p>

<p>1 would, on the face of it, be the common law measure of 2 recovery, so that the actual charge is not excessive by 3 comparison with that. 4 MR DE WAAL: My Lord, if -- 5 LORD SUMPTION: I agree you don't accept it is the going 6 rate but if it were, that would follow, wouldn't it? 7 MR DE WAAL: My Lord, yes. 8 LORD NEUBERGER: Except you would say that everybody is 9 imposing a penal rate and it does not stop being 10 a penalty simply because everybody does it. 11 MR DE WAAL: My Lord, yes. 12 LORD MANCE: Your real complaint is that ParkingEye is 13 making a profit. If this had been done in-house by the 14 operator of the retail park, that would have been 15 incurred, presumably, all the overheads or equivalent 16 overheads to those which ParkingEye incurs. 17 Now presumably, it was regarded as sensible to let 18 this out, contract it out to ParkingEye. It may be 19 ParkingEye's overheads, since they operate countrywide 20 would be less and that enables them to make a profit. 21 So I mean, in reality may be we ought to test this 22 against a situation where it is actually done in-house. 23 Would there be anything wrong with the general scheme 24 which is designed to restrict parking and to give people 25 two hours, give everyone two hours in return for a quid</p> <p style="text-align: center;">Page 53</p>	<p>1 it is £10, the thing would be unworkable because no-one 2 can sue for £10 or take the trouble, or the overheads 3 would shoot up if you were making the enquiry simply to 4 recover a £10 charge. I would like you just to think 5 about those points. 6 MR DE WAAL: My Lord, of course, forgive me, that assumes 7 one needs to charge in the first place and as I have 8 suggested, there are alternative models, free car parks, 9 there are car parks where you pay on entry and exit and 10 therefore there is no problem about recovery because you 11 pay it back. 12 LORD MANCE: I see, yes. 13 MR DE WAAL: But that is a solution. The solution that 14 ParkingEye has come up with in conjunction with this 15 landowner and other landowners is not the only solution, 16 it is not a solution that, as it were, needs to be made 17 to work by this court by the imposition of a deterrent 18 penalty. 19 Once one starts from the supposition, as it were, 20 which is the way the Court of Appeal started to say, 21 "Look, we need to find a way of making this work, it can 22 only work if the charge is this high otherwise it is 23 uneconomic to recover", one leads inextricably to that 24 conclusion. 25 LORD MANCE: Barrier operated schemes, you have to have a</p> <p style="text-align: center;">Page 55</p>
<p>1 pro quo which is that everyone takes the risk that if 2 they stay longer than two hours they may be hammered. 3 You say, "Hammered". 4 MR DE WAAL: My Lord, that assumes that, first of all, the 5 landowner or retailers would want to impose such charges 6 and assumes that they would -- 7 LORD MANCE: Someone has to pay, presumably, for the 50,000 8 a year which goes to the retail park operator and is 9 some mitigation of the costs of keeping the car park up. 10 But somebody has to pay for that, but somebody has to 11 pay for the overheads of an operating a scheme like 12 this. 13 MR DE WAAL: My Lord, somebody has to pay for the overheads 14 of an operating scheme, but in this particular fact the 15 overheads are concerned principally with the recovery of 16 these charges. It is -- 17 LORD MANCE: You have to maintain the cameras, no doubt, and 18 so on and then recover the charges. But one then gets 19 down to the question -- I mean assuming that you don't 20 object to the profit element -- the question is one of 21 how you split the costs across the constituents, that is 22 the users, they have chosen a model which imposes them 23 on overstayers and on an uniform basis. 24 Presumably, if they had tried to graduate the system 25 and introduce a system of if you were five minutes over</p> <p style="text-align: center;">Page 54</p>	<p>1 chap there in case the machine is not working or 2 somebody has to pay a penalty charge. Anyway. 3 LORD TOULSON: Can I just ask you this: if the proper 4 analysis of the contract is that the £85 is a charge for 5 not leaving, at the end of the permitted two hours -- in 6 other words the consideration for being allowed to park 7 is the promise to pay £85 if you don't leave within two 8 hours, then is there room for the penalty doctrine to 9 operate? 10 MR DE WAAL: If it is the consideration, it is a core term 11 and it is not a price peddle on breach and penalty and 12 penalty does not arise. One could only think about it 13 in terms of a relief from an unconscionable parking or 14 something like that. 15 LORD SUMPTION: On the reasonableness of the charge, is it 16 legitimate to deduce that £85 is reasonable from the 17 fact that large numbers of motorists have freely entered 18 the car park, choosing to accept the terms on the 19 notice, including your client? 20 MR DE WAAL: My Lord, no. 21 LORD SUMPTION: They have alternatives, they don't have park 22 there, they don't have to drive at all. 23 MR DE WAAL: My Lord, no, because most people expect to 24 perform rather than to breach a contract and -- 25 LORD SUMPTION: They must have been aware of the</p> <p style="text-align: center;">Page 56</p>

<p>1 consequences of not performing because they are spelt 2 out in the largest lettering, the second largest 3 lettering on the notice. 4 MR DE WAAL: My Lord, as was Mr El Makdessi, who was 5 a rather more sophisticated commercial operator in 6 Cavendish, and if the answer is that once you expose 7 yourself to this sword of Damocles, then you cannot 8 complain when it falls and chops your head off, 9 because -- 10 LORD SUMPTION: It goes to a slightly different point, 11 namely what the damages would be apart from such a 12 clause. Can one deduce from the fact that people are 13 prepared to park in a police station where there is £85 14 to pay if you stay for more than two hours, but people 15 generally regard that as a reasonable price because 16 otherwise they would not choose to enter the park, 17 therefore it is not excessive. 18 MR DE WAAL: My Lord is attributing a degree of 19 sophistication to an average consumer, which is, in my 20 submission, as demonstrated by the fact that this 21 business works and makes a profit not a degree of 22 sophistication they have, because no reasonable person 23 would want to expose themselves to a charge which is 24 something like 20 per cent of the average weekly wage. 25 LORD MANCE: We all hope for best, is the answer. We assume</p> <p style="text-align: center;">Page 57</p>	<p>1 My Lord, the third and final point on penalties is 2 that they should, in any event, not be abrogated for 3 take-it-or-leave-it consumer contracts. 4 The direction of travel of the law in this direction 5 is in favour of greater consumer protection, not less. 6 And my Lord, Lord Toulson, has, for example, brought to 7 our attention the Law Commission report which proposes 8 on a different topic -- one I will come on to next -- 9 expanding the protection of the unfair terms and 10 contracts regulation to small businesses. 11 My Lord, the final five minutes are on the 12 regulations. Might I use the first bit to anticipate 13 something which may be put to me: why the regulations 14 are not sufficient on their own for a consumer. And 15 I am grateful to the El Makdessi respondents having 16 drawn my attention to the passage in the judgment of 17 Mr Justice Andrew Smith B4/12 in the case of 18 Office of Fair Trading v Abbey National and if I could 19 invite you to find B4/12, page 3161. 20 LORD NEUBERGER: 3161, thank you. 21 MR DE WAAL: Paragraph 328 onwards, when his Lordship dealt 22 with a submission by the bank for regulations displaced 23 common law on penalties. 24 Turn over the page at 331, the conclusion that -- 25 sorry, paragraph 331, page 2162. Paragraph 331, not</p> <p style="text-align: center;">Page 59</p>
<p>1 we are not going to do things which are stupid and we 2 often do them. 3 LORD CLARKE: I imagine in the future, if you win this 4 appeal, this notice will simply say something different, 5 it will say: three hour maximum stay, hour one free, 6 hour two free, hour three £85. 7 MR DE WAAL: But there is a reason, my Lord, that ParkingEye 8 have put it in this way and have not taken up the option 9 of election to argue the point that has been put to me, 10 I am inferring -- you don't know about this -- that if 11 they simply provide free parking and then impose 12 a charge for breach. They can argue, first of all, that 13 they are not in beneficial occupation from the point of 14 view of rates. 15 And secondly, they don't have to raise VAT invoices. 16 So, they could do that but it would not be easy to 17 do that. If it was easy to do that they would have done 18 that already. It would make, I suspect, it much more 19 expensive because they would end up paying rates and 20 VATs. I don't know that, it is speculation on my part 21 that there is a reason for this business being 22 structured in this way. 23 Otherwise it would be perfectly logical to do what 24 my Lord proposes and it would solve the problem for the 25 operator.</p> <p style="text-align: center;">Page 58</p>	<p>1 persuaded by the bank's arguments: 2 "The question of whether, if it were binding, it 3 might be unenforceable in whole or in part because its 4 (Inaudible) does not arrive, there is no reason why the 5 regulation should displace the common law rules when the 6 regulations do not protect the consumer directly. If it 7 is laid down that the minimum standards of protection 8 for consumers does not reflect a policy that consumers 9 should not enjoy protection beyond that no reason in the 10 directive that it should deprive consumers of protection 11 that they enjoy at common law." 12 There were hints in Ms Smith's submissions that it 13 would not be a problem to abolish the doctrine even for 14 consumers because the regulations were sufficient. But 15 the common law on penalty is still a valuable protection 16 for consumers, it deals with a different issue to 17 fairness and it should remain. 18 In relation to, finally, the regulations, my Lord, 19 I will simply draw your attention to my case to two 20 passages in the position of the House of Lords in 21 First National Bank, volume -- 22 LORD MANCE: 8123, yes. 23 MR DE WAAL: Page 7127 -- let me just find the right file. 24 It is in the consumers authority bundle at -- 25 LORD MANCE: It is in bundle H.</p> <p style="text-align: center;">Page 60</p>

15 (Pages 57 to 60)

<p>1 MR DE WAAL: Volume H, tab 3, director general of fair 2 trading at First National Bank. 3 The speeches of Lord Bingham at 7127, paragraph 17, 4 from -- 5 LORD NEUBERGER: Sorry 7127? 6 MR DE WAAL: My Lord, 7127. 7 LORD CARNWATH: This is set out in your case, this passage? 8 MR DE WAAL: My Lord, it is. 9 LORD NEUBERGER: If it is set out in your case, yes. 10 MR DE WAAL: My Lord, reading from D, to H: 11 "Significance in balance is met in terms in favour 12 of the supplier. This may be by granting to the 13 supplier beneficial option that I am imposing on the 14 consumer, disadvantageous burden or risk of duty." 15 We say the risk here is of overstaying by accident 16 and imposing a penalty. A little further down between E 17 and F: 18 "Of course the detriment has to be to the consumer." 19 At F: 20 "Openness requires that the term should be expressed 21 fully, clearly and legibly containing no pit falls or 22 traps." 23 Well, there is a trap here in relation to the fact 24 it is not clear whether the maximum stay is two hours 25 parking or two hours in the car park.</p> <p style="text-align: center;">Page 61</p>	<p>1 effected by the inclusion of the term or his lawyer 2 might reasonably be expected to object to its inclusion 3 and press for its deletion." 4 I press that point home to my Lords because plainly 5 Mr Beavis, if properly advised, would never have agreed 6 such an onerous term. 7 My Lord, that observation was reinforced by the 8 subsequent judgment of the European Court of Justice in 9 the Aziz case, which I will now not take my Lords to 10 because I have had my hour now. 11 LORD NEUBERGER: It is set out in your -- 12 MR DE WAAL: It is set out in my -- 13 LORD NEUBERGER: And obviously, as I mentioned yesterday, we 14 accept that you are not abandoning material in your 15 written case simply because you are not referring to it, 16 but we have the arguments on that. And again, it is 17 a passage which you quote. 18 MR DE WAAL: It is a passage which I quote. There is just 19 one final point and for your Lordships' note there is 20 an analogy here with a point made by my Lord, 21 Lord Sumption, in a case called Plevin, which was a case 22 about misselling of PPI and the amount of commission 23 paid to a broker. At 7219 in volume H, paragraph 18 -- 24 LORD MANCE: Sorry, which? 25 MR DE WAAL: Volume 7219, volume 18 in Lord Sumption's</p> <p style="text-align: center;">Page 63</p>
<p>1 Further down: 2 "Fair dealing requires that the supplier should not 3 deliberately or unconsciously take advantage of the 4 consumers' necessity, indigence, lack of experience of 5 unfamiliar (Inaudible) or weak bargaining position, has 6 no bargaining position he simply has to take these terms 7 when he parks." 8 Good faith in this context looks to good standards 9 of commercial mortality and practice. And I repeat my 10 submission that a contract which is designed to make a 11 profit solely by enforcing a secondary obligation is 12 contrary to commercial mortality, contrary to good 13 faith. 14 And finally paragraph 54 in the judgment speech of 15 Lord Millett on page 7138, again, that is after setting 16 out the test in the regulations: 17 "Because no single test of this ... it may also at D 18 be necessary to consider the effect of the conclusion on 19 the term of the substance or core of the transaction, 20 whether it is drawn to the attention of the consumer, 21 the consumer would be likely be surprised by it, but the 22 term is a standard term not merely non-negotiable 23 consumer contracts." 24 Then he goes on to say: 25 "Then whether in such cases the party adversely</p> <p style="text-align: center;">Page 62</p>	<p>1 judgment. He observed that if Mrs Plevin had been aware 2 that the broker had been paid 7.18 per cent she would 3 certainly have questioned this. 4 What I say is, if a shopper or a motorist such as 5 Mr Beavis comes into this car park and knows that not 6 only is he at risk of paying the £85, but he is entering 7 into a system which is set up on the basis of number of 8 people, "I am bound to fail, I am bound to pay this 9 charge, otherwise it would not work", he is going to be 10 much more cautious. He is going to question the wisdom 11 of parking there and he is going to be much more 12 conscious of his liability of leaving within the 2 13 hours. 14 LORD SUMPTION: Why was he not conscious of these things 15 when he saw the notice? 16 MR DE WAAL: Because as my Lord, Lord Mance, put back to me, 17 he hoped for the best. 18 If he had known he was entering into a potential 19 trap, he would have perhaps been in a position -- 20 LORD CLARKE: Except your only potential trap is the two 21 hours in the car park as opposed to the car parking 22 place. Apart from that there is no trap, is there? 23 MR DE WAAL: That is the trap but if he had known that 24 somebody had a designed a system based upon some 25 analysis that a certain number of people were bound to</p> <p style="text-align: center;">Page 64</p>

<p>1 fail, he would have been much more conscious, as 2 Mrs Plevin was -- 3 LORD CLARKE: In the actual terms it could not be plainer. 4 MR DE WAAL: The terms could not be plainer, no. 5 LORD CLARKE: It is obvious, on the face of it, that if you 6 stay longer than two hours you are going to pay £85. It 7 is perfectly clear. 8 MR DE WAAL: The terms are obvious, but what he is not aware 9 of, anymore than Mrs Plevin was when she was paying the 10 substantial percentage of her premium to the broker by 11 way of commission, what he is not aware of is it is 12 a system set up based upon a premise that a number of 13 people failed and if he had known that he might have 14 been more alert to the risk. That is the submission. 15 My Lords, those are my submissions. 16 LORD NEUBERGER: Thank you very much indeed. 17 Submissions by MR BUTCHER 18 MR BUTCHER: The Consumer's Association is grateful for the 19 opportunity of addressing you. And your Lordships will 20 know who the Consumer Association is, what your 21 Lordships may not have at the forefront of your minds is 22 that the Consumer's Association is a designated enforcer 23 under part 8 of the Enterprise Act in respect of all 24 infringements of domestic -- 25 LORD MANCIE: It occurs to me, I am sorry to interrupt you</p> <p style="text-align: center;">Page 65</p>	<p>1 There has been a considerable discussion this morning 2 about two issues, one the question of the status of 3 ParkingEye. It is recorded in the judgment of the Court 4 of Appeal that the first instance judge found that 5 ParkingEye contracted as principal, but there was no 6 appeal from that finding. Thus that the ParkingEye had 7 no interest in the land and on that basis it was found 8 by Lord Justice Moore-Bick that ParkingEye suffers no 9 direct financial loss if an individual motorist 10 overstays because: 11 "It has no interest in the land over which the 12 licence is granted and suffers no immediate loss in 13 terms of income, which might otherwise have been derived 14 from another motorist using car park." 15 That is paragraph 25 of the 16 Lord Justice Moore-Bick's judgment. 17 So, paragraphs 8 and 28 in relation to that, my 18 Lords. 19 As to the nature of the agreement, as it has been 20 seen, there was no argument, it was not what it appears 21 to be. And as a matter of construction, we would 22 suggest it is not a very difficult contract to construe. 23 If you look at 7068, that is the terms, it says it is 24 two hours maximum stay, it then says: 25 "Failure to comply with the following will result in</p> <p style="text-align: center;">Page 67</p>
<p>1 Mr Butcher, should one disclose that one is a subscriber 2 to Which?, which I think your organisation produces. 3 LORD NEUBERGER: I think the answer is probably, yes. 4 I should add I assume that nobody has the slightest 5 objection. 6 MR BUTCHER: It is also designated as a regulator for the 7 purposes of part 2 of the Consumer Rights Act 2015. 8 I say that just to indicate that the 9 Consumer's Association takes and is officially empowered 10 to take an active interest and role in ensuring that 11 consumers are not subjected to unfair or onerous terms 12 or trading practices. 13 The Consumer's Association is concerned with the 14 potential for the judgment of the Court of Appeal to 15 undermine protection for consumers not just in the area 16 of parking but across a wide spectrum of markets, 17 possibly leading to the imposition of excessive default 18 charges doubtless said to be justified in the name of 19 some supposed wider good. 20 Equally, Consumer's Association concerned with the 21 abolitionist arguments advanced in the Cavendish case 22 would amount to a significant undermining of consumer's 23 protections. 24 We have come, as it were, to argue the case on the 25 basis on which it was decided by the Court of Appeal.</p> <p style="text-align: center;">Page 66</p>	<p>1 a parking charge of £85." 2 There are three followings: 3 "Parking is limited to two hours, you have to park 4 only within the marked bays, and it is only blue badge 5 holders who are to park in the marked bays." 6 And then it says, although of course this is 7 illegible, at least on my copy of it, but it is all set 8 out in the judgment of the Court of Appeal, that 9 motorists agree to comply with the car park regulations 10 ie those, should a motorist fail to comply with the car 11 park regulations ie all of those, it accepts that they 12 are liable to pay a parking charge of £85. 13 In our submission that could hardly be clearer. If 14 you don't do those things which you have promised to do, 15 any of those, you have to pay a sum for breach which is 16 in the sum of £85. 17 LORD NEUBERGER: So, after the two hours' stay, they are 18 trespassers. 19 MR BUTCHER: I think is that is right, my Lord. 20 LORD NEUBERGER: You think that is right. 21 MR BUTCHER: I think it is right. 22 LORD NEUBERGER: But do you submit it is right? 23 MR BUTCHER: I don't want to -- 24 LORD NEUBERGER: Do you want to say -- I mean this is new 25 territory. If you want to reserve your position and</p> <p style="text-align: center;">Page 68</p>

