Press Summary

26 July 2023

R (on the application of PACCAR Inc and others) (Appellants) *v* Competition Appeal Tribunal and others (Respondents)

[2023] UKSC 28
On appeal from: [2021] EWCA Civ 299

Justices: Lord Reed (President), Lord Sales, Lord Leggatt, Lord Stephens and Lady Rose

Background to the Appeal

This appeal is concerned with a matter of statutory interpretation in the context of litigation funding. Litigation funding involves the agreement of a third party (with no prior connection to the litigation) to finance all or part of the legal costs of certain litigation, in return for a percentage of any damages recovered should the funded litigant be successful. In particular, this appeal concerns whether each of the agreements to provide this funding, known as litigation funding agreements (**"LFAs"**), constitute a "damages-based agreement" (**"DBA**"), a term given a specific definition by statute. In order to be lawful and enforceable a DBA has to satisfy certain conditions. The LFAs have been entered into without satisfying those conditions, so the question whether they constitute DBAs is critical for their enforceability.

The issue arises in the context of applications to bring collective proceedings for breaches of competition law. The second respondent (**"UKTC"**) and the third respondent (**"RHA"**) each sought an order from the Competition Appeal Tribunal (the **"Tribunal"**) to enable them to bring collective proceedings on behalf of persons who acquired trucks from the appellants (collectively, **"DAF"**) and other truck manufacturers. The proposed proceedings take the form of "follow-on" proceedings in which compensation is sought for the alleged higher prices paid for trucks as a result of the breach of European competition law, as found in the infringement decision of the European Commission dated 16 July 2016. To obtain a collective proceedings order from the Tribunal, UKTC and RHA needed to show that they had adequate funding arrangements in place to meet their own costs and any adverse costs order made against them should they lose. Both UKTC and RHA relied on the LFAs in an effort to meet these requirements.

Section 154 of the Coroners and Justice Act 2009 (**"CJA 2009"**) inserted section 58AA into the Courts and Legal Services Act 1990 (**"CLSA 1990"**). Section 58AA(1) and (2) provide that a DBA

will be unenforceable unless certain conditions are complied with. Shortly after the insertion of section 58AA, the Damages Based Regulations 2013 (the **"DBA Regulations 2013"**) came into force. These set out further requirements which must be satisfied if a DBA is to be enforceable. It is accepted that the LFAs in this appeal would not satisfy these conditions.

The relevant part of the definition of DBA in this appeal, pursuant to section 58AA(3), is whether the LFAs involve the provision of "claims management services". This phrase is defined, under section 58AA(7), by reference to earlier legislation, being the Compensation Act 2006 (**"CA 2006"**) until 1 April 2019 and the Financial Services and Markets Act 2000 (**"FSMA 2000"**) thereafter. These refer to *regulated* "claims management services". Such a service is regulated only if prescribed by the Secretary of State or specified in an order made by the Treasury. "Claims management services" are defined in the CA 2006 and FSMA 2000 in materially the same terms. Under section 4(2)(b) of the former, such services are "advice or other services in relation to the making of a claim" and "other services" includes, in particular, a reference to "the provision of financial services or assistance".

The Tribunal held that the LFAs did not involve the provision of "claims management services". As a result, they were not DBAs and were not therefore rendered unenforceable by virtue of section 58AA(2). The Divisional Court dismissed the appeal. The appellants appeal under the leap-frog procedure directly to the Supreme Court.

Judgment

The Supreme Court allows the appeal by a majority. Lord Sales gives the leading judgment, with which Lord Reed, Lord Leggatt and Lord Stephens agree. Lady Rose gives a dissenting judgment.

Reasons for the Judgment

An important feature of this appeal is that the definition of DBA, derived from one legislative context (the CA 2006), has been used in a different legislative context (section 58AA of the CLSA 1990). The meaning of the definition has not changed. The meaning has to be determined with reference to the CA 2006.

In relation to the wording of section 4 of the CA 2006, the Court held that the words "claims management services" read according to their natural meaning were capable of covering the LFAs **[50]**. In relation to the statutory purpose, the Court held that Part 2 of the CA 2006 was intended to provide a broad power to allow the Secretary of State to decide what targeted regulatory response might be required from time to time as information emerged about what was then a new and developing field of services seeking to encourage or facilitate litigation, where the business structures were opaque and poorly understood at the time of enactment. The wide language used in section 4 **[63]-[65]**, and the degree of parliamentary control for the future exercise of the section 4 power, which is a feature of the scheme of Part 2 **[60], [62]**, were strong indicators of this. Viewed in this light, there was good reason to think that Parliament used wide language in section 4 deliberately and with the intention that the words of the definition should be given their natural meaning **[72]**.

The DBA Regulations 2013 are not a permissible aid to interpreting "claims management services", as defined in the CA 2006. They were not introduced broadly contemporaneously in combination with the CA 2006 as part of a single coherent scheme, nor were they subject to review by the same Parliament which enacted the 2006 Act **[47]**. By contrast, the

Compensation (Regulated Claims Management Services) Order 2006 (the **"Scope Order"**) was broadly contemporaneous and formed part of the same legislative scheme as, and so is a legitimate aid to interpretation of, the CA 2006; as is the Explanatory Memorandum which accompanied the Scope Order **[46]**. The Scope Order and the Explanatory Memorandum support the interpretation of the definition of DBA for which the appellants contend **[61], [73]**.

The respondents relied on the wording of the defined term itself – "claims management services" – to submit that the definition should be limited to services in the context of the management of a claim. This notion was referred to as "the potency of the term defined". The Court held that this notion was not relevant to the appeal for three reasons. First, the terms explicitly used in the definition in the primary legislation and also in the Scope Order cannot be read as involving the management of claims, nor as having claims management as a unifying core of meaning **[78]**. Second, "claims management services" had no established and generally accepted meaning which could lead a reader of the text of section 4 to suppose that the express language of the definition was to be treated as qualified or coloured by that meaning **[79]**. Third, to read the definition in section 4 in this way would be counter to the scheme and purpose of the CA 2006 **[83]**.

The Court also held that the interpretation of section 4 of the CA 2006 as covering the LFAs in this case did not produce any absurdity in relation to section 58B, which section 28 of the Access to Justice Act 1999 inserted into the CLSA 1990 but which had not been brought into force, to make enforceable certain other forms of LFAs which were otherwise thought to be unenforceable **[84]**. Further, the Court held that events subsequent to 2006 were not relevant to the interpretation of section 58AA **[90], [94]**.

Lady Rose dissents and would dismiss the appeal. She agrees with the Divisional Court and the Tribunal that the provision 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 **[154]**. Lady Rose holds that the fact that litigation funding would not naturally fall within the scope of the term "claims management services" is important **[111]**. This points to the fact that claims management services include providing financial assistance, but that this does not mean that all financial assistance constitutes "claims management services" whenever it relates to a claim **[115]-[122]**.

References in square brackets are to paragraphs in the judgment