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Group litigation / Competition law

2 August 2023

(Un)Enforceable Litigation Funding Agreements: The Supreme Court's Shock Decision in *PACCAR*

On 26 July 2023, the Supreme Court handed down its judgment in *R (on the application of PACCAR Inc & Others) v Competition Appeal Tribunal & Others* [2023] UKSC 28 (judgment here). By majority, the Court concluded that an agreement to provide litigation funding (an "LFA") in exchange for a payment calculated as a share of the damages recovered constitutes a damages-based agreement ("DBA"). This widely unexpected conclusion means that an LFA of that particular kind will be unenforceable insofar as it relates to opt-out collective proceedings (in which DBAs cannot be used at all), or, in any event, fails to comply with legislation applicable to DBAs.

BACKGROUND

1. The appeal arose in the Trucks collective proceedings,[1] which concern two separate applications for a collective proceedings order. The first application in time was brought by UK Trucks Claim Limited which sought certification on an opt-out basis and the second application in time was

[1] Case 1282/7/7/18 *UK Trucks Claim Limited v Stellantis NV (formerly Fiat Chrysler Automobiles NV) & Others* and Case 1289/7/7/18 *Road Haulage Association v Traton SE & Others*.

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brought by the Road Haulage Association Limited which sought certification on an opt-in basis.

2. As part of the certification dispute, it was argued that the LFAs by which the proposed collective proceedings were to be funded amounted to DBAs for the purpose of section 58AA of the Courts and Legal Services Act 1990 ("**section 58AA**"). On that basis, it was argued that the LFA by which the proposed opt-out collective proceedings were to be funded was unenforceable pursuant to section 47C(8) of the Competition Act 1998[2] and the LFAs by which the proposed opt-in collective proceedings were to be funded would need to satisfy the requirements of the Damages-Based Agreement Regulations 2013 (the "**DBA Regulations**"). It was common ground that the LFAs in question did not satisfy the DBA Regulations.[3]

3. The critical question was therefore whether, as a matter of statutory interpretation, the LFAs by which the proposed collective proceedings were to be funded amounted to DBAs for the purpose of section 58AA. With that question in mind, the relevant legislation can be summarised as follows:

   a. Section 58AA(3) provides that:

      "*a damages-based agreement is an agreement between a person providing advocacy services, litigation services* ***or claims management services*** *and the recipient of those services which provides that– (i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and (ii)* ***the***

[2] Per section 47C(8) of the Competition Act 1998: "*[a] damages-based agreement is unenforceable if it relates to opt-out collective proceedings*". NB, section 47C(9)(c) defines a "*damages-based agreement*" as an agreement of the kind described in section 58AA.

[3] Judgment, [29].

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amount of that payment is to be determined by reference to the amount of the financial benefit obtained" (emphasis added).

b. Prior to an amendment taking effect from 29 November 2018, section 58AA(7) provided that, for the purpose of section 58AA(3), "*claims management services*" had the same meaning given to that term in section 4(2) of the Compensation Act 2006; as amended, section 58AA(7) has since provided that "*claims management services*" has the same meaning given to that term in section 419A of the Financial Services and Markets Act 2000.[4]

c. It is important to note that in both the Compensation Act 2006 and the Financial Services and Markets Act 2000 "*claims management services*" is referred to in the context of powers conferred by Parliament for the regulation of services by way of subordinate legislation. In both statutes, "*claims management services*" is defined as the provision of "*advice or other services in relation to the making of the claim*" and includes "*the provision of financial services or assistance*".[5]

d. Sections 58AA(1), (2) and (4) provide that a DBA will be unenforceable if it fails to satisfy requirements for DBAs as might be prescribed by law.[6]

e. Finally, the respondents to the appeal sought to rely on provisions in the Compensation (Regulated Claims Management Services) Order 2006 (SI 2006/3319) (the "**Scope Order**") and the DBA Regulations as an aid to the interpretation of the term "*claims management services*" as that term appeared in the Compensation Act 2006. Both the Scope Order and the DBA Regulations post-date the Compensation Act 2006.

