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UK SUPREME COURT RULES THAT MANY LITIGATION FUNDING AGREEMENTS ARE UNENFORCEABLE IN ENGLAND & WALES

R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents), [2023] UKSC 28

To Our Clients and Friends:

In a greatly anticipated judgment of the UK's Supreme Court (the "UKSC"), a 4-1 majority has ruled that litigation funding agreements ("LFAs"), under which the funder's remuneration is calculated by reference to a share of the damages ultimately recovered, fall within the statutory definition of damages-based agreements ("DBAs"). Although the decision largely turns on principles of statutory interpretation, the consequences of the UKSC's ruling are potentially significant:

- Existing and future LFAs under which the funder's remuneration is calculated by reference to a share of the damages ultimately received will now be unenforceable in England & Wales unless they comply with the conditions set out in the Damages-Based Agreements Regulations 2013 (the "**Regulations**").
- In the context of opt-out collective proceedings before the Competition Appeal Tribunal (the "CAT"), such LFAs will be unenforceable even if they comply with the Regulations as a result of a prohibition on DBAs for opt-out collective proceedings.

Although the full extent of its implications is not yet clear, the decision will undoubtedly have a significant impact on litigation funding in the UK, and in particular in collective proceedings before the CAT. It remains to be seen whether, in light of the decision, the UK Parliament will consider direct intervention to regulate this area.

I. Background to the UKSC Judgment and Procedural History

The case concerned the question of whether LFAs are to be classified as DBAs, and therefore subject to the UK legislation governing DBAs, including the Regulations and the Courts and Legal Services Act 1990 (the "CLSA"). Lord Henderson underscored the importance of this question in his judgment at the Court of Appeal stage in 2021 as follows:

*The issue [...] is in general terms whether funding agreements entered into with claimants by third parties who play no part in the conduct of the litigation, but whose remuneration is fixed as a share of the damages recovered by the client, are "damages-based agreements" within the meaning of the relevant legislation which regulates such agreements. **If they are, the likely consequence would be that most, if not all, litigation funding agreements currently in existence would be unenforceable [...].**[1]*

The UKSC was therefore asked to consider whether the principles governing DBAs extended to litigation funders as well as to solicitors. In essence: should a LFA be treated as the same type of agreement as a client-solicitor DBA, despite the fact the litigation funder will be a third-party to the proceedings?

The question mainly turned upon the definition of a DBA, which is found at section 58AA(3)(a) of the CLSA:

[A DBA 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 amount of that payment is to be determined by reference to the amount of the financial benefit obtained.^[2]

Since 1 April 2013, DBAs have been a permitted form of fee arrangement for contentious proceedings in England & Wales.^[3] But despite the introduction of DBAs being characterized as a positive development for flexibility and accessibility to justice for applicants,^[4] DBAs in high-value English civil cases remain relatively rare.^[5] Legal professionals have been reticent to embrace the practice due to the lack of certainty regarding compensation for their services, as well as the lack of clarity in the existing drafting of the Regulations that govern DBAs.^[6]

a. The Competition Appeal Tribunal Phase

The case originates from a cartel decision by the European Commission (the “EC”), dated 19 July 2016. In that decision, the EC held that five major European truck manufacturing groups, ((1) DAF, (2) Daimler, (3) Iveco, (4) Volvo/Renault and (5) MAN)), infringed EU Competition Law by, *inter alia*, exchanging information on their respective future gross pricing.^[7] Subsequently in 2018, Road Haulage Association Limited (“RHA”), a haulage trade association, and UK Trucks Claim Limited (“UKTC”), an SPV set up specifically to pursue the claim (together, the “Applicants”), brought proceedings in the CAT seeking damages from the manufacturers pursuant to section 47B of the UK Competition Act 1998.^[8] Both the Applicants had LFAs in place. The CAT heard the case in June 2019, having ordered in December 2018 that the two applications be heard together.^[9]

DAF contended that the Applicants’ LFAs constitute DBAs, with the consequence that they were unenforceable as they did not comply with the requirements under 58AA(3)(a) of the CLSA. Further, DAF contended that the Applicants did not satisfy the requirements for being authorised to bring the collective proceedings because section 47C(8) of the Compensation Act 2006 (the “CA”) stipulated that a DBA is unenforceable if it relates to opt-out proceedings.^[10]

In its judgment dated 28 October 2019, the CAT found in favour of the Applicants.^[11] DAF thereafter applied to the Court of Appeal for permission to apply for judicial review.

b. The Court of Appeal Phase

The Court of Appeal handed down its judgment on 5 March 2021,^[12] dismissing DAF’s appeal and holding that it would not grant DAF permission to apply for judicial review on the substantive DBA issue.^[13]

The Court of Appeal focused on the interpretation of the definition of “*claims management services*” in section 4(2)(b) of the CA; in particular, whether that term encompassed LFAs.^[14] The phrase was imported into section 58AA(3)(a) of the CLSA’s DBA definition, as outlined above. The Court of Appeal determined that the definition of DBAs under these statutes did not include LFAs. DAF thereafter opted to appeal directly to the UKSC; permission to do so was granted in May 2022.