<p>1 make written submissions -- that was not meant to be 2 a cheap joke. 3 MR BUTCHER: I understand that. That would be my 4 submission, but I would like a sort of locus. 5 LORD NEUBERGER: I indicate it is only fair that you do. 6 LORD CARNWATH: Can one consider that without bringing in 7 the position of the freeholders? 8 MR BUTCHER: Absolutely you can. They have structured their 9 arrangement, we have here a contract -- 10 LORD NEUBERGER: If there was estoppel between landlord and 11 tenant there is estoppel between licensor and licensee, 12 surely. 13 MR BUTCHER: Here we are talking about the contract between 14 Mr Beavis and ParkingEye contracting as principal, that 15 is the only contract we are talking about. 16 LORD SUMPTION: Is it nevertheless the case that for some 17 purposes ParkingEye are the agents of the landowner, 18 they are the agents of the landowner for the purpose of 19 controlling access to the site, for the purpose of 20 determining how long a person may stay and so on. This 21 is a right which they have to derive from the landowner. 22 MR BUTCHER: They derive those rights, but their contractual 23 rights to the money derive only from this contract which 24 they make as principal. 25 LORD SUMPTION: But we cannot wholly ignore the landowner</p> <p style="text-align: center;">Page 69</p>	<p>1 MR BUTCHER: They extract from him an express promise to 2 comply and it is a promise which is of value in the eyes 3 of the law. 4 LORD TOULSON: An implied promise. 5 MR BUTCHER: No, it is an express promise. That is the 6 purpose of that last part -- 7 LORD NEUBERGER: The agreement -- 8 MR BUTCHER: It says, "by parking the motorists agree to 9 comply with the car park regulations." 10 LORD TOULSON: It may be a semantic point, but it is by 11 conduct. 12 MR BUTCHER: By conduct, yes indeed. 13 LORD NEUBERGER: Thank you. 14 MR BUTCHER: I am going to move on. 15 LORD MANCE: On your point about interest though, I think 16 the argument against you would be that the interest of 17 ParkingEye is evident. This £85 must go to cover their 18 costs of operating the scheme. Plus any payment they 19 have to make to the actual owners of the car park and 20 perhaps if that is to give them a profit. So, is -- 21 MR BUTCHER: (Inaudible) their interest commercially under 22 their business model, it is not the interest which their 23 contract with Mr Beavis allows them to protect. Just 24 as -- 25 LORD MANCE: Probably the point, yes.</p> <p style="text-align: center;">Page 71</p>
<p>1 when one is looking at the question of justification. 2 MR BUTCHER: Yes, you can, in my submission. When we are 3 talking about a penalty clause -- and I am going to come 4 to this -- you are considering what is the interest of 5 the contracting party under the contract. That is the 6 only interest which can be properly protected. 7 LORD TOULSON: Before we leave the first topic, because 8 I think it does bear on what comes next, you don't 9 suggest that this can possibly be construed as a licence 10 which can extend beyond the two year period because it 11 starts off two hour max stay. 12 MR BUTCHER: It does. 13 LORD TOULSON: Do you say the consideration for what would 14 otherwise simply be a gratuitous licence limited to two 15 hours, is a promise by the parker that he will pay 16 a charge, an identified charge, in the event of him 17 doing one of three things? 18 MR BUTCHER: I would put it that he promises to abide by the 19 parking regulations. He promises to do those three 20 things, in fact. And that is a promise -- 21 LORD TOULSON: We have difficulty in seeing that a mere 22 agreement to comply with the terms of a licence was 23 consideration for licence because that is all he is 24 entitled -- I mean the licence is limited by its 25 limitations.</p> <p style="text-align: center;">Page 70</p>	<p>1 MR BUTCHER: Just as in relation to the issue of a genuine 2 pre-estimate of damages, if we revert to Lord Dunedin's 3 test, you could not say in relation to what might be 4 a genuine pre-estimate of the loss, that it is some loss 5 caused by breaches of other contracts or by reference to 6 benefits under other contracts. It is only the loss 7 which will be suffered by a breach of this contract by 8 this defendant that would go into what is the loss which 9 is to be pre-estimated. 10 You cannot take into account in these matters some 11 general notion of a commercial interest at large. But 12 I was going to come to that, my Lords. 13 LORD NEUBERGER: Yes. 14 MR BUTCHER: Although I am going to have to deal with all of 15 these points quite briefly. 16 LORD CLARKE: You say on the true construction of this 17 contract that if you park slightly outside one of the 18 marked base it costs you £85. 19 MR BUTCHER: You are in breach, that is what it says. It 20 says: 21 "If you fail to comply with the following ..." 22 LORD NEUBERGER: Okay. 23 MR BUTCHER: My Lords, I have five points or groups of 24 points. The first is in relation to law on penalties 25 generally. The Consumers' Association general position</p> <p style="text-align: center;">Page 72</p>

<p>1 in relation to the law on penalties is that there should 2 be neither modification in a fundamental sense and still 3 less abolition. 4 The law is long established, Parliament could have 5 intervened to replace it but has not. At least in its 6 core area of sums paid on breach, it is not uncertain. 7 Countless agreements have been structured based upon it. 8 There have been no significant judicial calls for its 9 abolition and any question of abolition should be the 10 product of an extensive consultation. Not possible and 11 not achieved in this case or these cases. 12 Certainly, there should be no question of either 13 abolition or any fundamental change in the area of 14 consumer contracts. But given that the 15 Consumer's Association for its part would see there as 16 being significant difficulties of drawing at common law 17 a line between those who might be thought to deserve 18 particular protection and others, the 19 Consumers' Association would consider that the existing 20 law is preferable potentially applicable to all 21 contracts. 22 But if there is to be any modification of the 23 existing position, penalties rule should be retained in 24 the consumer sphere, it is considered that it does 25 provide a significant protection for consumers against</p> <p style="text-align: center;">Page 73</p>	<p>1 so they don't apply, for example, to small businesses. 2 The protections afforded by those regulations, the 3 Unfair Terms In Consumer Contracts Regulations derive 4 from the 1993 EC directive which specifically envisages 5 that member states may have laws which provide consumers 6 with a higher level of protection. More stringent than 7 those provided for in the directive. That is recital 12 8 to the 1993 directive, which is at bundle J, page 7302. 9 LORD SUMPTION: We know from the foreign materials that most 10 or certainly many civil law countries do in fact have 11 a law of penalties or something resembling it. 12 MR BUTCHER: Yes. It cannot be assumed, my Lords, that the 13 consumer protection legislation, which there has been, 14 would have been identical had there not been a law as to 15 penalties. And it is not difficult to think of clear 16 examples of where there is a benefit to the consumer in 17 having the common law protection, as well. 18 But, the Unfair Terms In Consumer Contracts 19 Regulation, for example, do not apply to terms which 20 have been individually negotiated. 21 So you could have a term which had been negotiated 22 individually but nevertheless, in a situation of severe 23 inequality of bargaining power, the Unfair Terms in 24 Consumer Contract Regulations would not bite on that and 25 yet the protection forwarded by the common law doctrine</p> <p style="text-align: center;">Page 75</p>
<p>1 one type of clause which can be particularly onerous. 2 While issues of inequality of bargaining power may 3 not have been part of the original reasoning behind law 4 of penalties, there are judicial acknowledgments that 5 its effect in addressing the undesirable consequences of 6 inequality of bargaining power is one of the reasons for 7 its retention. 8 It is implicit in the judgment of Lord Denning in 9 Bridge v Campbell Discount. I don't want to take you to 10 it, but you will see that, there, he refers to 11 considerations as to whether the consumer has really 12 agreed. And it is explicit in authorities, which I know 13 your Lordships have been taken to, Amev v Austin in 14 Australia referred to with approval by the Privy Council 15 in Philips Hong Kong v AG. 16 The Consumer Association's judgment is that in that 17 context, the law as to penalties has been salutary, with 18 very few difficulties thrown up. And the fact that 19 there are some other statutory protections for some who 20 are in weaker bargaining positions, which are in force, 21 does not eliminate the need for the protection provided 22 by the law as to penalties. 23 So for example, the Unfair Terms in Consumer 24 Contract Regulations, does not apply to other than 25 individuals who are not engaged in tradeable business,</p> <p style="text-align: center;">Page 74</p>	<p>1 of penalties would. 2 Quite apart from that, it is not difficult to think 3 of situations where the requirements of the regulations 4 would not be complied with. For example, if you have 5 penalties going both ways, it might be difficult to say 6 that there was there a significant imbalance created by 7 the existence of the penalty on the consumer. 8 Or it might be difficult to say that the contract 9 was not in good faith in that the term would have been 10 agreed even if the consumer had individually negotiated 11 the term on legal advice because there is effectively no 12 choice in the matter in a world of Google and Amazon, 13 that is a real possibility. 14 So, for those reasons, the existence of some 15 protections afforded by the 16 Unfair Terms in Consumer Contract Regulations is not 17 an adequate reason for dispensing with the law as to 18 penalties. 19 And equally, because there has been some mention of 20 it, the Consumer Protection from Unfair Trading 21 Regulations 2008 do not have that effect either. Their 22 existence does not affect the point I am making, at all. 23 That regime is essentially to ensure transparency and 24 eliminate inaccuracy of information. But transparency 25 and inaccuracy are not a cure for a penalty or an unfair</p> <p style="text-align: center;">Page 76</p>

<p>1 term when you are dealing with people in an unequal 2 bargaining position.</p> <p>3 My Lords, the second point, the application to the 4 present case.</p> <p>5 In our submission, on the basis of the existing law 6 there is not the least doubt that the (Inaudible) 7 term(?) here was an unenforceable penalty. Once it is 8 accepted, as it is, that it takes effect, if at all, as 9 a contractual stipulation, there is really very little 10 possibility of argument. Other than that the law should 11 be fundamentally altered.</p> <p>12 The conclusion which the Court of Appeal came to was 13 one which, with respect to them they were not able to 14 come to in accordance with the doctrine of stare 15 decisis. This was, in our submission, quite clearly -- 16 and there is no issue as to this -- a sum which was to 17 be charged to deter breach.</p> <p>18 LORD NEUBERGER: The fact that something is a deterrent or 19 has that purpose may help determine that it is a penalty 20 but does it mean that it is ex hypothesis a penalty?</p> <p>21 MR BUTCHER: Absolutely it does, my Lord.</p> <p>22 LORD NEUBERGER: In every case?</p> <p>23 MR BUTCHER: If you conclude that the predominant purpose of 24 the term is to deter.</p> <p>25 LORD NEUBERGER: The predominant purpose?</p> <p style="text-align: center;">Page 77</p>	<p>1 the purpose? What is the question of construction we 2 are embarked upon? It is to decide whether it is a sum 3 stipulated in terrorem of the offending party or is it 4 liquidated damages?</p> <p>5 LORD SUMPTION: What do you say about the cases on 6 commercial justification, are they wrong?</p> <p>7 MR BUTCHER: I am going say quite a bit about them.</p> <p>8 LORD NEUBERGER: In the time that you have.</p> <p>9 MR KIRK: I am going to say as much as I can about them. It 10 has gone wrong.</p> <p>11 What I would say, and I say immediately, is even in 12 those cases it has never been doubted that if you can 13 say that the predominant purpose of the clause is to act 14 as a deterrent, then it is a penalty.</p> <p>15 Indeed, that is the formula which Mr Justice Colman 16 uses in Lordsvale. He says at the end that an increment 17 over the pre-estimate might be commercially justified 18 provided always:</p> <p>19 "That its dominate purpose was not to deter the 20 other party from breach."</p> <p>21 That is the Lordsvale test. Approved by 22 Lord Justice Mance in Cine Bes where he sets that out in 23 terms with that proviso.</p> <p>24 LORD SUMPTION: In this case, if the landowner had operated 25 the scheme himself, instead of using ParkingEye, he</p> <p style="text-align: center;">Page 79</p>
<p>1 MR BUTCHER: That is a penalty. And this is important 2 because what happened in Dunlop was Lord Dunedin said 3 that the touchstone of a penalty is that it is there to 4 deter or it is to be in terrorem, while for a liquidated 5 damages clause it is a pre-evident(?) loss. He then 6 that there are four tests which help you determine, or 7 may help you determine in a particular case the answer 8 to that question of construction.</p> <p>9 I think I should show your Lordships this because --</p> <p>10 LORD NEUBERGER: This is bundle A, page 871.</p> <p>11 MR BUTCHER: Yes, of course, this is extremely well covered 12 by now, but if you go to page 870 of bundle A.</p> <p>13 LORD NEUBERGER: It is important we see how you say it 14 applies.</p> <p>15 MR BUTCHER: Yes, what Lord Dunedin says is at 2 on 870: 16 "The essence of a penalty is a payment of money 17 stipulated as in terrorem of the offending party. The 18 essence of a liquidated damages is a genuine covenanted 19 pre-estimate of damage. The question of whether a sum 20 stipulated is penalty or liquidated damage assess 21 a question of construction to be decided upon the terms 22 in inherent circumstances of each particular contract. 23 To assist this task of construction, various tests have 24 been suggested."</p> <p>25 Then he lists his famous four tests. But what is</p> <p style="text-align: center;">Page 78</p>	<p>1 would not, in your submission, have been entitled to 2 have a charge or to have a notice like this for the 3 purpose of regulating the use of his car park and 4 ensuring that shoppers always had space in which to put 5 their car. Because that would be using the £85 to deter 6 people from misusing the car park as opposed to 7 compensating himself from any loss. Is that right?</p> <p>8 MR BUTCHER: If it takes effect as a contractual term, yes.</p> <p>9 LORD SUMPTION: Yes, I see.</p> <p>10 MR BUTCHER: So, in all of those cases, Lordsvale, Cine Bes, 11 Murray v LeisurePlay, all of them have had that proviso, 12 provided always that its dominant purpose was not to 13 deter the other party from breach.</p> <p>14 Indeed, even in his own judgment in this case, when 15 Lord Justice Moore-Bick sums up what those cases have 16 decided, in paragraph 21 of his judgment, at page 6972, 17 he says:</p> <p>18 "The modern cases thus appear to accept that 19 a clause providing for the payment on breach of a sum of 20 money that exceeds the amount that a court would award 21 as compensation or which requires a transfer of property 22 for no consideration, or at an under value, may not be 23 regarded as penal if it can be justified commercially 24 and if its predominant purpose is not to deter breach."</p> <p>25 Now, if he had applied his own formulation of what</p> <p style="text-align: center;">Page 80</p>

