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When is a DBA not a DBA?

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

This appeal was 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 concerned whether each of the agreements to provide this funding, known as litigation funding agreements ("LFAs"), constituted 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 had been entered into without satisfying those conditions, so the question whether they constituted DBAs was critical for their enforceability.

The issue arose 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 took the form of "follow-on" proceedings in which compensation was 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.

S154 of the Coroners and Justice Act 2009 ("CJA 2009") inserted S58AA into the Courts and Legal Services Act 1990 ("CLSA 1990"). S58AA(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 S58AA(3), was whether the LFAs involved the provision of "claims management services". This phrase was 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 appealed under the leap-frog procedure directly to the Supreme Court.

The Supreme Court allowed the appeal by a majority.

An important feature of this appeal was that the definition of DBA, derived from one legislative context (the CA 2006), had been used in a different legislative context (S58AA of the CLSA 1990). The meaning of the definition had not changed. The meaning had to be determined with reference to the CA 2006.

In relation to the wording of S4 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. 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 S4, and the degree of parliamentary control for the future exercise of the S4 power, which was a feature of the scheme of Part 2, were strong indicators of this. Viewed in this light, there was good reason to think that Parliament used wide language in S4 deliberately and with the intention that the words of the definition should be given their natural meaning.

The DBA Regulations 2013 were 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. 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 was a legitimate aid to interpretation of, the CA 2006; as was the Explanatory Memorandum which accompanied the Scope Order. The Scope Order and

the Explanatory Memorandum support the interpretation of the definition of DBA for which the appellants contended.

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 could ot be read as involving the management of claims, nor as having claims management as a unifying core of meaning. Second, "claims management services" had no established and generally accepted meaning which could lead a reader of the text of S4 to suppose that the express language of the definition was to be treated as qualified or coloured by that meaning. Third, to read the definition in S4 in this way would be counter to the scheme and purpose of the CA 2006 [83].

The court also held that the interpretation of S4 of the CA 2006 as covering the LFAs in this case did not produce any absurdity in relation to S58B, which S28 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. Further, the Court held that events subsequent to 2006 were not relevant to the interpretation of S58AA.

Simon Fisher, Costs Lawyer at FOIL member firm **DWF** comments:

'The decision is likely to be relevant only to class actions and high value non-insurance backed actions that require substantial funding to bring/defend claims. Further, it is more relevant to clients seeking to challenge their own LFA than it is for third parties via the Indemnity Principle to challenge their opponents' entitlement to costs.

Creative ways are likely to be found to bring challenges into the fray of inter-partes assessments where the opponent has an LFA. To ensure the information is to hand at conclusion parties should seek details if a litigation funder is backing any other parties. This information can be obtained via seeking security for costs or via requests for further information.

At conclusion, where a costs order has already been made, then by virtue of the Indemnity Principle the paying party may be able to begin a challenge to the solicitors' retainer with a view to finding it unenforceable, with the effect being disallowing the solicitors' entitlement to recover of costs.

In matters where costs orders have not yet been made, it is not too late for a party to seek to vary a LFA/enter into a new agreement, so there is likely to be a limited window of opportunity for any challenges to be made. It is likely that litigation funders will react quickly to restructure their LFAs so there may be a limited opportunity for challenges.

Whilst there has been speculation following this decision by some in the legal industry that it may result in a number of funders exiting the market, due to feasibility of the business model/financial losses, this has been played down by the funders' representative bodies. In a joint statement issued by the International Legal Finance Association and the Association of Litigation Funders of England and Wales, whilst saying they were disappointed by the decision, they went on to say that it "*is not generally expected to impact the economics of legal finance and will not deter our members' willingness to finance meritorious claims. It will only affect how legal finance agreements are structured so that they comply with the regulations and individual financiers will have been considering what if any changes are needed to their own legal finance agreements as a consequence of this decision*.''

Nicola Critchley FOIL President and member of the Costs SFT adds: -

'In September 2015 the Civil Justice Council published a report on Damages Based Agreement reform but none of the 45 recommendations were implemented. Separately Professor Rachael Mulheron (Chair of the CJC WG) and Nicholas Bacon KC were asked by the MoJ to draft the damages Based Agreements Regulations 2019. Those Regulations, which expressly provided that an LFA is not a DBA, were not taken forward. This seems to be an opportune time for the CJC report and draft regulations to be revisited by the government'.