[4] In *PACCAR*, nothing turned on the fact that, at different points in time, section 58AA cross-referred to different legislation in respect of the definition of "*claims management services*".
[5] Section 4(2) Compensation Act 2006; section 419A Financial Services and Markets Act 2000.
[6] The DBA Regulations are requirements prescribed by law for the purpose of section 58AA(4). As above, in *PACCAR*, it was common ground that the relevant LFAs did not comply with the DBA Regulations.

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BEFORE THE CAT AND THE DIVISIONAL COURT

4. Both the CAT and the Divisional Court concluded that the provision of pure litigation funding did not fall within the definition of "*claims management services*", which meant that agreements for pure litigation funding would not face questions as to their enforceability by reason of those agreements amounting to DBAs.[7] In that regard, the decisions of the CAT and the Divisional Court did not upset the working assumption in the market that litigation funding agreements pursuant to which a funder provides funding without involvement in the conduct of the litigation are not DBAs within the meaning of section 58AA.

BEFORE THE SUPREME COURT

5. As above, contrary to the decisions of the CAT and the Divisional Court, the Supreme Court majority concluded that the provision of pure litigation funding does fall within the definition of "*claims management services*", as that definition was interpreted by the Court, with the consequence that LFAs which provide that funders are entitled to remuneration as a percentage of any damages recovered are to be regarded as DBAs.

6. Following a detailed review of authority setting out the relevant principles of statutory interpretation, the key reasons for the Court's decision which are most likely to be of interest are as follows:

    a. **Presumption against absurdity**: although it is correct that the courts will not interpret a statute so as to produce an absurd result, the courts must also "*ensure that they do not rely on the presumption against absurdity in order to substitute their view of what is reasonable for the policy chosen by*

[7] See a summary of the Divisional Court's reasoning at [2021] EWCA Civ 299, [96].

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the legislature".[8] Having made that observation, the Court went on to conclude that the statutory words by which 'claims management services' is defined (see paragraph 3 above), when "*read according to their natural meaning*" are apt to cover an LFA which provides for remuneration as a share of damages.[9]

b. **Potency of the term defined**: further, the term "*claims management services*" does not "*have any clear or generally accepted meaning in ordinary parlance which [is] capable of exerting any significant "potency" in terms of qualifying the ordinary words used by Parliament [to define the term]*".[10] In developing a definition for 'claims management services', it is clear that "*Parliament deliberately used wide words of definition […] precisely because of the nebulousness of the notion of "claims management services" at the time and in order to ensure that the general policy objective of the [legislation] would not be undermined*".[11] Moreover, the reader of the statutory definition would not suppose that the language used was to be treated as "*qualified or coloured*" by any generally accepted meaning.[12]

c. **Context of the statutory definition**: the scheme of Part 2 of the Compensation Act 2006 by which 'claims management services' was defined created a broadly framed power on the part of the Secretary of State to designate, subject to the supervision of Parliament, regulated claims management services and to target the regulation of them according to his or her assessment of where a need for regulation was shown to exist;[13] Parliament intended that that power "*should be able to regulate effectively in future in a new and fast developing area in which, as at the time of enactment, the funding and business models being used were not*

[8] Judgment, [43].
[9] Judgment, [50].
[10] Judgment, [49].
[11] Judgment, [49]. See also Judgment, [65] and [67].
[12] Judgment, [79].
[13] Judgment, [60] to [61].

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fully understood".[14] It was accepted that effective regulation would be undermined by narrow or unclear powers, and there would be no good reason to look for implied limitations which do not appear from the wide language used.

d. **Relevance of subsequent legislation**: the respondents' arguments in favour of a restrictive interpretation of the term "*claims management services*" were not considered to be assisted by the respondents' references to the Scope Order and the DBA Regulations, both of which post-date the definition of "*claims management services*" as that term appears in the Compensation Act 2006. The Court noted that whilst "*there is authority to the effect that, if a statute is ambiguous a later Act of Parliament might be relied on as persuasive authority as to its meaning […] the inference to be drawn from a later Act as to the meaning earlier legislation was intend to have is comparatively weak and the principle comes into play only where there are two potential interpretations of the earlier legislation which are "both equally tenable"*".[15] The majority considered that there was no ambiguity of that kind.[16]

7. As against the majority, Lady Rose provided a lengthy dissenting judgment which concludes that "*the giving of financial assistance is only included in the term claims management services if it is given by someone who is providing claims management services within the ordinary meaning of that term*".[17] Further, Lady Rose noted that "*Parliament did not intend by enacting section 58AA suddenly to render unenforceable damages-based litigation funding agreements*".[18]

[14] Judgment, [62].
[15] Judgment, [93].
[16] Judgment, [93].
[17] Judgment, [254].
[18] Judgment, [253]. The full dissenting judgment is at paragraphs [101] to [255].