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<p>1 the authorities had established, he would have come to 2 exactly the opposite conclusion to that which he did. 3 Because it was found by the first instance judge that 4 the predominant purpose of this clause is to deter 5 breach. No challenge to that in the Court of Appeal and 6 it is accepted here. So -- 7 LORD CARNWATH: Sorry, your answer to my Lord, 8 Lord Sumption, assumes that the landowner adopts 9 an agreement in this form, which specifically makes the 10 charge for failure to comply, if it is done in a way 11 my Lord, Lord Clarke, was suggesting, saying that 12 a charge for saying beyond the two hours, then that 13 would be okay. 14 MR BUTCHER: Obviously different considerations can apply if 15 it is a charge for a period of stay. 16 LORD CARNWATH: Even though the practical effect is exactly 17 the same? 18 MR BUTCHER: In this area of the law above all, it should be 19 no surprise that you have to look at exactly what has 20 been written to see whether the law of penalties apply 21 to it. That is a given. 22 What we are dealing with here is this contract in 23 these terms. Whether we, the Consumers' Association, 24 would have objections to other contracts in other terms, 25 is not something I can really speculate on. But, we are</p> <p style="text-align: center;">Page 81</p>	<p>1 a predominant purpose to deter, that means there is no 2 financial interest to be compensated, doesn't it? 3 Otherwise it would be a genuine pre-estimate. But here, 4 there is not only the dominant interest to deter but, 5 actually, from the point of view of ParkingEye, the 6 whole purpose of carrying on business is to make 7 a profit, cover your overheads and to make a profit. Is 8 one allowed to take that interest into account and say 9 that it falls outside the usual category of case where 10 the predominant interest to deter is, so to speak, 11 something which is protected without having any backing 12 in a financial interest? 13 MR BUTCHER: Not at all, because indeed what Lord Dunedin is 14 here envisaging is that there may indeed be a financial 15 interest but to a certain point. 16 LORD MANCE: Yes. 17 MR BUTCHER: But that the terms which he says are primarily 18 there to deter go beyond protecting that financial 19 interest and overstep the mark. 20 LORD MANCE: But here they are the same, aren't they? 21 Doesn't the financial interest go to the extent on 22 average, overall, of £85. 23 MR BUTCHER: On average, overall, is an idea which has no 24 place in the authorities, at all. 25 You cannot say that because I have a financial</p> <p style="text-align: center;">Page 83</p>
<p>1 talking here about this contract and there may be -- 2 LORD TOULSON: You accept, if you had a contract where it 3 was the price of the service, then neither the 4 regulations nor the common law doctrine would apply. 5 But you say, they have not chosen to make this a price 6 of the service. 7 MR BUTCHER: They have not and they may have very good 8 reason for doing so. 9 LORD TOULSON: But if they said, "Here is a graduated 10 charges scheme. First hour is such-and-such, second 11 hour is such-and-such, then one would be in different 12 territory. 13 MR BUTCHER: We would be in different territory and 14 everything might depend on what you mean by 15 such-and-such in those circumstances, but I don't want 16 to answer hypotheticals on the basis of something which 17 is not here. 18 LORD TOULSON: Fine. 19 MR BUTCHER: So, my Lords, that is the predominant, that is 20 the test which we are looking to see whether terms fall 21 into or not. 22 In terrorem has been said is not a very modern 23 phrase. It has been substituted for predominant purpose 24 to deter. 25 LORD MANCE: Normally, in the case where you have</p> <p style="text-align: center;">Page 82</p>	<p>1 interest in my business model over here, I can impose 2 upon you under my individual contract, a sum which bears 3 no relation to a loss which you are going to cause me by 4 breach of that contract. 5 LORD TOULSON: When you talk about predominant interest, you 6 say this has to be deduced objectively from the terms of 7 the contract. I say that for this reason: if one were 8 to ask one self whether ParkingEye wanted above all 9 things to deter people from behaving as Mr Beavis did, 10 the answer is quite obviously they didn't, they would be 11 horrified if nobody paid as Mr Beavis did, they would 12 not make any profit at all. 13 But you say, one is not looking at what is their 14 personal objective, you are looking at objectively at 15 the terms of the contract to say: what does this clause 16 serve? 17 MR BUTCHER: That is exactly what Lord Dunedin is saying. 18 LORD CARNWATH: But Lord Dunedin is not dealing with a part 19 of a scheme, he is dealing with a single contract. 20 Obviously he looks at that, any of these cases show us 21 how one approaches a contract which depends for its 22 commercial reality on its relationship with lots of 23 other contracts. 24 MR BUTCHER: I don't believe that has ever been suggested 25 that --</p> <p style="text-align: center;">Page 84</p>

<p>1 LORD CARNWATH: We are in new territory. 2 MR BUTCHER: I don't believe it has ever been suggested that 3 you can look at some other contract to see whether this 4 term is as a matter of construction -- 5 LORD CARNWATH: Has it ever arisen; did it ever need to be 6 suggested? 7 LORD MANCE: I think it has been suggested now. 8 LORD CARNWATH: It is being suggested now, yes. 9 MR BUTCHER: But nor does the penalty -- simply does not 10 give rise to that possibility. 11 LORD CARNWATH: It has not done because the issue has not 12 arisen. 13 MR BUTCHER: There must be all sorts of cases where it could 14 theoretically have been said, "That would be very much 15 in my general interest." 16 LORD CARNWATH: No, very specifically you are saying people 17 can park for free, "So I get no profit at all but only 18 because as part of a general scheme I make a profit out 19 of the fact that a number of the them will exceed and 20 pay a large sum, that is a commercial basis for the 21 whole thing. I am not interested in deterrents and, 22 indeed, the more that overstay the better but that is 23 the scheme". Now -- 24 MR BUTCHER: The very essence of that scheme is, in our 25 submission, one which the courts should be very keen to</p> <p style="text-align: center;">Page 85</p>	<p>1 So, ultimately the jurisdiction is not about saying, 2 "Is there a deterrent motive", it is saying is the 3 stipulation unconscionable and extravagant? 4 MR BUTCHER: In my submission, and I don't want to go over 5 too much of the ground we have already heard, that is 6 not right. 7 Lord Halsbury's remarks in Clydebank, which were 8 extemporary have been refined and made more precise by 9 Lord Dunedin in Dunlop, who does not just put it on the 10 basis of whether it is unconscionable or extravagant, he 11 has put it on the basis that it is an issue of 12 construction that the clause either falls where it is 13 a sum stipulated in terrorem or is a sum by way of 14 liquidated damage and there are various tests which can 15 be used. 16 LORD HODGE: But in two he refers to Clydebank and the first 17 of his indicia(?) in 4A is a reference exactly to that 18 test, of unconscionability and extravagance, and he 19 refers to the illustration that Lord Halsbury gave. 20 MR BUTCHER: But he is there saying, very precisely, is it 21 extravagant and unconscionable in amount in comparison 22 with the greatest loss that could conceivably be proved 23 to have followed from the breach. 24 LORD NEUBERGER: You have another three points to develop 25 The only question I have with this is, you all refer</p> <p style="text-align: center;">Page 87</p>
<p>1 look at the doctrine of penalties as applicable to the 2 individual contract. 3 LORD SUMPTION: On that footing where are the deterrents, 4 because as has been pointed out ParkingEye do not wish 5 to deter people from overstaying? They want them to do 6 it. The deterrent only applies -- 7 MR BUTCHER: As your Lordships have put before, Mr Beavis 8 does not know of those arrangements. He -- you are 9 looking to construe the contract. Is the contract, as 10 objectively construed, one where that is a deterrent? 11 The answer is self-evident in my respectful submission. 12 LORD HODGE: But, all sorts of contractual terms can be 13 a deterrent and you plead in stare decisis, but I might 14 suggest the expression predominant purpose of deterrent 15 is a subtle moving away from what Lord Dunedin was 16 talking about. At 870, his summary at paragraph 2 is 17 clearly a reference back to Lord Halsbury in Clydebank. 18 And if you go to 851 and see what Lord Halsbury said in 19 Clydebank, in the first two paragraphs he asks whether 20 it is simply a penalty to be held over the other party 21 in terrorem and then has an alternative way of saying 22 the same thing, whether it is, what I think gave 23 jurisdiction to the courts in both countries to 24 interfere at all in the agreement between the parties, 25 unconscionable and extravagant.</p> <p style="text-align: center;">Page 86</p>	<p>1 to Lord Dunedin but do any other of the members of the 2 House of Lords agree with him? I know they agree with 3 the results, but perhaps you could tell us -- don't do 4 it now -- but perhaps you could tell us whether in fact 5 it is just his view -- I know it is taken but ... 6 MR KIRK: My Lord, can I do that at a different point in 7 writing? 8 But what we do say is, Lord Dunedin has been taken 9 as the law and it has been accepted and summarised and 10 put into modern language as is there a predominant 11 purpose to deter and that has been said at least three 12 times by the Court of Appeal. 13 LORD NEUBERGER: I understand that, but one of the reasons 14 this case is here is for us to consider what the law 15 should be, as well as what it may have been understood 16 to be. 17 MR BUTCHER: Indeed, although of course your Lordships will 18 take into account the passage of all these years. 19 LORD NEUBERGER: We are not mammals, at least not 20 intentionally. 21 MR BUTCHER: Yes. 22 My Lord, because we fall, as we say, absolutely 23 clearly within the primary test of Lord Dunedin you 24 don't actually need to look at the subordinate tests and 25 to see whether or not this could be said to be a genuine</p> <p style="text-align: center;">Page 88</p>

<p>1 pre-estimate of a loss.</p> <p>2 But of course, it is not a genuine pre-estimate of</p> <p>3 a loss because on no view has ParkingEye suffered a loss</p> <p>4 of £85 or anything like it, in fact it has suffered no</p> <p>5 direct financial loss from this breach, which as we say</p> <p>6 is the only breach which is relevant.</p> <p>7 And you cannot, as we say, pray in aid all sorts of</p> <p>8 different possible permutations under its business</p> <p>9 scheme, there is no basis that this is a genuine</p> <p>10 pre-estimate of a loss for this contract.</p> <p>11 Even if, which I don't accept for a moment, you can</p> <p>12 do what Lord Justice Moore-Bick said, which was look at</p> <p>13 what potential indirect losses are across the board of</p> <p>14 its business, ParkingEye makes a profit out of this. It</p> <p>15 makes a profit in addition to all its costs and so on no</p> <p>16 possible view is this a genuine pre-estimate of its</p> <p>17 loss. Even if you take that broader view.</p> <p>18 My Lords, my third point is that the way in which</p> <p>19 the Court of Appeal reached its conclusion was novel and</p> <p>20 highly unsatisfactory.</p> <p>21 What they did was to say, "Recent cases have used</p> <p>22 the concept of commercial justification, then as</p> <p>23 commercial considerations can be taken into account, why</p> <p>24 not wider social considerations", and then it comes down</p> <p>25 with a test of extravagant and unconscionable, divorcing</p> <p style="text-align: center;">Page 89</p>	<p>1 least the retailers who want the shoppers to come, on</p> <p>2 the small minority of people who are involved without</p> <p>3 regard to their particular circumstances and their</p> <p>4 ability to pay.</p> <p>5 Fourthly, this approach seeks to build on this</p> <p>6 concept of commercial justification, which to the extent</p> <p>7 it has any merit, has no application to a consumer</p> <p>8 situation like this.</p> <p>9 I should say, and this answers my Lord</p> <p>10 Lord Sumption's question earlier, we say that it</p> <p>11 actually has no merit, for three very short reasons.</p> <p>12 The commercial justification reasoning, which is</p> <p>13 said to possibly explain and excuse some difference</p> <p>14 offender the genuine pre-estimate of loss.</p> <p>15 First of all, it doesn't evolve and is not implicit</p> <p>16 in the central authorities.</p> <p>17 Secondly, if one applied it to many decided cases,</p> <p>18 it would not explain them, so there is a case in the</p> <p>19 bundle Jeancharm v Barnet, for example, where there are</p> <p>20 penalties both sides and of course one might say, "Well,</p> <p>21 the commercial justification for one was the other".</p> <p>22 Held by the Court of Appeal there, note just look at</p> <p>23 that clause.</p> <p>24 So, it doesn't explain the cases, or all of them.</p> <p>25 And, thirdly, what are recognised commercial</p> <p style="text-align: center;">Page 91</p>
<p>1 that from the origin which we saw quite clearly in that</p> <p>2 test, (a), of Lord Dunedin's, whether it is extravagant</p> <p>3 or unconscionable by comparison with the greatest amount</p> <p>4 of loss which could be anticipated to result from the</p> <p>5 breach.</p> <p>6 To that we say first, if that is a radical</p> <p>7 departure, which was not open to the Court of Appeal.</p> <p>8 Secondly, it introduces very considerable</p> <p>9 uncertainty into the law. What might be thought to be</p> <p>10 the commercial or social justification for a penal term,</p> <p>11 is a matter on which there is likely to be much debate</p> <p>12 and difference of view in the circumstances of any</p> <p>13 particular case.</p> <p>14 Thirdly, and as a matter of particular concern to</p> <p>15 the Consumers' Association, is that this approach could</p> <p>16 potentially permit considerable hardship to be imposed</p> <p>17 on particular consumers in pursuance of supposedly wider</p> <p>18 interests, significant amounts are imposed on</p> <p>19 individuals who may be very ill-equipped to pay them.</p> <p>20 Your Lordships will know that the basic state</p> <p>21 pension is £115 per week. Judge the amount of this</p> <p>22 penalty by that comparison.</p> <p>23 What this scheme and these charges seek to do is to</p> <p>24 impose the entire costs of this scheme, which is of</p> <p>25 great benefit to a whole range of people, including not</p> <p style="text-align: center;">Page 90</p>	<p>1 considerations which are not? One might have thought</p> <p>2 that in any case in which commercial parties have come</p> <p>3 to an agreement, there is a commercial justification for</p> <p>4 the terms which they have agreed. But that is</p> <p>5 apparently not what this commercial justification test</p> <p>6 is looking at and it seeks in some way, it divides</p> <p>7 commercial justification between some recognised</p> <p>8 commercial justifications and others which are not, by</p> <p>9 criteria which are not apparent.</p> <p>10 So we say, that it doesn't actually have any merit,</p> <p>11 that.</p> <p>12 But if it did have any merit, it has no place in</p> <p>13 a consumer arrangement like this, because presumably the</p> <p>14 notion behind the commercial justification point is that</p> <p>15 the term in question serves the shared commercial</p> <p>16 objective which the two parties have in entering into</p> <p>17 the contract. But, that simply cannot be said of</p> <p>18 a consumer arrangement like this and the commercial</p> <p>19 justification for ParkingEye via its scheme is of no</p> <p>20 concern and is not in any way shared by the consumer.</p> <p>21 So we say, that the commercial justification</p> <p>22 reasoning is suspect but is, in any event, of no</p> <p>23 application here.</p> <p>24 LORD MANCE: Maybe it is commercial interest on one side and</p> <p>25 customer interests on the other, because certainly it is</p> <p style="text-align: center;">Page 92</p>