II. The UKSC Judgment

The case was heard on 16 February 2023.^[15] By a majority of 4-1, the UKSC overturned the Court of Appeal’s judgment on 26 July 2023 and held that LFAs could amount to “*claims management services*” such that they are considered DBAs which must comply with the Regulations in order to be enforceable. As noted above, much of the UKSC’s analysis focused on English law rules of statutory interpretation.

Lord Sales (with whom Lords Reed, Leggatt and Stephens agreed) held that “*claims management services*”, as referred to in section 58AA(3)(a) of the CLSA, includes LFAs. Lord Sales focused on construing what he understood to be the original intention of the drafting and, as such, found that “*Parliament used wide language [...] deliberately and with the intention that the words of the definition of “claims management services” should be given their natural meaning.*”^[16] His Lordship concluded that the natural meaning included the role of litigation funders in financing claims, and noted that “[p]articipants in the third party funding market may have made the assumption that such arrangements are not DBAs and hence are not made unenforceable by section 58AA(2). But this would not justify the court in changing or distorting the meaning of “claims management services” as it is...”^[17]

In a dissenting minority view, Lady Rose would have upheld the CAT and Court of Appeal’s position that LFAs did not constitute DBAs. Her Ladyship found that LFAs did not constitute “*claims management services*” because “*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.*”^[18] In reaching her conclusion, Lady Rose maintained that Parliament did not intend for 58AA(3)(a) of the CLSA to “*to render unenforceable damages-based litigation funding agreements.*”^[19]

III. Implications of the UKSC Judgment

The UKSC’s judgment has significant implications for third party litigation funding in the UK. Parties involved in UK litigation that are supported by a third party funding agreement will need to assess whether their existing LFAs are (or might be considered) DBAs in light of the judgment and, if so, consider whether amendments are needed to ensure that they comply with the Regulations. There may be further risks for fully resolved cases under funding arrangements, in that amounts already paid to the funders may be challenged on the basis that the funding agreement could be deemed unenforceable.

For opt-out collective proceedings in the CAT, the implications of the UKSC’s judgment are more acute given the general prohibition on DBAs for such cases. It remains to be seen whether – and how – funders might seek to restructure LFAs in opt-out collective proceedings, so that they are not considered DBAs. It is likely that the judgment will, in the short term at least, create complications for funders and class representatives involved in current and future opt-out proceedings.

The wider and more long term impact of this decision on the litigation funding market in the UK (which has been strong and growing in recent years) remains to be seen.

[1] *Paccar Inc. v RHA and UKTC* [2021] EWCA Civ 299, para. 2 (emphasis added).

[2] The Courts and Legal Services Act 1990, section 58AA.

[3] The Damages-Based Agreements Regulations 2013.

[4] See Ministerial Foreword, Ministry of Justice, “*Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson’s Recommendations – The Government Response*”, March 2011, p. 3-4.

[5] In the Civil Justice Council 2 September 2015 Press Release on DBA Recommendations, Professor Rachael Mulheron, Chairman of the CJC’s working party, noted: “*DBAs have been used very sparingly by the legal profession since the Jackson reforms took effect in 2013. This has been unfortunate, given that the use of DBAs in contentious litigation was, arguably, the most novel aspect of those 2013 reforms.*”

[6] Lord Justice Jackson proposed wide-ranging reforms to the civil litigation costs system in 2009 – these are widely referred to as the “*Jackson Reforms*” and included the introduction of DBAs addressed above. Following a public consultation, these were implemented in large part via the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“*LASPO*”) and the 2013 Regulations. In November 2014, the Ministry of Justice recognised that there were drafting issues with the Regulations and asked the Civil Justice Council to review them to consider possible improvements.

[7] *Case AT. 39824 – Trucks*, 19 July 2016; *UK Trucks Claim Limited v Fiat Chrysler Automobiles N.V. and Others* [2019] CAT 26, paras. 1-2.

[8] N.B: The UKTC application was brought against Iveco and Daimler; the RHA application against Iveco, MAN and DAF.

[9] *UK Trucks Claim Limited v Fiat Chrysler Automobiles N.V. and Others* [2019] CAT 26, paras. 1-2.

[10] *Id.*, para. 15.

[11] *Id.*, para. 110(1).

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[12] *Paccar Inc. v RHA and UKTC* [2021] EWCA Civ 299.

[13] *Id.*, paras. 105-107.

[14] The Compensation Act 2006, section 4(2)(b).

[15] The UKSC had, earlier, granted permission for the Association of Litigation Funders of England & Wales to make written submissions as an intervener, which it did (a reflection of the importance the appeal had to the litigation funding sector in this jurisdiction).

[16] *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)*, [2023] UKSC 28, para. 72.

[17] *Id.*, para. 91.

[18] *Id.*, para. 254.

[19] *Id.*, para. 253.



Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's global Litigation, International Arbitration, or Transnational Litigation practice groups, or any of the following authors in London:

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