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IMPLICATIONS

8. The Court's decision is plainly highly significant. Contrary to the widely held view prior to the judgment, it is now clear that LFAs which entitle a funder to payment determined by reference to the amount of the financial benefit obtained in proceedings, such as a percentage of any damages recovered, are likely to be regarded as DBAs to which the statutory regime set out above applies.

9. It follows that LFAs of that specific type (i) cannot be used in opt-out collective proceedings before the CAT at all,[19] and (ii) outside the context of opt-out collective proceedings, must satisfy the requirements in the DBA Regulations in order to be enforceable.[20]

10. It was said in evidence and submissions before the Court that this may serve to "*invalidate most if not all LFAs that have been agreed since litigation funding began*"[21] and that "*the likely consequence in practice would be that most third party litigation funding agreements would by virtue of that provision be unenforceable as the law currently stands*".[22]

11. However, whilst it is beyond dispute that the judgment is likely to give rise to the need for certain contractual arrangements for the funding of litigation and arbitration to be revisited, the following should be borne in mind:

    a. Many LFAs already provide that funders are to be remunerated by reference to a multiple of the funding advanced, rather than as a share of the damages recovered. LFAs agreed on that basis would not

[19] See section 47C(8) of the Competition Act 1998.
[20] See section 58AA. Also see Judgment, [87].
[21] Judgment, [244].
[22] Judgment, [13].

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obviously fall within the definition of a DBA (as a DBA is now to be understood) unless they are structured in ways that otherwise bring the agreement within the scope of section 58AA, such as by linking the amount of any payment due to the funder to the financial benefit to be obtained.

b. It is entirely possible that extant LFAs which are affected may be the subject of variation by the agreement of the parties to them so to as to avoid unintended consequences. Agreements may be varied, for example, so that the amount of any payment to the funder is not to be determined by reference to the damages to be obtained (see section 58AA(3)(i) and (ii)). Further, depending on the specific circumstances of the case, it may be possible to seek a remedy of rectification.

c. It may likewise be possible for the terms of LFAs to be amended to ensure that the requirements of the DBA Regulations are satisfied, which would mean (other than in opt-out collective proceedings) that the funder remains entitled to the payment of a share of the damages.[23]

12. Assuming funders will seek commercial solutions to the issues that arise from the Supreme Court's findings, in the immediate term, one can expect to see considerable procedural activity arising from amendments that may be needed to LFAs. This may impact upon procedural timetables in ongoing proceedings or those in contemplation.

13. Separately, there is the question of whether the disruption caused by the Supreme Court's judgment will result in lobbying (for example by the Association of Litigation Funders) for legislative changes, or for the prompt exercise of the Secretary of State's wide statutory powers with the objective of ensuring the enforceability of existing LFAs. One obvious potential

[23] However, we recognise that this will not necessarily be straightforward. As was noted in *Zuberi v Lexlaw* [2021] EWCA Civ 16 at [74], the DBA Regulations do not "*represent the draftsman's finest hour*".

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legislative change would be to amend the definition of "*claims management services*" in section 58AA so as not to cross-refer to legislation concerning the regulation of claims management services; rather to instead specify a narrower range of services to which section 58AA and the DBA Regulations are to apply.

14. Finally, one should note that the judgment may give rise to a period of uncertainty between litigants and funders in relation to LFAs that are to be regarded as unenforceable. Nevertheless, the commercial imperatives of the parties and the need to have careful regard to the position in equity as well as law are likely to be important considerations to those seeking advice with respect to their position in the light of the judgment.

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2 August 2023

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