<p>1 in everyone's interest to be able to find a parking 2 place. So, this scheme is designed to help the 3 retailers and also designed to help the customers. 4 MR BUTCHER: We now move away from a commercial 5 justification but a social justification or convenience 6 justification. The trouble with this is we are now in 7 an area of vagueness and unevidenced vagueness. 8 LORD SUMPTION: It is not a social justification, it is 9 simply a justification related to the purpose of the 10 transaction viewed as a whole. 11 MR BUTCHER: But one which is almost impossible to quantify. 12 LORD NEUBERGER: It cuts both ways doesn't it? 13 MR BUTCHER: Not at all, my Lord. Not if you adopt the 14 straightforward approach. But these considerations, 15 considerations like that have no place in the law as to 16 penalty. Certainly they have not had, so that you 17 cannot say over some sort of more general matter, which 18 does of course not mean any loss and yet justifies this 19 clause. That has never been found. 20 This is or would be quite novel and you can imagine 21 the arguments in each case. How valuable is that sort 22 of indefinite matter and how is it to be compared with 23 the amount that is then being charged? 24 My Lord, my fourth point, the Protections of 25 Freedoms Act, the reliance on that is entirely</p> <p style="text-align: center;">Page 93</p>	<p>1 LORD MANCE: The whole schedule only applies under paragraph 2 one where the driver is required. This is just designed 3 to give you an extra remedy against the keeper? 4 MR BUTCHER: Yes, and if you cannot enforce it against the 5 driver, you cannot enforce it against the keeper. 6 LORD NEUBERGER: I understand. 7 MR BUTCHER: It assumes enforceability, it doesn't say the 8 penalties are permissible. Of course, it does not say 9 what charging structure you should use at all. 10 LORD CARNWATH: Do you need, under the definition of parking 11 charge, 7317, we have a distinction between a sum in the 12 nature of a charge and one resulting from tortious 13 damages. 14 MR BUTCHER: My Lord, as briefly as possible: the way this 15 operates is you might have two different regimes and you 16 might seek to impose it by a contractual charge or you 17 might leave it to a remedy in damages for trespass. 18 Those are two different models, that is not to say if 19 you have gone down the contractual route and stipulated 20 that it is a charge that the law as to penalties -- 21 LORD CARNWATH: This is in the nature of the charge but it 22 does not answer the question. 23 MR BUTCHER: My Lord, exactly. 24 My Lords, fifth point very briefly, the regulations. 25 The Consumers' Association is concerned about the Court</p> <p style="text-align: center;">Page 95</p>
<p>1 misplaced. The Protections of Freedoms Act does not 2 give any approval to the particular scheme of charging 3 used here, ie what amounts to a penal amount. 4 On the contrary, we would submit that the Protection 5 of Freedoms Act must and will have been drafted assuming 6 that the existing law of penalties is applicable. It is 7 of note that the Act does not provide for any statutory 8 modification or restriction of the law of contractual 9 penalties in this area. And that, notwithstanding that 10 it is recognised that the charges may be imposed 11 contractually, and that this is an area where, as 12 everyone knows, local authorities may impose penalties. 13 So, even though they know that those are the sorts 14 of areas, they don't modify the law as to penalties. 15 But instead -- and this is an important point -- the Act 16 assumes that the charge is enforceable from the driver. 17 That is paragraph 51A on page 532O. 18 So, unless the charge is enforceable against the 19 driver -- 7320 -- I am sorry, 7320. 20 LORD MANCE: I was going to say -- 21 LORD NEUBERGER: Very well, thank you. 22 MR BUTCHER: 7320 of bundle J. 23 The first condition is that the creditor has the 24 right to enforce against the driver of the vehicle the 25 requirement to pay.</p> <p style="text-align: center;">Page 94</p>	<p>1 of Appeal's approach to the Unfair Terms in Consumer 2 Contracts Regulations. 3 That has two aspects. You have to look at all the 4 terms of the contract in making this assessment and if 5 I could remind you at 6965 of the consumer core bundle, 6 where the terms of this contract are all set out, you 7 will find that apart from the clauses which we have been 8 considering, the ParkingEye gives very little indeed, in 9 addition. 10 So: 11 "We are not responsible for car park, surface, 12 parking regulations apply 24 hours a day all year round, 13 irrespective of site opening hours, parking is at the 14 absolute discretion of the site and by parking within 15 the car park, agree to comply." 16 Sorry, I should have read out: 17 "We are not responsible for the car park's surface, 18 other motor vehicles, damage or loss to or from motor 19 vehicles or user's safety." 20 Looking at this bargain as a whole, the consumer is 21 not getting anything out of this very much. When we 22 then consider the question, the two questions which 23 arise out of the regulations, first, is there 24 a significant imbalance? We say clearly this does 25 create a significant imbalance. It is created by the</p> <p style="text-align: center;">Page 96</p>

<p>1 imposition of a charge which greatly exceeds even the 2 highest market rates and is imposed even though breach 3 doesn't cause the other contracting party any direct 4 loss. And the other terms of the contract mean that it 5 is not counterbalanced by any other obligations which 6 ParkingEye undertakes. On the contrary, even the two 7 hours is apparently at their absolute discretion. 8 LORD NEUBERGER: Yes. 9 MR BUTCHER: The only points against this raised by the 10 Court of Appeal are to say that there was the objective 11 of securing a turnover of parts for the benefit of "The 12 community" and that by comparison with local authority 13 penalties the scheme is not very different. 14 LORD SUMPTION: The expression in the regulation: 15 "If it causes a significant imbalance in the 16 parties' rights." 17 MR BUTCHER: Yes? 18 LORD SUMPTION: Does that mean that it does not matter if 19 there is a significant imbalance in the parties' rights; 20 which explains why one of them has agreed a particularly 21 disadvantageous contract? Or do you literally have to 22 show that the imbalance has resulted from the terms? 23 The way the authorities approach this appears to be 24 a bit broader than that and a bit closer to the first 25 way of looking at it.</p> <p style="text-align: center;">Page 97</p>	<p>1 by "Contrary to the requirement of good faith". It 2 doesn't require what a prudent lawyer would regard as 3 a showing of bad faith. And your Lordship has seen that 4 in the First National Bank case, Lord Millett says that 5 one -- this is at bundle H, page 7138 -- 6 LORD NEUBERGER: Thank you, yes. 7 MR BUTCHER: "It would be unfair, if it is not a term which 8 could reasonably be expected that the consumer or his 9 lawyer, because he imagines he is advanced, if the 10 proposed term had been negotiated with legal advice, 11 would have objected to." 12 LORD NEUBERGER: Yes. 13 MR BUTCHER: That is really the same test as in Aziz. 14 By those tests this is unfair and also the term will 15 not be in good faith if it exploits known tendencies on 16 the part of consumers to misjudge how they behave. That 17 is the Ashbourne case, the case about gyms, which is the 18 quintessential area where people misjudge what they are 19 going to do. 20 LORD NEUBERGER: Mr Justice Kitchen's decision. 21 MR BUTCHER: That's right. The gym knows that people 22 misjudge and put in a minimum term that may be unfair. 23 Judged by those standards these terms were unfair. 24 A consumer with his lawyer sitting beside him would have 25 insisted at least that there should have been</p> <p style="text-align: center;">Page 99</p>
<p>1 MR BUTCHER: I believe that the jurisprudence is that you 2 have to see what the position is by comparison with what 3 would be the position without the term. 4 LORD TOULSON: That is advocate in Lord (Inaudible)'s 5 approach. 6 LORD SUMPTION: Yes, so you are actually looking for 7 generally at the relationship between the parties. 8 MR BUTCHER: And here without the provision of this term, as 9 pointed out by the Court of Appeal, you would be left 10 with a remedy in damages that would not be of any 11 particular consequence or value. 12 There is no one in the European directive the 1999 13 regulations or anywhere else that matters such as the 14 benefit to the community are relevant in deciding 15 whether or not there is a significant imbalance between 16 the contracting parties. 17 The assessment of imbalance is done by comparing the 18 position with the terms without prevailing without it. 19 There is no basis for saying that the term does not 20 create a significant imbalance between the parties 21 because there are other similar statute based 22 arrangements, statutory arrangements are of their own 23 sui generis. 24 My Lord, the second aspect is good faith. It is 25 necessary to remember what is meant in the regulations</p> <p style="text-align: center;">Page 98</p>	<p>1 a provision making clear when I park the car, that there 2 is a grace period, probably that there is a graduated 3 level of charges and he would want to know whether he 4 was actually making a profit. 5 LORD SUMPTION: He would not say, this lawyer, "You can go 6 in here and ignore the £85 because it is a penalty". 7 MR BUTCHER: He might indeed. He might say that, but if it 8 is going to be said to be justified, he would want to 9 say, "Well, of course this is the Supreme Court coming 10 up, I will want these terms as well". 11 So, it is also clear that ParkingEye is taking 12 advantage of known patterns of consumer behaviour 13 whereby sometimes people get the amount of time they 14 will take to do things wrong. 15 LORD SUMPTION: You are giving evidence there. 16 LORD TOULSON: You are giving evidence there, are you not, 17 when you say, "ParkingEye is taking advantage of known 18 patent patterns of human behaviour". 19 LORD NEUBERGER: They wouldn't be in business otherwise. 20 MR BUTCHER: Indeed, they only make money if they do that. 21 LORD TOULSON: They only make money if people overstay, but 22 whether they overstay by five minutes or half an hour or 23 leave it there for the afternoon is a -- 24 MR KIRK: I think the Court of Appeal was prepared to assume 25 all of that, but the point I did need to make is this</p> <p style="text-align: center;">Page 100</p>

<p>1 charging structure is not designed or capable of dealing 2 with the real long term deliberate overstay. Because it 3 is a specific amount of £85. 4 So, if you really wanted to exploit it, you would go 5 and stay indefinitely. 6 LORD NEUBERGER: That is why I asked whether you still had 7 a claim for trespass, because if you did that is not 8 such a powerful point, is it? 9 MR BUTCHER: ParkingEye will not have a claim for trespass. 10 LORD NEUBERGER: No, but that is not known -- somebody will 11 have a claim for trespass. 12 MR BUTCHER: That is why I would like to think about that. 13 It certainly looks -- and this I am sure I do not 14 need actual evidence, but one of the reasons why people 15 incur the parking charges, and a major one, is that they 16 misjudge how long things are going to take and come back 17 to the car late. I don't think that would require 18 evidence. 19 The point that consumers have to submit to similar 20 charges from local authorities pursuant to statute based 21 authority does not mean that the clause is either one 22 which it can be assumed they would agree to if 23 negotiating a contract. Or is other than one which 24 exploits a known weakness in consumer behaviour. 25 My Lords, I am sorry that that has taken five Page 101</p>	<p>1 words "Extravagant" and "Unconscionable" words that are 2 perhaps not in modern usage. 3 It has been expressed that this is not really the 4 language of 21st century English. The question, the 5 first question to address is how were they used in the 6 main case that we have considered from which they came? 7 So, that is Clydebank. 8 If I could ask your Lordships to turn in the main 9 authorities bundle, A, to divider 5, which is the 10 Clydebank case, 851. 11 LORD NEUBERGER: You will appreciate that we have looked at 12 this more than once in the past few days. 13 MR KIRK: I appreciate and the purpose is not really to deal 14 with any detail, it is simply to provide the platform 15 upon which I am going to give -- 16 LORD NEUBERGER: Unconscionable and extravagant, 851, yes 17 MR KIRK: At 851 we are dealing with the Lord Chancellor's 18 speech. He uses "Unconscionable and extravagant" in the 19 middle paragraph, "Extravagant or unconscionable" in the 20 next paragraph, "Unconscionable or not" in the paragraph 21 after that. And it is clear, if we turn forward to 22 page 858, in the speech of Lord Davey and I will read 23 this passage: 24 "But of course the question whether it is exorbitant 25 or unconscionable is to be considered with reference to Page 103</p>
<p>1 minutes longer than I should have done. Thank you. 2 LORD NEUBERGER: You have covered areas you may not have 3 expected. Thank you very much indeed Mr Butcher. 4 Mr Lewis, I didn't ask you whether you had anything 5 to add to Mr de Waal, I am sorry. 6 Mr Kirk? 7 Submissions by MR KIRK 8 MR KIRK: My Lord, can I start by, forgive me, dealing with 9 the structural questions which is whether this is 10 effectively a contractual term or a matter of breach. 11 I would prefer to deal with that in writing. 12 LORD NEUBERGER: Very well. 13 MR KIRK: And deal with the other questions that arise as 14 a consequence, but I accept that, if it is rightly 15 construed as a term of the contract, that the penalties 16 doctrine has no application and it is likely, subject to 17 the question of intelligibility to fall outside the 18 exception for the adequacy of price in relation to the 19 regulations. 20 Can I start with our position in relation to the 21 doctrine of penalties. We don't ask the court to 22 overrule the penalties doctrine and we obviously 23 approach it on the basis of the more flexible approach 24 reflected in the Court of Appeal's judgment. And in 25 relation to that, it is important to consider the two Page 102</p>	<p>1 the point of time at which the stipulation is made 2 between the parties. That is to say you are to consider 3 whether it is extravagant, exorbitant or 4 unconscionable." 5 I think at some point he goes on to say it doesn't 6 matter which word. 7 LORD CARNWATH: The following words: 8 "Whatever word you would like to select." 9 MR KIRK: I am obliged. 10 The question arises, whether you are going to assess 11 whether a term meets a particular test. What does that 12 test really mean? The word extravagant in ordinary 13 English usage, we say, means something akin to far more 14 than is necessary. 15 The word exorbitant, manifestly or grossly excessive 16 mean effectively the same thing. That much is not so 17 difficult to determine from the case law. The question 18 really is what is meant by unconscionable? Not a modern 19 word. How do we address the meaning of unconscionable 20 in the 21st century? So, I would ask that your 21 Lordships turn back to the First National Bank case and 22 to the very famous test of Lord Bingham. Which is found 23 at 7127 in bundle H. 24 It is only where Lord Bingham looks back at good 25 faith, and it is the passage in within the highlighted Page 104</p>

<p>1 text that reads:</p> <p>2 "Good faith in this context is not an artificial or</p> <p>3 technical concept, nor since Lord Mansfield was its</p> <p>4 champion is it a concept wholly unfamiliar to British</p> <p>5 lawyers. It looks to good standards of commercial</p> <p>6 mortality and practice."</p> <p>7 We say that, effectively, that is what is meant</p> <p>8 here. We say that if you combine extravagant and</p> <p>9 unconscionable, you are really looking at one concept.</p> <p>10 That is effectively this question: was the amount so</p> <p>11 large that you would not be acting in good faith to make</p> <p>12 somebody pay it?</p> <p>13 In relation to that question, the test is really one</p> <p>14 which you have to consider all of the relevant</p> <p>15 circumstances. There are two approaches that have</p> <p>16 developed or there is one approach that has developed</p> <p>17 since the Dunlop case. The rigid mechanical approach as</p> <p>18 it was referred to by Professor Baron and that approach</p> <p>19 seemed to have, seemed to predominant to suits that word</p> <p>20 again, up until the commercial justification cases.</p> <p>21 Our submission is that in relation to the origin of</p> <p>22 the doctrine, you need to look at when the amount is</p> <p>23 extravagant and unconscionable and in relation to that</p> <p>24 to consider all of the relevant circumstances, not</p> <p>25 simply the question of whether the stipulated amount is</p> <p style="text-align: center;">Page 105</p>	<p>1 public interest.</p> <p>2 The question that arises in this case is whether</p> <p>3 those interests are justification for the imposition of</p> <p>4 a stipulated amount that is not extravagant or</p> <p>5 unconscionable.</p> <p>6 LORD NEUBERGER: Is that a convenient moment?</p> <p>7 MR KIRK: It is my Lord.</p> <p>8 LORD NEUBERGER: Thank you very much. We will resume again</p> <p>9 at 2.00 pm.</p> <p>10 The court is now adjourned.</p> <p>11 (1.00 pm)</p> <p>12 (The Luncheon Adjournment)</p> <p>13 (2.00 pm)</p> <p>14 MR KIRK: My Lords, can I start now by looking at one of the</p> <p>15 factors that we say is important under both your</p> <p>16 consideration of the penalties doctrine and also in</p> <p>17 relation to unfair terms, that is the policy behind the</p> <p>18 legislation. It has been a matter of discussion</p> <p>19 earlier.</p> <p>20 I am now looking back at the Protection of Freedoms</p> <p>21 Act which is in consumer authorities bundle J,</p> <p>22 divider 4, and 7309 in the electronic bundle.</p> <p>23 LORD NEUBERGER: What page, I beg your pardon?</p> <p>24 MR KIRK: 7309.</p> <p>25 LORD NEUBERGER: Thank you very much. I have it, yes.</p> <p style="text-align: center;">Page 107</p>
<p>1 greater than the recoverable loss in any particular</p> <p>2 circumstances.</p> <p>3 The value question here, the battle ground here, in</p> <p>4 relation to this particular contract is whether, when</p> <p>5 you have a situation where there is no recoverable loss,</p> <p>6 there can ever be, the stipulated amount that is not</p> <p>7 a penalty. So, the question that arises at the</p> <p>8 forefront of all of this is whether there can ever be</p> <p>9 a situation where other interests, non-financial</p> <p>10 interests, or whether financial interests that are</p> <p>11 indirect, are sufficient to allow the clause to stand.</p> <p>12 There are four potential interests here: the first</p> <p>13 is the company, the respondent's companies' interest in</p> <p>14 keeping their contract.</p> <p>15 LORD NEUBERGER: Yes.</p> <p>16 MR KIRK: The second is their reputation, if they allow</p> <p>17 people to abuse the car park, et cetera.</p> <p>18 LORD NEUBERGER: Yes.</p> <p>19 MR KIRK: Then there are two which are more remote. There</p> <p>20 is the potential landowner's interest, despite the fact</p> <p>21 that we accept that he is not privy to the contract</p> <p>22 between the parking company and the consumer.</p> <p>23 And the fourth, which is, I suppose, the most remote</p> <p>24 is the overarching interest of people who use the car</p> <p>25 park, who are obviously third parties, the public, the</p> <p style="text-align: center;">Page 106</p>	<p>1 MR KIRK: And we can see that chapter 2, "Vehicles left on</p> <p>2 land", is the second chapter in part 3, which is</p> <p>3 entitled protection of property from disproportionate</p> <p>4 enforcement action.</p> <p>5 If I ask them that we turn to the criminal offence,</p> <p>6 which is at 7315, section 54.</p> <p>7 LORD NEUBERGER: Yes?</p> <p>8 MR KIRK: It is not only made an offence to immobilise or</p> <p>9 clamp a motor vehicle, but it is made an offence to</p> <p>10 remove or restrict the movement of such a vehicle by any</p> <p>11 means.</p> <p>12 So effectively, a private landowner cannot clamp,</p> <p>13 cannot tow, cannot move a motor vehicle.</p> <p>14 LORD NEUBERGER: Yes, we have the point.</p> <p>15 MR KIRK: There is an exception for barrier car parks in</p> <p>16 section 54.3, but that is not the point I need to make</p> <p>17 at this stage.</p> <p>18 LORD NEUBERGER: Yes.</p> <p>19 MR KIRK: If we turn over the page to sections 55 and 56.</p> <p>20 LORD NEUBERGER: Yes.</p> <p>21 MR KIRK: They are described as alternative remedies in</p> <p>22 relation to vehicles left on land. Section 55 provides</p> <p>23 an extension of what were police and local authority</p> <p>24 powers to remove vehicles from public land and it</p> <p>25 extends that right over private land. So, effectively</p> <p style="text-align: center;">Page 108</p>

<p>1 the police and/or local authority and several other 2 public bodies have a residual right to remove vehicles 3 that are dangerously parked. 4 LORD NEUBERGER: Yes. 5 MR KIRK: The point we make is this, and it is a very simple 6 one, whether you frame the parking charge in contractual 7 terms, whether it is framed in breach of contract, 8 whether it is framed in trespass, if you are only 9 entitled to charge the market rate for car parking, then 10 that will simply not deter. And so, you can glean from 11 that, we say, the policy behind this was to replace 12 a system of self-help with a system of charging for 13 parking in a way that is unauthorised. 14 LORD MANCE: Why do you assume that this scheme is intended 15 to promote deterrent schemes of parking? 16 MR KIRK: Because, my Lord, if you were limited to charging 17 the rate that, for example, the multistory nearby 18 charge, so a rate that you might expect to pay in a city 19 centre, and that was the limit, you could do no more, 20 then everybody's private land would be the subject of, 21 effectively, a right to park where you could park and 22 simply pay a small market rate for doing so. That 23 cannot have been the policy behind this legislation. If 24 it was the policy then it would have been very easy for 25 Parliament to stipulate that.</p> <p style="text-align: center;">Page 109</p>	<p>1 afforded in the directive. 2 The first question that I had, that I raise 3 rhetorically, is what factors are to be considered and 4 when are they to be considered? And that is set out in 5 article 4.1. I will read the relevant part: 6 "Without prejudice to article 7, the unfairness of 7 a contractual term shall be assessed taking into account 8 the nature of the goods or services, under which the 9 contract was concluded and by referring at the time of 10 conclusion of the contract to all of the circumstances 11 attending the conclusion of the contract and to all the 12 other terms of the contract or of another contract on 13 which it is dependent." 14 We can see, there, an all embracing test of all the 15 circumstances. We say that that is very, very similar 16 to the approach in the extemporary judgment of the Lord 17 Chancellor in Clydebank. There is no reason within this 18 test to confine ourselves to looking in isolation at the 19 term without reference to all of the existing 20 circumstances. Whether there be other terms that are 21 interdependent, whether there be other contracts that 22 are dependent. 23 There is no good reason, we say, why the same should 24 not apply in relation the penalties doctrine. 25 The time at which it is to be considered under both</p> <p style="text-align: center;">Page 111</p>
<p>1 So, we say that whatever the mechanism, that policy 2 is a factor that ought to be considered when one 3 considers all of the circumstances under both penalties 4 and under the regulations. 5 Can I turn to the regulations now. I want to make 6 my submissions by reference structurally to seven 7 questions that arise. They arise both under the 8 regulations and under the penalties doctrine. I want to 9 compare and contrast those seven points. 10 I should say that the 1999 regulations have or are 11 soon to be replaced by the provisions in the 12 Consumer Rights Act, although they are not yet in force 13 and the wording has changed very slightly, particularly 14 in relation to the definition of core terms. But I am 15 going to come to that in due course. 16 I am going to work, in fact, rather than taking the 17 domestic implementation provisions, from the directive 18 if that assists. That directive can be found in the 19 same divider at 7301. 20 LORD NEUBERGER: Thank you. Yes. 21 MR KIRK: My Lords, I do not have time to go through the 22 background to the directive, but I will simply say that 23 it is a minimal harmonisation directive. So, it is no 24 part of my submission that the consumer protection 25 afforded by penalties may not exceed the protections</p> <p style="text-align: center;">Page 110</p>	<p>1 is at the time that the contract is concluded. And it 2 would seem to us, or in our submission rather, that that 3 is the appropriate test under both. 4 Now, we have been referred, during the course of the 5 hearing, to a variety of other suggested tests. I do 6 not have time to go through each of them, but it would 7 seem clear that at least from the oppression test, as it 8 is applied in Canada, that you would consider all of the 9 circumstances at the point at which you come to enforce 10 the contract and so there is a relevant distinction 11 there that may be important. 12 The second factor that, or factor of comparison, is: 13 do you consider the imbalance in the relationship 14 between the parties? Under unfair terms, yes, you do. 15 But it is not simply a question of a trader being 16 a more significant entity than an individual. It cannot 17 be, otherwise all such relationships would be 18 imbalanced. It is a question, we say, of whether unfair 19 advantage has been taken of that relationship. 20 This question of whether imbalance can be considered 21 under the penalties doctrine was, I think, considered in 22 submissions in relation on behalf of Cavendish. Could 23 I take the court to bundle A -- 24 LORD CARNWATH: Article 3 is not dealing with imbalance 25 between the parties, it is dealing with imbalance</p> <p style="text-align: center;">Page 112</p>

<p>1 between the terms, as my Lord, Lord Sumption, pointed 2 out earlier on. 3 LORD SUMPTION: The imbalance has to be caused by the terms 4 once they have been agreed. I mean, it may not make 5 a great deal of difference, because if the obligation to 6 pay the £85 is simply the result of a free choice, made 7 by the motorists, his options are not being constricted 8 by the circumstances or the conduct of the landowner, or 9 ParkingEye, then it is hard to regard it as arising from 10 any imbalance. 11 MR KIRK: I suppose that is the same or a different way of 12 saying that you consider the terms, you consider the 13 relationship when you consider the terms. 14 So, I suppose I am not really saying anything that 15 is different. 16 What I hoped to do was to show the difference in 17 approach between imperial tobacco and Lord Radcliffe's 18 approach in Bridge, so if I can take your Lordships to 19 bundle A, this is divider 3. Page 819. 20 LORD TOULSON: Which bundle? 21 LORD NEUBERGER: A. 22 LORD TOULSON: A, I am sorry. 23 MR KIRK: Campbell Discount v Bridge, which is a hire 24 purchase arrangement. I think the facts have been dealt 25 with, but the contract as a whole would now fall foul of</p> <p style="text-align: center;">Page 113</p>	<p>1 involved in going to a retail park like this, isn't it? 2 MR KIRK: The nature of the shops was considered during the 3 course of the trial. 4 LORD MANCE: Yes. 5 MR KIRK: These are not supermarkets, these are shops -- 6 there is a shoe shop, a Mothercare, there are shops 7 where you would probably not expect to spend a great 8 deal of time there. A lot of points have been taken 9 during the course of this hearing that were not 10 factually addressed during the course of the earlier 11 hearings and, in particular, at trial. 12 If that question of one minute, two minutes 13 overstaying had been raised then I would have taken the 14 court to a point that arises -- I will just pass up the 15 British Parking Association code, which is the 16 additional document, it is page 10. 17 There are, as a requirement -- I think it is putting 18 it too high to say a regulatory requirement -- but 19 a requirement of the membership of the approved 20 organisation, the government approved organisation you 21 must have, allow, a reasonable time for people to come 22 in and out. So, nobody is charged, if the system is 23 applied correctly, for staying less than two hours. 24 LORD TOULSON: You mentioned evidence. What evidence was 25 there before the court? We don't have it, do we?</p> <p style="text-align: center;">Page 115</p>
<p>1 the Consumer Credit Act, but Lord Radcliffe said, and 2 this is at the end of his judgment: 3 "I do not speculate as to what principles they would 4 have thought applicable to a hire purchase contract in 5 which the hirer, I dare say willingly enough, transacts 6 only with the dealer who is not the agent of the owner 7 and if he signs up at all, signs up to an elaborate 8 fixed menu of stipulations and conditions, which he 9 probably does not bother himself to read and very likely 10 does not or cannot understand." 11 Our submission is that what that shows is that as 12 a factor in considering the doctrine of penalties, the 13 courts were willing to consider the relationship between 14 the parties. 15 The third point of comparison is a question of 16 whether you consider good faith unconscionability. 17 LORD MANCE: Has anybody ever done a study as to how many of 18 these £85 penalty charges arise from very limited 19 overstays? I mean, I don't know what supermarkets or 20 shops there are here, but if you get caught in 21 a supermarket queue, and you are two minutes over the 22 two hours, you presumably get the parking charge and 23 I imagine you feel quite upset. 24 It is not just the relationship between parking 25 ParkingEye and the consumer, it is all the relationships</p> <p style="text-align: center;">Page 114</p>	<p>1 MR KIRK: There was evidence from ParkingEye, a witness 2 statement from ParkingEye, which set out the manner in 3 which this operated. 4 LORD TOULSON: Right. 5 MR KIRK: There was evidence from Mr Beavis, the defendant, 6 which concerned a global approach to parking. 7 LORD TOULSON: Did the evidence from ParkingEye explain the 8 rationale of the calculation which would have led to the 9 £85? 10 MR KIRK: No. 11 LORD TOULSON: No. Right. 12 LORD SUMPTION: Was the operating scheme, that we have just 13 been referred to, before the court? 14 MR KIRK: Yes, it was put before the court and in particular 15 reliance was placed on it by the appellant. 16 LORD MANCE: What does it have to do with the contract? It 17 is not referred to, is it? It is not a contractual 18 document. 19 MR KIRK: No, it is not a contractual document. 20 LORD MANCE: Is it referred to? I don't think it is 21 referred to. 22 MR KIRK: There is a sign which shows -- 23 LORD MANCE: BPA? 24 MR KIRK: Yes, BPA. 25 LORD MANCE: But as far as the contract is concerned, it is</p> <p style="text-align: center;">Page 116</p>

<p>1 the document we have, and clause 13, which may or may 2 not be easy to apply to this contract, isn't 3 contractual.</p> <p>4 LORD SUMPTION: It is only evidence of what might happen in 5 practice, not what must have happened.</p> <p>6 MR KIRK: The issue of short staying was not raised.</p> <p>7 LORD MANCE: I was not actually addressing short staying, 8 I was addressing short overstay.</p> <p>9 And what is a reasonable period? We don't know.</p> <p>10 MR KIRK: There was no evidence about that. I do know but 11 I am going to resist that temptation.</p> <p>12 I should add, though, that we have made submissions 13 about how this area of industry is regulated and I am 14 not going to repeat those submissions. But, this code 15 which effectively binds these operators, because if they 16 don't sign up to it they cannot have access to the 17 information that allows them to run their business, the 18 identities of motorists, is a code that is arrived at if 19 your Lordships look at the foreword on the second page, 20 it is the last paragraph. It is this:</p> <p>21 "I would like to thank those that contributed to 22 this updated code. In particular the members of the 23 advisory panel which include representatives of from 24 both the operators and consumer and motoring 25 organisations including the AA, Citizen's Advice Bureau,</p> <p style="text-align: center;">Page 117</p>	<p>1 faith and we have been through that. The points that we 2 would make about this particular term are those that we 3 have set out in our case.</p> <p>4 But, the challenge, the challenge that has been made 5 to it relates not so much to the term as to the business 6 model. We question whether the unfair terms doctrine is 7 the appropriate mechanism through which to make such 8 a challenge, because there is another mechanism that is 9 open to organisations such as the Consumer Association, 10 that would allow them to consider the commercial 11 practice involved here.</p> <p>12 If I could ask your Lordships to turn in consumer 13 authorities bundle J to 7295, it is the Consumer 14 Protection from Unfair Trading Regulations, 2008. 7295, 15 J, divider 2.</p> <p>16 This is the primary legislation that allows 17 regulators such as local authority trading standards 18 departments and the Consumers' Association to take 19 action against unfair commercial practices. Commercial 20 practices is defined very broadly.</p> <p>21 The legislation which implements the European 22 directive, the unfair commercial practices directive, 23 sets out all of the potentially unfair commercial 24 practices and I am not going to go through in detail but 25 just in summary, they are numerous.</p> <p style="text-align: center;">Page 119</p>
<p>1 Consumer Focus, the RAC Foundation and Disabled Motoring 2 UK."</p> <p>3 So, it is a document that is designed in some ways 4 to balance the interests of both consumers and 5 motorists.</p> <p>6 One of the parking terms that we have not considered 7 in any detail was the parking term in relation to 8 disabled bays. That is a requirement under this code, 9 which I should just flag up before I leave it, which is 10 at page 10.16, "Disabled motorists".</p> <p>11 It refers in general terms to obligations under the 12 Equalities Act. But we can see, really, if you have 13 obligations in relation to disabled motoring, it would 14 seem highly unlikely that they could be described in 15 anything other than deterrent terms. You are not saying 16 to somebody, "However you construe the contract you may 17 park in a disabled bay", you are saying, "Don't park in 18 a disabled bay".</p> <p>19 Can I then put that to one side and then return to 20 my questions. Do you consider good faith? I have 21 already answered that in relation to penalties before 22 the short adjournment and the answer is in a limited 23 way, you don't really consider it in the same way that 24 you would consider illegality or something of that 25 nature. Under the regulations, you do consider good</p> <p style="text-align: center;">Page 118</p>	<p>1 The prohibition of commercial practice contravenes 2 the requirements of professional diligence and if you 3 turn to 7296, you will see how broad a test this is:</p> <p>4 "Professional diligence means the standard of 5 special skill and care which the trader may reasonably 6 be expected to exercise towards consumers, which is 7 commensurate with either honest market practice in the 8 traders' field of activity or the general field of good 9 faith in the trader's field of activity."</p> <p>10 Misleading actions:</p> <p>11 "A commercial practice that contains false 12 information and is therefore untruthful in relation to 13 any one of a number of matters."</p> <p>14 Again a commercial practice that could be challenged 15 under this legislation.</p> <p>16 Perhaps the most important is the broadest of the 17 commercial practices that can be challenged using this 18 legislation, misleading omissions.</p> <p>19 Commercial practices and misleading omissions is at 20 7299. If in its factual context, taking account of 21 various matters, it omits material information, it hides 22 material information, it provides material information 23 in the manner which is unclear, unintelligible, 24 unambiguous and/or timely. And this:</p> <p>25 "The commercial practice fails to identify its</p> <p style="text-align: center;">Page 120</p>

<p>1 commercial intent unless this is already apparent from 2 the context." 3 So, although in a business to business relationship 4 there is great scope for redrafting clauses, it is not 5 quite so easy in a consumer context where you have to be 6 frank about what your commercial intent is. 7 But the point we make here is that if you are 8 challenging a business model, it is not sufficient to 9 simply go under the unfair terms and challenge the 10 unfair term, because what you are really considering is 11 the commercial practice. What they are really saying 12 here is that it is wrong for a business such as this to 13 make profit from parking in the way that they do on this 14 breach model. 15 But the point we make here is that if you are 16 challenging a business model, it is not sufficient to 17 simply go under the unfair terms and challenge the 18 unfair term, because what you are really considering is 19 the commercial practice. What they are really saying 20 here is that it is wrong for a business such as this to 21 make profit from parking in the way that they do on this 22 breach model. 23 That, we say, is a broader question which does not 24 relate simply to the individual term as there is between 25 trader and consumer, it may have an impact --</p> <p>LORD CARNWATH: You could have said that in the Ashbourne case, couldn't you?</p> <p>MR KIRK: The Ashbourne case is a classic example of how the office of fair trading, as it was, went and used both the unfair commercial practices directive under part 8 of the Enterprise Act and their rights under the unfair terms legislation, to consider a whole host of bad practices.</p> <p style="text-align: center;">Page 121</p>	<p>1 based upon the rationale of the decision in 2 First National Bank. First National Bank, obviously, 3 involved default interest payment after judgment. 4 I suppose the distinction that there might be between 5 First National Bank and the Abbey National case is that 6 in the Abbey National case it was not found to be 7 a matter of breach, a question of breach, it was found 8 to be a question of a term. So, you could then 9 legitimately go on to consider whether it fell within 10 the exception. 11 Your Lordships expressed an interest, I was merely 12 going to take you to the various tests, if that would be 13 useful, but I don't need to, because of the position or 14 the submissions that I am making. 15 LORD CLARKE: The test for what? 16 MR KIRK: The tests in relation to core terms. 17 LORD CARNWATH: That is not an expression one finds in the 18 regulation. 19 LORD TOULSON: 4.4 is the regular provision in the 20 regulation, isn't it, in the directive? Sorry, we are 21 on the directive. 22 MR KIRK: Yes. I should say that the language has changed 23 in the Consumer Rights Act. And so: 24 "The exclusion from the assessment of fairness, 25 a term of a consumer contract may not be assessed for</p> <p style="text-align: center;">Page 123</p>
<p>1 LORD CARNWATH: But they succeeded under the unfair terms 2 didn't they, in relation to the misuse as it was seen of 3 the customer's propensity to be overoptimistic; do you 4 say that was wrong? 5 MR KIRK: I don't say that was wrong, but I am saying in 6 this case, it is not so much the term that is the 7 problem. Because if you take out the parking company, 8 you put the landowner there, then it doesn't seem to be 9 an issue. It is the model, it is the way in which they 10 make their profit. 11 That, we suggest, is more susceptible to challenge 12 on the basis of commercial practice rather than unfair 13 term. 14 LORD HODGE: So, you say in relation to the challenge that 15 we are facing here, we should assess it as if the 16 landowner were doing that which you do, in effect? 17 MR KIRK: Yes. Yes. I want to be careful that I am not 18 accepting something with which I might find hidden trap. 19 LORD HODGE: There wasn't intended to be. 20 MR KIRK: Your Lordships showed an interest in the core 21 terms. To the extent that this is a case in which, 22 certainly for the purposes of my submissions now, we 23 work on the basis of breach. 24 It has been accepted that a default provision does 25 not fall within the core terms and that is primarily</p> <p style="text-align: center;">Page 122</p>	<p>1 fairness under section 62 to the extent that it 2 specifies the main subject matter of the contract or 3 [and these are the key words] the assessment is of the 4 appropriateness of the price payable under the contract 5 by comparison with the goods." 6 Et cetera. 7 LORD NEUBERGER: Where do we find that? 8 MR KIRK: I don't think these provisions have been handed 9 up. 10 LORD MANCE: It is a new Act coming in. Don't worry then. 11 LORD HODGE: The only major difference between 6.2 of the 12 regulation and what you have read out is the emphasis on 13 appropriateness rather than adequacy. 14 MR KIRK: There was reference to remuneration, as well. My 15 understanding from there was a law commission report -- 16 LORD TOULSON: I was just turning that up now because what 17 you have just read out had a rather familiar ring to it. 18 It may be from the bill attached to the unfair terms in 19 contracts report, but anyway it matters not. 20 MR KIRK: We couldn't find the suggestion in the law 21 commission report for the change to the word 22 "Appropriateness", but there is some reference, if it 23 assists your Lordship, in the explanatory notes at 301 24 to 303, which in summary say that adequate was not 25 a particularly clear word to use and remuneration added</p> <p style="text-align: center;">Page 124</p>

<p>1 nothing.</p> <p>2 LORD TOULSON: Anyway, these are yet to be introduced</p> <p>3 provisions?</p> <p>4 MR KIRK: Yes and as I understand it there is no starting</p> <p>5 point.</p> <p>6 The only two further matters that I need to address</p> <p>7 your Lordships upon -- or I do not need to -- are two</p> <p>8 questions that arose during the first case.</p> <p>9 LORD CARNWATH: Before you do that, are you going to say</p> <p>10 anything about the Aziz test? Is that one of the ones</p> <p>11 you are covering; whether you could reasonable assume</p> <p>12 that the consumer would have agreed to such term in the</p> <p>13 individual contract notion?</p> <p>14 MR KIRK: Yes, and the judge had in mind what Lord Millett</p> <p>15 said in the First National Bank, the trial judge had in</p> <p>16 mind that test. That is one of the factors you</p> <p>17 consider.</p> <p>18 You would in this situation, of course, consider</p> <p>19 whether the consumer would accept this. But in this</p> <p>20 case, this was actually very clear that this was</p> <p>21 a consumer who had used the car park on several</p> <p>22 occasions, that was the evidence during the course of</p> <p>23 the trial. It seemed very difficult to say in those</p> <p>24 circumstances, when you have a term that you knew</p> <p>25 perfectly well applied, and he repeatedly used the car</p> <p style="text-align: center;">Page 125</p>	<p>1 constricted either by the conduct of the other party or</p> <p>2 by the circumstances in which they find themselves?</p> <p>3 MR KIRK: Yes. I am not sure I could argue with that.</p> <p>4 The whole rationale for European consumer law and,</p> <p>5 perhaps, a rationale that we can find in our own common</p> <p>6 law, is not to make decisions for consumers or protect</p> <p>7 them from their bad decisions, it is so that consumers</p> <p>8 can make informed decisions where they are not taken</p> <p>9 advantage of. This is a situation where it would be</p> <p>10 very difficult to say that a consumer was being taken</p> <p>11 advantage of when the signage was so clear and in</p> <p>12 accordance with what you might ordinarily expect.</p> <p>13 LORD TOULSON: They are two different matters, aren't they?</p> <p>14 There is the requirement for clarity and understanding,</p> <p>15 core terms, even core terms have to pass that test.</p> <p>16 A quite separate matter is the substance of it. And of</p> <p>17 course, if people are presented with the contract of</p> <p>18 adhesion and everybody in the market is following the</p> <p>19 same term, then the customer has no choice wherever he</p> <p>20 goes, but the Aziz postulate is looking at it in</p> <p>21 a rather different way. Which is if you were starting</p> <p>22 with a blank sheet of paper and if you were in</p> <p>23 a position to influence this term, whether it is</p> <p>24 something where your lawyer would say, "Well, hang on,</p> <p>25 this is not right, this needs some justification".</p> <p style="text-align: center;">Page 127</p>
<p>1 park, as many others did, that there could be any real</p> <p>2 basis for saying that he wouldn't have used it had he</p> <p>3 known or wouldn't have use it had he realised.</p> <p>4 LORD MANCE: That is not quite the same. Would have agreed</p> <p>5 to in individual contract negotiations postulates,</p> <p>6 a blank sheet of paper and them sitting down either side</p> <p>7 of a table and one of them saying, "Now, this is what</p> <p>8 I want", and the other then having an opportunity to</p> <p>9 comment; driving into a retail facility and everything</p> <p>10 going well the first few times, seems to me a different</p> <p>11 kettle of fish.</p> <p>12 MR KIRK: Yes. We would simply say if you consider the</p> <p>13 circumstances of this case --</p> <p>14 LORD SUMPTION: If you assume that there is a difference</p> <p>15 between what the motorist actually agreed to and what he</p> <p>16 would have agreed to in a negotiated contract, then you</p> <p>17 must surely also be assuming that in some way the</p> <p>18 situation is such that the motorists choices are</p> <p>19 contradicted.</p> <p>20 Otherwise, it is difficult to see why there should</p> <p>21 be a difference; why would he not park someone else</p> <p>22 where ex hypothesis the charges were lower or different</p> <p>23 or whatever?</p> <p>24 So, doesn't it ultimately boil down to the question,</p> <p>25 whether the consumer's choices have been in any way</p> <p style="text-align: center;">Page 126</p>	<p>1 MR KIRK: Yes, I suppose the justification in this situation</p> <p>2 is the fact that this is a free car park where you get</p> <p>3 two hours free, you balance that against the risk that</p> <p>4 you might overstay and be found to have to pay the £85</p> <p>5 or £50, in fact.</p> <p>6 LORD MANCE: Going back to the context, we are told in the</p> <p>7 statement of facts and issues, this car park is located</p> <p>8 adjacent to Chelmsford railway station in a retail park.</p> <p>9 Without having been to Chelmsford for many decades,</p> <p>10 I would wager a pretty fair bet that you would be most</p> <p>11 unlikely to be able to park free near Chelmsford railway</p> <p>12 station, outside this.</p> <p>13 LORD NEUBERGER: Being a wager it is definitely</p> <p>14 unenforceable.</p> <p>15 LORD MANCE: Can one take judicial notice of that sort of</p> <p>16 consideration.</p> <p>17 LORD NEUBERGER: We just have.</p> <p>18 MR KIRK: Certainly, a big factor in this case was the</p> <p>19 overall justification that if you don't have something</p> <p>20 that deters people from abusing a parking space --</p> <p>21 LORD MANCE: Everyone will park there for free.</p> <p>22 LORD NEUBERGER: Lord Mance must be right, must he not?</p> <p>23 Seriously, we all know there are areas around the</p> <p>24 country, near shopping centres, where parking is a very</p> <p>25 desirable feature. Near a railway station, even more so</p> <p style="text-align: center;">Page 128</p>

<p>1 and you normally have to pay for the first hour as well 2 as subsequent ones. 3 LORD TOULSON: My difficulty with all this is it comes back 4 to the point you indicated earlier that before the 5 court, there was no evidence to explain the rationale of 6 the £85 or how it was arrived at in relation to this car 7 park. 8 One rather suspects it may be that ParkingEye has a 9 standard rate and that is what it has in all its car 10 parks. That may be right and may be wrong, but the fact 11 is that we are all now engaging in our own speculations 12 as to what might be a justification of £85 at this 13 particular location, aren't we? 14 MR KIRK: That was a function of the way in which the term 15 was attacked in the County Court. The approach in the 16 County Court was to look globally at the ParkingEye 17 business and say, "You make too much profit, you are 18 profiting", and there was a factual finding in relation 19 to expenditure and profit and I think it is found in the 20 pleadings at 6906 -- 21 LORD TOULSON: The only material I get from the first 22 instance judgment he had was, a comparison with local 23 authority parking rates and the company's balance sheet. 24 MR KIRK: Yes. 25 LORD TOULSON: That was it.</p> <p style="text-align: center;">Page 129</p>	<p>1 one moves slightly and all the cars along the line are 2 all slightly over the white line, you get 10 of those 3 that is rather good for ParkingEye because you have 10 4 times £85. 5 MR KIRK: My Lord, I am not going to give evidence, but it 6 was not an issue that was raised. 7 LORD TOULSON: It wasn't, but we are looking -- no, all 8 right. Thank you. 9 MR KIRK: I am conscious that I don't want to overstay. 10 LORD NEUBERGER: Thank you very much, Mr Kirk. Mr de Waal 11 Reply submission by MR DE WAAL 12 MR DE WAAL: My Lord, there is quite a lot of evidence that 13 Mr Beavis would like me to give to you about car parking 14 in Chelmsford and I am not going to do that. 15 The fact is that as my Lord, Lord Toulson, observes 16 that there was no evidence and the point, and it bears 17 repeating, the point that we have made is that the Court 18 of Appeal in this case assumed on no basis, that there 19 was an abuse which needed to be cured or deterred by the 20 allowance or imposition of a penalty which in the 21 development of the law as it then was, in April, was not 22 permissible. 23 It is our submission that if an exception to the law 24 of penalty is to be created, it should only happen on 25 the grounds of social justification with proper</p> <p style="text-align: center;">Page 131</p>
<p>1 MR KIRK: That was it. 2 LORD TOULSON: Right. 3 MR KIRK: There was general evidence about what their costs 4 were and how they were attributed the lion's share in 5 fact to the administration and installation of the 6 operating system. 7 But there was no detailed analysis, primarily 8 because we were not saying that the breach caused 9 a particular loss. If there had been that approach then 10 I accept that it would have been appropriate to deal 11 with each of the items in detail. 12 My Lord, those are my submissions, unless I can 13 assist your Lordships further. 14 LORD TOULSON: Can I ask one question, I think we were told 15 that the regulations referred to in the contractual 16 document are simply what is on the face of the document. 17 MR KIRK: Yes, your Lordship is right. 18 LORD TOULSON: Parked within marked bays, do I understand 19 that correctly, that somebody parks and is not squarely 20 within a marked bay, that gives rise to a £85 charge. 21 MR KIRK: Yes. 22 LORD SUMPTION: Presumably on the basis that you are 23 effectively occupying the space of two cars. 24 LORD TOULSON: You might not be, I mean one is not allowed 25 to give evidence, but you have a sort of car park where</p> <p style="text-align: center;">Page 130</p>	<p>1 consultation as a result of perhaps a law commission 2 report or by Parliament, but not on the basis of what 3 any of us as members of the public might think about the 4 rights and wrongs of parking. 5 Secondly, in relation to the question of when there 6 is no recoverable loss, can there be a situation where 7 other interests are sufficient to allow the clause to 8 stand? We say, firstly, no. 9 I gratefully adopt what my learned friend Mr Butcher 10 has said to you in his submissions, you have to look at 11 it as the single contract between Mr Beavis and 12 ParkingEye. 13 But secondly, and even more forcefully, if there are 14 any such interests, by definition since one is talking 15 about a contract, those have to be interests which were 16 in Mr Beavis's contemplation when he drove into that car 17 park and there is nothing in the contract, nothing in 18 the signs which warned him that if he overstays, that 19 might effect ParkingEye's relationship with the 20 British Airways Pension Fund or anyone else. So, one 21 cannot develop the interests argument in the way in 22 which my learned friend proposes that you do. 23 My Lord, those were the two points I wished to 24 respond to in reply to Mr Kirk's submissions. Unless 25 you have any more questions for me?</p> <p style="text-align: center;">Page 132</p>

<p>1 LORD NEUBERGER: Thank you very much indeed.</p> <p>2 MR DE WAAL: I don't know whether the court wish to hear</p> <p>3 from --</p> <p>4 LORD NEUBERGER: Mr Butcher if there is anything you have to</p> <p>5 add?</p> <p>6 Reply submissions by MR BUTCHER</p> <p>7 MR BUTCHER: Can I say two things, the law of penalties may</p> <p>8 import the notion of good faith by reference to looking</p> <p>9 at the regulation and then much the same test. That is</p> <p>10 a profoundly novel idea and English law has, on the</p> <p>11 whole, rejected importation of concepts of good faith</p> <p>12 unless it is absolutely necessary and it has never been</p> <p>13 thought to be so in the doctrine of penalties hitherto.</p> <p>14 One of the advantages of English commercial law is</p> <p>15 often thought to be that it doesn't involve general</p> <p>16 concepts of good faith.</p> <p>17 The second was in relation to the consumer</p> <p>18 protection regulations. I didn't quite understand the</p> <p>19 point that was being made here. The consumer protection</p> <p>20 regulations are not exclusive as to the Unfair Terms</p> <p>21 in Consumer Contracts Regulations. A term might fall</p> <p>22 foul of the Unfair Terms in Consumer Contracts</p> <p>23 Regulations and there may also be unfair practice.</p> <p>24 Now, our complaint here has not been about the</p> <p>25 model, at all. It has been about the term. We are</p> <p style="text-align: center;">Page 133</p>	<p>1 LORD NEUBERGER: I would not want to be too specific, but it</p> <p>2 seems to us the characterisation of the arrangement is</p> <p>3 important in order to decide whether the £85 is capable</p> <p>4 of being characterised as a penalty rather than</p> <p>5 a payment, a contractual payment for the licence after</p> <p>6 two hours.</p> <p>7 I don't want to limit the parties to the various</p> <p>8 ways in which the arrangements have been characterised</p> <p>9 in argument, but I think you should exchange what you</p> <p>10 have to say and at the same time provide them to the</p> <p>11 court by next Thursday, that gives you a week.</p> <p>12 5.00 pm Thursday. I would not encourage any</p> <p>13 replies, but it would be unfair to shut them out because</p> <p>14 there may be something unexpected. Thursday should give</p> <p>15 you quite long enough. A week; yes? Fine.</p> <p>16 Any replies by the following Monday, but not</p> <p>17 encouraged. So be it. Thank you very much.</p> <p>18 We are grateful to you, particularly in light of the</p> <p>19 fact that we raised this hare, if you can raise a hare,</p> <p>20 and you dealt with it and still finished well within</p> <p>21 time. Thank you very much indeed.</p> <p>22 I take it there is now a bit of rearranging to do.</p> <p>23 Probably more seemly to rise and come back shortly.</p> <p>24 (2.50 pm)</p> <p>25 (A short adjournment)</p> <p style="text-align: center;">Page 135</p>
<p>1 relying on the Unfair Terms in Consumer Contracts</p> <p>2 Regulations.</p> <p>3 Of course, if we fail in relation to that, and</p> <p>4 indeed the respondents seem to be inviting it, we might</p> <p>5 well consider the issue of enforcement under the</p> <p>6 consumer protection regulations. But they are both</p> <p>7 potentially applicable and that fact does not in any way</p> <p>8 mean that the Unfair Terms in Consumer Contracts</p> <p>9 Regulation are not.</p> <p>10 Those were the only two points I wanted to make</p> <p>11 unless I can assist further.</p> <p>12 Housekeeping</p> <p>13 MR DE WAAL: Forgive me, my Lord, there are two practical</p> <p>14 matters I ought to address you on. One is after the</p> <p>15 short adjournment you should have found this on your</p> <p>16 desk. That is a from the POPLA --</p> <p>17 LORD NEUBERGER: Thank you very much, we did.</p> <p>18 MR DE WAAL: Secondly, in terms of the written submissions</p> <p>19 from the parties, I apprehend that the board would like</p> <p>20 to receive written submissions on whether the agreement</p> <p>21 is a contract or a licence. It is termed questions of</p> <p>22 consideration and in relation --</p> <p>23 LORD NEUBERGER: Really the characterisation of the</p> <p>24 arrangement.</p> <p>25 MR DE WAAL: Characterisation of the arrangement.</p> <p style="text-align: center;">Page 134</p>	<p>1</p> <p>2 LORD NEUBERGER: Ms Smith, Mr Bloch, my colleagues were</p> <p>3 rather berating me on the basis that we thought you had</p> <p>4 not really a great deal to say arising out of what had</p> <p>5 been said, but that may be over optimistic. Indeed,</p> <p>6 over pessimistic.</p> <p>7 Further submissions by MS SMITH</p> <p>8 MS SMITH: My Lord, I have a couple of things, I will keep</p> <p>9 them very short. It has been suggested by Mr Bloch that</p> <p>10 I go first and I don't particularly object to that,</p> <p>11 subject to whether he has anything to say I will not</p> <p>12 reply.</p> <p>13 LORD NEUBERGER: We will not pull any strict rules, so you</p> <p>14 go ahead.</p> <p>15 MS SMITH: I am grateful.</p> <p>16 My Lords, can I check, first of all, this morning we</p> <p>17 put on to your desk the Payment of Creditors (Scotland)</p> <p>18 Act 1814. You may not want to look at it, but it is</p> <p>19 there.</p> <p>20 I am grateful. It has a green tab on it.</p> <p>21 LORD TOULSON: That goes with the M'Beath case, doesn't it?</p> <p>22 Was it appealed?</p> <p>23 LORD HODGE: Quite a long time ago, but it is a relevant</p> <p>24 background to the case.</p> <p>25 LORD NEUBERGER: It was relevant to the explaining the case.</p> <p style="text-align: center;">Page 136</p>

<p>1 MS SMITH: That's right. 2 It has been repealed I understand. 3 LORD MANCE: Which bit is relevant? 4 MS SMITH: It is section 9, my Lord. 5 LORD HODGE: It is the very last words of section 9, the 6 first bit allows creditors to join in the adjudication 7 and there is this part of modification at the end of the 8 section. 9 LORD NEUBERGER: Yes. 10 MS SMITH: My Lords, insofar as the grounds of appeal that 11 I am interested in are concerned, I need only, I think, 12 touch on what has been said about ground 1 and ground 3. 13 I don't think anything that has been said going anywhere 14 towards ground 2 in our appeal. 15 Taking ground 1 first, obviously we are seeking 16 abolition of the rule, but we have various alternative 17 submissions in relation to that, including the question 18 of the commercial case and redefining the rule so as to 19 address the situation of the commercial case. 20 I just want to respond to one thing that Mr Butcher 21 said, which was that the law was certain. At the same 22 time as saying that, he said that the cases on 23 commercial justification over the last 20 years were all 24 wrong, which rather gives the lie to the suggestion that 25 the law is certain or coherent in any way, shape or</p> <p style="text-align: center;">Page 137</p>	<p>1 Now, I need to deal with that by reference really to 2 two categories, I need to deal with that by reference to 3 the category of the consumer and by reference to small 4 businesses. 5 Dealing first with the consumer, my Lords, 6 Mr Butcher said that the regulations, the statutory 7 protection, does not apply if the terms are individually 8 negotiated. 9 Now, as things currently stand, that is true and we 10 would say that that is a matter that is better for 11 Parliament to address as a shortcoming in relation to 12 all unfair terms in consumer contracts, whether or not 13 they are penal; but we also say that is exactly what 14 Parliament now has done in the Consumer Rights Act 2015, 15 in respect of which Royal assent was given in March and 16 we understand that is going to be in force in October. 17 The relevant part of the Act, I am afraid is not in 18 the bundle, we can provide you with the Act in due 19 course. But the point is that the Act does not say that 20 it does not apply to terms which are individually 21 negotiated. So, that protection for consumers has been 22 extended by the new Act to cover situations where terms 23 have been individually negotiated. 24 So, we don't accept the point Mr Butcher made there 25 as to the need to keep the doctrine of penalty so as to</p> <p style="text-align: center;">Page 139</p>
<p>1 form. 2 My Lords, I want to come back on what Mr Butcher 3 said about the relationship between the rule, the 4 doctrine of penalties, and the existing protections in 5 the regulations. 6 Can I start please by taking you back to the case at 7 B4/12, 3162, that is the 8 Office of Fair Trading v Abbey National case. And look 9 at paragraph 331 within the judgment of 10 Mr Justice Andrew Smith. It is on page 3162. 11 LORD NEUBERGER: Yes. 12 MS SMITH: I am not going to read it to you, but can 13 I simply say this: Mr Justice Smith was not there saying 14 that we still need the rule of penalties for consumers 15 because he was not dealing with that. He is dealing 16 with the argument as to whether the mere existence of 17 the regulations precludes him from applying the rule. 18 He is not looking at whether there are unprotected 19 situations. 20 So, it is a rather different point from the one that 21 my learned friend Mr Butcher was making. 22 My Lords, the next point I want to make is that 23 Mr Butcher said: 24 "If one abolishes the doctrine of penalties, 25 consumers would be worse off."</p> <p style="text-align: center;">Page 138</p>	<p>1 protect for that sort of situation. 2 Now, the second point that I make in response to 3 him. 4 LORD MANCE: Perhaps we would have to keep it for your case 5 and only abolish the doctrine of penalties from October? 6 MS SMITH: My Lord, I obviously could not accept that as 7 a proposition. 8 LORD MANCE: No. 9 MS SMITH: And insofar as my case is concerned, of course, 10 I have my alternative proposition in relation to the 11 commercial case. Which obviously would not affect the 12 consumer scenario. 13 My Lords, the second point I make in response to him 14 relates to the test of fairness under the regulations. 15 That test is, in my submission, not as circumscribed as 16 he would have you believe. Mr Butcher said: 17 "There may be circumstances in which it is difficult 18 to meet the question of whether there is a significant 19 imbalance or whether there has been good faith or not 20 and that therefore we still need the doctrine to cover 21 that sort of situation." 22 Now, those concepts are within regulation 5 of the 23 existing regulations, you will find those in C7 at 3538. 24 Forgive me, my Lords my bundle has come apart. 25 The test for unfairness is in regulation 6,</p> <p style="text-align: center;">Page 140</p>

<p>1 assessment of unfair terms on 3539: 2 "Without prejudice to regulation 12 the unfairness 3 the contractual term a term shall be assessed taking 4 into account the nature of the goods or services for 5 which the contract was concluded and by referring at the 6 time of conclusion of the contract to all the 7 circumstances attending the conclusion of the contract 8 and to all the other terms of the contract or of another 9 contract on which it is dependent." 10 So, that is an open-ended list of factors in 11 relation to that regulation and derives as I understand 12 it from the directive that Mr Kirk took you to. 13 That is even more so in terms of the scope when one 14 looks at the new Act and it is section 62 subparagraph 5 15 B of the new Act. Which, forgive me, I only have for 16 the moment on an iPad: 17 "Whether a term is fair is to be determined by 18 reference to all the circumstances existing when the 19 term was agreed and to all of the other terms of the 20 contract or of any other contract on which it depends." 21 My Lords, we were rather surprised that you were not 22 taken to those provisions given that that is a new Act 23 that is about to come into force and we would suggest 24 provides ample protection in relation to questions of 25 unfairness.</p> <p style="text-align: center;">Page 141</p>	<p>1 penalty, but perhaps going into the concept of disguised 2 penalties. 3 So, my Lords, effectively, what we say in response 4 to what Mr Butcher has said about this is that there is 5 plenty of protection for consumers who fall within those 6 statutory protections and it is in fact hard to see when 7 there may be any circumstances in which one would want 8 to strike something down as a penalty, because there is 9 sufficient protection for the consumer arising by 10 reference to those regulations. 11 LORD NEUBERGER: Yes. 12 MS SMITH: Now, if I can come on to small businesses, 13 my Lords, we of course accept that the question of small 14 businesses is more difficult. I would like to deal with 15 it though by reference to the law commission report that 16 Lord Toulson drew our attention to on the first day, the 17 unfair terms in contracts. 18 Now, I hope you all have that to hand, my Lords. It 19 recommended extending protections to small businesses, 20 but it primarily did that by reference to concerns about 21 inequality of bargaining power, the unfairness of the 22 contract, the imbalance between the parties. 23 You can see that, my Lords, if you look at section 5 24 and if one takes it from page 81 in the law commission 25 report, paragraphs 5.12 to 521. One can see in 512</p> <p style="text-align: center;">Page 143</p>
<p>1 The last point on existing protection in relation to 2 consumers, concerns the schedule of indicative terms 3 which may be regarded as unfair. You will find that in 4 C7 at 3554. And you will find there at 3554, under 5 paragraph 1, subparagraph (e), terms which have the 6 object or effect of: 7 "(e) Requiring any consumer who fails to fulfill his 8 obligation to pay a disproportionately high sum in 9 compensation." 10 My Lords, that is plainly addressing the question of 11 penalty clauses. 12 My Lords, this is yet another instance of where the 13 extension of protection has been provided. In fact, in 14 the 2015 Act, and you have that in our note on stare 15 decisis, towards the end of note we mentioned the fact 16 that in paragraph 5 of schedule 2 to the new Act, there 17 is an extension of the protection beyond simply penalty 18 clauses and into, and it is subparagraph 5: 19 "A term which has the object or effect of requiring 20 that where the consumer decides not to conclude or 21 perform the contract, the consumer must pay the trader 22 a disproportionately high sum in compensation or for 23 services which have not been supplied." 24 So, that potentially looks as if it is going to 25 strike down something that goes beyond the ordinary</p> <p style="text-align: center;">Page 142</p>	<p>1 there is a reference to clauses which are potentially 2 unfair to the small business but are currently outside 3 the reach of UCTA and then 513: 4 "Where the small business attracts a customer for 5 goods or services which are outside its field of 6 expertise it is in a position similar that of 7 a consumer. Outside their area of expertise they may be 8 in a poor position to look after their own interests." 9 And then, 515: 10 "Practically speaking small businesses are unlikely 11 to be able to seek legal advice on the terms of a 12 proposed contract and are much less likely than a larger 13 business to have appreciable in-house legal expertise, 14 as such small businesses are distinctly more vulnerable 15 than larger businesses to unfair terms." 16 516: 17 "Unlikely to have anything like a full understanding 18 of standard terms put forward by the other party." 19 A few lines down: 20 "seldom have the resources to obtain legal advice on 21 a contract of this type. May be taken unfairly by 22 surprise. When a small business is a customer for goods 23 or services on a one off basis most unlikely to have the 24 bargaining power to persuade the other business to alter 25 its standard terms."</p> <p style="text-align: center;">Page 144</p>

<p>1 Then there is reference in 519 to power imbalances 2 and so forth. I would just invite you to read the whole 3 of that section because one can see that it is really 4 focusing on the question of any one equality of 5 bargaining power, imbalance between the negotiating 6 parties in circumstances where there is a small 7 business.</p> <p>8 LORD HODGE: But Lord Diplock very tersely, I think, in 9 Robophone said the doctrine was needed because some 10 people cannot contract a la cart, they have to dine --</p> <p>11 MS SMITH: That is right, my Lord. It is the case with some 12 people, but not the case with commercial parties who are 13 negotiating in the way that happened in this case.</p> <p>14 LORD NEUBERGER: Yes.</p> <p>15 MS SMITH: Now, in the list of indicative terms in the law 16 commission report, penalty clauses, there is protection 17 in relation to penalty clauses included. One finds that 18 at page 188, schedule 2, part 2, you see at paragraph 5 19 on 188:</p> <p>20 "A term requiring A when in breach of contract to 21 pay B a sum significantly above the likely loss to B."</p> <p>22 So, it was suggested that penalty clauses should be 23 included and, of course, that is a rational way for the 24 law to develop. But in our respectful submission, that 25 is a matter for Parliament to deal with.</p> <p style="text-align: center;">Page 145</p>	<p>1 I want to show you a couple of passages from 2 Clydebank, Dunlop and Imperial Tobacco to make good on 3 that submission. Could I invite you to take up bundle A 4 and turn first to look at Clydebank, which is behind 5 tab 5, at page 852 to 853.</p> <p>6 852, you will see Earl of Halbury, Lord Chancellor, 7 saying this at the bottom of the page:</p> <p>8 "Obvious on the face of it, but the very thing 9 intended to be provided against, by this ...(Reading to 10 the words)... is to avoid that kind of minute and 11 somewhat and difficult and complex system of examination 12 which would be necessary if you were to attempt to prove 13 the damage. As I pointed out to the learned counsel 14 during the course of his argument, in order to do that 15 properly and to have any material effect on any tribunal 16 determining that question one ought to have before one's 17 mind the whole administration of the Spanish navy how 18 they were going to use their torpedo boat destroyers in 19 one place rather than another and what would be the 20 relative speed they were getting by this agreement. It 21 would be absolutely idle or impossible to enter into 22 a question of that sort unless you had some kind of 23 agreement between the parties as to what was the real 24 measure of damages which ought to be applied."</p> <p>25 Then the other learned counsel suggests you cannot</p> <p style="text-align: center;">Page 147</p>
<p>1 Of course, the critical point for you is, well, what 2 do you do before Parliament intervenes; what do you do 3 absent that intervention? And our submission is, as I 4 am sure you are well aware, one shouldn't simply keep 5 this rule just to provide for the odd situation where 6 there may be an issue for a small business.</p> <p>7 The penalty doctrine, in any event, in our 8 submission, does not address the key problems that were 9 identified by the law commission in the law commission 10 report, which were the unfair terms that had been agreed 11 in circumstances where there was an inequality of 12 bargaining power.</p> <p>13 Now, that situation is not addressed by the penalty 14 doctrine.</p> <p>15 Can I then turn to ground 3 and deal with some 16 submissions that Mr Butcher made in relation to Dunlop.</p> <p>17 Mr Butcher suggested that the test in Dunlop is to 18 be applied by reference to whether the loss flows from 19 the breach of the particular term, without reference to 20 the surrounding circumstances and that that is a test 21 that does not look beyond the particular interest of the 22 parties to the contract.</p> <p>23 Well, my Lords, one only has to look at facts in 24 Dunlop to see that that proposition is quite plainly 25 wrong.</p> <p style="text-align: center;">Page 146</p>	<p>1 have damages of this character because really in the 2 case of a war ship it has no value at all. That is 3 a strange and somewhat bold assertion. If it was an 4 ordinary commercial vessel capable of being used for 5 obtaining profits, I suppose there would not be very 6 much difficulty in finding out what the ordinary use of 7 a vessel of this size and capacity, and so forth, would 8 be. What would be the hire of such a vessel and what 9 would therefore be the equivalent in money of not 10 obtaining the use of that vessel according to the period 11 of the collapse."</p> <p>12 And so forth --</p> <p>13 LORD NEUBERGER: I think we have to --</p> <p>14 MS SMITH: You have the point.</p> <p>15 LORD NEUBERGER: Yes.</p> <p>16 MS SMITH: My Lord, the extract in Dunlop is Lord Atkinson 17 at page 875 to 876, behind tab 6 in this bundle.</p> <p>18 It is the passage starting near the bottom of the 19 page, four lines into the final paragraph, five lines 20 into the final paragraph:</p> <p>21 "It has been urged that as the sum of five pounds 22 becomes payable on the sale of even one shilling less 23 than the listed price --"</p> <p>24 LORD NEUBERGER: We have seen this.</p> <p>25 MS SMITH: You have seen that, my Lord.</p> <p style="text-align: center;">Page 148</p>

<p>1 LORD HODGE: It is looking at the trade in globo.</p> <p>2 MS SMITH: It is looking at the case in globo, precisely so.</p> <p>3 LORD TOULSON: This is in answer to the point I put to</p> <p>4 Mr Butcher, saying this case was looking at</p> <p>5 an individual contract. It was not, it was because you</p> <p>6 looked at the whole thing that you actually decided --</p> <p>7 MS SMITH: That is right, so Mr Butcher's submissions about</p> <p>8 that, I am afraid to say, were wrong. This case is</p> <p>9 looking at very much more than simply the interests of</p> <p>10 an individual --</p> <p>11 LORD TOULSON: I think it was wrong to put the point to him</p> <p>12 MS SMITH: With respect, my Lord, I was not suggesting that</p> <p>13 for one moment. But, if one looks at the facts, the</p> <p>14 point Mr Butcher was making was wrong.</p> <p>15 The last case on that I would draw your attention</p> <p>16 to, it is a point I alluded to when I was making my</p> <p>17 submissions earlier, but I didn't show you the</p> <p>18 reference, it is in Imperial Tobacco it is in A10, 976</p> <p>19 to 977 and you will see at the bottom of 977, and this</p> <p>20 is within the judgment of Lord Wright, there is</p> <p>21 a reference to Dunlop and then there is a reference to</p> <p>22 Lord Atkinson's points, the ones I have just been</p> <p>23 referring to and then over page at 978 -- sorry, I am on</p> <p>24 the wrong page, my Lords, I do apologise. Let me</p> <p>25 just -- my Lords, I apologise it is 976 to 977 -- so it</p> <p style="text-align: center;">Page 149</p>	<p>1 of the clause is to deter breach. I think that test has</p> <p>2 been identified in the commercial justification cases.</p> <p>3 Mr de Waal made a similar proposition, he suggested</p> <p>4 that the concept of commercial justification was the</p> <p>5 rooted in the compensatory principle, therefore seeking</p> <p>6 to take it back into the well known dichotomy.</p> <p>7 Our written case deals in detail with the problem</p> <p>8 with those rationales with compensatory principle, with</p> <p>9 deterrents as a proper rationale, but the short point</p> <p>10 for present purposes is that we simply don't agree with</p> <p>11 those propositions as to commercial justification,</p> <p>12 whether as it is, in fact, been applied by the courts</p> <p>13 over the last 20 years or so, or indeed whether as to</p> <p>14 how it should be developed insofar as you are looking at</p> <p>15 whether there should be a concept of commercial</p> <p>16 justification.</p> <p>17 My Lords, the reality is that cases which have</p> <p>18 applied the commercial justification test, are concerned</p> <p>19 with clauses which have nothing to do with compensating</p> <p>20 for breach and that, as I submitted to you the day</p> <p>21 before yesterday, is why those cases have had to</p> <p>22 identify that test.</p> <p>23 LORD NEUBERGER: We are going over old ground now, are we?</p> <p>24 We are now really going over old ground.</p> <p>25 MS SMITH: We are and that is simply the point I wanted to</p> <p style="text-align: center;">Page 151</p>
<p>1 is right at the bottom of 976, final sentence, final</p> <p>2 line:</p> <p>3 "Any particular act of that sort by any particular</p> <p>4 trader is very difficult and indeed in a practical sense</p> <p>5 impossible to prove."</p> <p>6 I should say this case, Imperial Tobacco, is also</p> <p>7 all about price maintenance so very similar to Dunlop:</p> <p>8 "I notice in one of the earlier cases Lord Justice</p> <p>9 Sankey, as he then was gave us an illustration of the</p> <p>10 mischief that might follow under certain circumstances,</p> <p>11 the case of throwing a stone into a pond. I need not be</p> <p>12 so picturesque, but it is quite obvious where you have</p> <p>13 a price maintaining system, which is an ordinary</p> <p>14 incident of the modern life in this type of business,</p> <p>15 any departure by a retailer from the terms to which he</p> <p>16 has undertaken as to maintaining a schedule of prices</p> <p>17 may have the most serious and widespread effect."</p> <p>18 My Lords, the last point that I want to make</p> <p>19 concerns some submissions that were made about the</p> <p>20 commercial justification test.</p> <p>21 Now, Mr Butcher submitted that the cases on</p> <p>22 commercial justification over the last 20 or so years</p> <p>23 are just wrong and that in any event that should not be</p> <p>24 the test and that the real test is whether the clause is</p> <p>25 in terrorem or whether, in fact, the predominant purpose</p> <p style="text-align: center;">Page 150</p>	<p>1 make and you already have it on board, my Lord.</p> <p>2 Unless there is anything further I can assist you</p> <p>3 with, those are the points I wanted to make in response.</p> <p>4 LORD NEUBERGER: Thank you very much, Ms Smith.</p> <p>5 MS SMITH: Thank you.</p> <p>6 Further submissions by MR BLOCH</p> <p>7 MR BLOCH: My Lord, as far as small businesses are</p> <p>8 concerned, they are at times vulnerable to the standard</p> <p>9 terms of bigger businesses, the penalties doctrine</p> <p>10 provides them with some protection. If the law is</p> <p>11 changed, it may be that that justification, the</p> <p>12 penalties doctrine, will fall away.</p> <p>13 Insofar as the law is as it is, the justification</p> <p>14 remains. It does not throw people into the water in</p> <p>15 order to encourage someone else to throw them a life</p> <p>16 line.</p> <p>17 The first issue that was raised this morning</p> <p>18 concerned the characterisation of the relationship</p> <p>19 between ParkingEye and Mr Beavis. A number of different</p> <p>20 potential analyses were mapped on to, essentially, the</p> <p>21 same basic facts.</p> <p>22 The problem arose in part, possibly wholly, as</p> <p>23 a result of the absence of any written agreement setting</p> <p>24 out the terms between the two of them. One can that</p> <p>25 constructively contrast that situation with the</p> <p style="text-align: center;">Page 152</p>

<p>1 situation we have in the Cavendish case.</p> <p>2 Here, we do have detailed terms employing legal</p> <p>3 concepts, such as consideration, breach and forfeiture</p> <p>4 and including provisions that provide for the</p> <p>5 possibility of beneficial interests being created in</p> <p>6 that consideration.</p> <p>7 In those circumstances, we submit, the conceptual</p> <p>8 differences, potentially the psychological differences</p> <p>9 and, of course, the legal differences are not to be</p> <p>10 disregarded, even if one can find alternative analyses</p> <p>11 which can be mapped on to the basic facts.</p> <p>12 On a number of occasions yesterday, and on one or</p> <p>13 two occasions today, the question has arisen as to</p> <p>14 whether or not the court will rewrite the parties'</p> <p>15 bargain and of course the court will not rewrite the</p> <p>16 parties' bargain. But that is, of course, precisely</p> <p>17 what the court is doing if it says, having concluded</p> <p>18 that the same result could be achieved in a different</p> <p>19 way, that the party's bargain could be treated as</p> <p>20 an equivalent to the different way in which that same</p> <p>21 result might be achieved.</p> <p>22 Mr Butcher made several submissions about the</p> <p>23 concept of commercial justification. And in relation to</p> <p>24 this, it may be that myself and my learned friend,</p> <p>25 Ms Smith, are as one.</p> <p style="text-align: center;">Page 153</p>	<p>1 concepts, which are not to be narrowly defined or</p> <p>2 mechanically applied, it may be that the difference</p> <p>3 between what is done in good faith and what can be done</p> <p>4 in good conscience is a rather narrow one. And the</p> <p>5 relationship between those concepts and those of the</p> <p>6 enforcement are of a manifestly excessive provision we</p> <p>7 would say is clear.</p> <p>8 Nonetheless, it is helpful to take the way in which</p> <p>9 the matter was posed by Mr Kirk. One may put it more</p> <p>10 broadly and look at it as at the date that the contract</p> <p>11 was entered into. Was the effect so excessive that the</p> <p>12 innocent party cannot, in good conscience, have intended</p> <p>13 to enforce it across the range of circumstances in which</p> <p>14 it, on its face, applies.</p> <p>15 That is a matter of construction and</p> <p>16 characterisation. It requires the court to look at the</p> <p>17 range of breaches, the whole -- in our case the</p> <p>18 wholesale competition and the unsuccessful soliciting --</p> <p>19 in the same way as in the ParkingEye case one looks at</p> <p>20 the person who overstays for an hour or a day and the</p> <p>21 person who overstays for a few minutes or simply parks</p> <p>22 amongst a row of cars parked crossing the line between</p> <p>23 the individual bays.</p> <p>24 The approach Mr Kirk advances also, we say, provides</p> <p>25 a further answer to one of the questions that was posed</p> <p style="text-align: center;">Page 155</p>
<p>1 We would submit that the ParkingEye case illustrates</p> <p>2 the need for a broader concept, such as commercial</p> <p>3 justification, rather than a narrow view of a genuine</p> <p>4 pre-estimate.</p> <p>5 If one takes the narrow view and seeks to apply it</p> <p>6 to cases such as the interest rate cases or the cases</p> <p>7 where the local authorities have had reason to step in</p> <p>8 and take over and complete works, and cases of that</p> <p>9 kind, one will either conclude that they all fall foul</p> <p>10 of the doctrine or one will have to conclude that the</p> <p>11 doctrine does not apply to them, at all.</p> <p>12 The broader view, which we say does in fact have its</p> <p>13 origins even in the authorities pre-Dunlop, and the</p> <p>14 notion of giving proportionality to the interest at</p> <p>15 stake, is the appropriate one to take where one has</p> <p>16 a broader concept of the types of clause that are caught</p> <p>17 or that engage the doctrine.</p> <p>18 Mr Kirk provided a characterisation of what is meant</p> <p>19 by extravagant and exorbitant and unconscionable, and he</p> <p>20 did so by reference to the concept of good faith, to</p> <p>21 which Mr Butcher and I think Ms Smith, take exception.</p> <p>22 The way Mr Kirk put it was to say, "Was the amount</p> <p>23 too large that you could not in good faith make someone</p> <p>24 pay it?"</p> <p>25 Given that we are dealing here with evaluative</p> <p style="text-align: center;">Page 154</p>	<p>1 as to how one should view clauses 5.1 and 5.6. The</p> <p>2 matter arose in the course of yesterday afternoon and it</p> <p>3 is in the transcript at page 122.</p> <p>4 Lord Mance, in response to an observation that I had</p> <p>5 made, states:</p> <p>6 "It depends on how you construe the doctrine of</p> <p>7 penalty. I mean, just as in Andrews the High Court</p> <p>8 extended penalty to non-breach situation, I think that</p> <p>9 perhaps Lord Sumption's suggestion is reducing penalty</p> <p>10 and saying it doesn't apply in all breach situations,</p> <p>11 even if the clause is structured so as to apply on</p> <p>12 breach does not subject necessarily to the penalties</p> <p>13 doctrine."</p> <p>14 Lord Sumption then stated:</p> <p>15 "That is absolutely what I am suggesting, but it not</p> <p>16 only has to be triggered by a breach, it has to be</p> <p>17 clause which is concerned with the consequences of</p> <p>18 breach, as opposed to the original assumptions on which</p> <p>19 the contract price was negotiated."</p> <p>20 I went on to develop what we would submit is one</p> <p>21 answer to that suggestion as to how the law might be</p> <p>22 narrowed. Namely, that it simply leads to a paradox and</p> <p>23 would serve to exclude from the doctrine, particularly</p> <p>24 undeserving set of clauses.</p> <p>25 But the point which arises from the way in which</p> <p style="text-align: center;">Page 156</p>

<p>1 Mr Kirk suggested one should look at the matter is to 2 consider the position as at the date that the contract 3 is made. On the basis that the parties are acting 4 rationally, as at the date the contract is made, the 5 court will not construe them as having intended to 6 attribute to a particular breach a consequence which is 7 out of all proportion to its consequences. 8 That will remain the same whether one is attempting 9 to construe it as an adjustment in relation to 10 consideration, just the same as if one was looking at it 11 from in the context of the penalties doctrine and asking 12 whether or not it was in any way proportionate to the 13 breach. 14 So, in the case where the doctrine would bite, in 15 the case where there is a manifest lack of 16 proportionality between the breach and the consequence, 17 the court will never construe the contract in such a way 18 as to conclude that rational men intended that 19 difference to be reflected in a difference of 20 consideration, for example. 21 So, whilst in theory one could attempt to narrow the 22 doctrine in that way, one has both the paradox as 23 a reason not to do it and one also has the fact, as 24 a practical matter, there are no clauses which would be 25 caught by the doctrine and which, at the same time,</p> <p style="text-align: center;">Page 157</p>	<p>1 LORD MANCE: Yes. 2 MR BLOCH: Yes, I am reminded from my left, insofar as one 3 is seeking to construe the agreement in a way which 4 reasonable men would have understood and intended it, 5 one cannot take it as evidence of reasonableness. 6 The further point relates to the reference which is 7 made to good will and reputation. In relation to that, 8 the question appears to be one of how the doctrine is to 9 accommodate those concepts. 10 In relation to that, a difficulty may arise 11 depending on the nature of the contract and the nature 12 of the business to which it relates and it may be in the 13 ParkingEye case, such a difficulty does arise. We don't 14 take a position on that. 15 All we need to say is that no such difficulty arises 16 in this case. It doesn't arise in this case because the 17 value of good will is clear from the contract. The 18 parties expressly put value on it and one can put a more 19 precise value on, but looking not only at the mechanism 20 for valuation within the agreement but the balance sheet 21 and indeed the agreed facts, the agreed figures, which 22 one finds in the case at core bundle 2, tab 2, page 599. 23 So, there is no difficulty in this case in putting 24 a value on it, the parties have put a value on it. 25 Similarly, there is no difficulty in this case in</p> <p style="text-align: center;">Page 159</p>
<p>1 would fall out of doctrine by disapplication in the 2 circumstances that Lord Sumption proposes. 3 Now, the further point which we would seek to raise, 4 and I think it may be the final one, is in relation to 5 the references that we made to good will and reputation. 6 LORD MANCE: Can I just say, that was quite a convoluted if 7 I may politely put it, submission, but does it amount to 8 this: that in answer to what Lord Sumption was putting, 9 you are saying it is just not realistic to assume that 10 a clause which has the casuistic characteristics, which 11 you say 5.1 and 5.6 has is really matched by any 12 adjustment of the original consideration, is that -- 13 MR BLOCH: We certainly do say that. 14 LORD MANCE: You do say that. Is that the essence of 15 what -- 16 MR BLOCH: As matter of construction, if the clause has 17 those characteristics, you have no basis on which to 18 construe it as the rational decision of the parties as 19 regards the consideration. 20 LORD MANCE: It must have just happened because they 21 actually, in the process of drafting, didn't sit down 22 and work out the present sort of case? 23 MR BLOCH: It could be that, it could be a trip wire, it 24 could be a deterrent. One does not need to limit the 25 class of illegitimate interests or motivations.</p> <p style="text-align: center;">Page 158</p>	<p>1 contrasting that value with the value that one gets from 2 the application of the default shareholders' option 3 price. There is no difficulty there, first of all 4 because a value has been put on it by the appellant, 5 which is very substantially less than the figures one 6 sees in the agreed figures. 7 And secondly, because it is agreed, and one again 8 gets that from the agreed statement of facts and issues, 9 and if one turns to it from the evidence of Mr Scott, 10 that the whole idea was that the NAV be used because it 11 did not take account of good will. 12 LORD MANCE: Just go to page 599. I was puzzled by one 13 thing on that. Just in relation to the clause 5.6 14 capped at 75 million, how does that work? Why is that 15 the loss? Shouldn't there be -- in respect of the full 16 sale of the remaining shares a difference between two 17 figures, namely the -- what you say is the full value 18 and the NAV, why is capped -- 19 MR BLOCH: The short answer to that is, yes. But, the 20 question is: what is the range of the NAV? 21 LORD MANCE: So, capped at 75 million is the maximum of that 22 difference. So, it could be less. 23 MR BLOCH: It could be 75, it could be significantly less. 24 It is undoubtedly likely to be a very substantial number 25 and for our purposes that is all we say that we need to</p> <p style="text-align: center;">Page 160</p>

<p>1 show.</p> <p>2 My Lords, unless you have any further questions for</p> <p>3 me.</p> <p>4 LORD NEUBERGER: Thank you. Anything you want to add?</p> <p>5 Reply submissions by MS SMITH</p> <p>6 MS SMITH: My Lord, the only point I would make is on my</p> <p>7 learned friend's final point about it is likely to be</p> <p>8 a very substantial number. As you will see from the</p> <p>9 judgment of Mr Justice Burton, as he accepted, and</p> <p>10 I think so did the Court of Appeal, that will depend on</p> <p>11 whether the good will in the business has been damaged</p> <p>12 by somebody acting in breach of clause 11.</p> <p>13 There may be circumstances where a significant</p> <p>14 breach in relation to clause 11 or even a minor breach</p> <p>15 has caused such damage that the profits are wiped out of</p> <p>16 this business and that the value in relation to the put</p> <p>17 option would fall substantially below the net asset</p> <p>18 value.</p> <p>19 LORD NEUBERGER: Yes.</p> <p>20 Well, thank you very much indeed. We, I think,</p> <p>21 thanked Ms Smith and Mr Bloch yesterday and those who</p> <p>22 prepared the written cases for them and we repeat</p> <p>23 briefly our thanks for their brief submissions today.</p> <p>24 We are grateful to Mr de Waal, Mr Kirk and</p> <p>25 Mr Butcher for their submissions today and to all those</p> <p style="text-align: center;">Page 161</p>	<p>1 INDEX</p> <p>2</p> <p>3 Submissions by MR DE WAAL1</p> <p>4 Submissions by MR BUTCHER65</p> <p>5 Submissions by MR KIRK102</p> <p>6 Reply submission by MR DE WAAL131</p> <p>7 Reply submissions by MR BUTCHER133</p> <p>8 Housekeeping134</p> <p>9 Further submissions by MS SMITH136</p> <p>10 Further submissions by MR BLOCH152</p> <p>11 Reply submissions by MS SMITH161</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 163</p>
<p>1 who were involved in preparing the written cases in that</p> <p>2 appeal, as well.</p> <p>3 We will take time to consider our decision and in</p> <p>4 the two appeals and let you know them in due course.</p> <p>5 Thank you all very much indeed. The court is now</p> <p>6 adjourned.</p> <p>7 (3.40 pm)</p> <p>8 (The case concluded)</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 162</p>	

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