Neutral Citation Number: [2021] EWCA Civ 299

Case No: C3/2020/0060 &C3/2020/0138

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
(THE HON MR JUSTICE ROTH, DR WILLIAM BISHOP
AND PROFESSOR STEPHEN WILKS
[2019 CAT 26 AND 28

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2021

Before :

LORD JUSTICE HENDERSON
LORD JUSTICE SINGH
and
LADY JUSTICE CARR

- -

Between :

(1) PACCAR INC **(2) DAF TRUCKS N.V.** **(3) DAF TRUCKS DEUTSCHLAND GMBH** **(collectively "DAF")**	**Appellants**
- and -	
(1) ROAD HAULAGE ASSOCIATION LIMITED ("RHA") **(2) UK TRUCKS CLAIM LIMITED ("UKTC")**	**Respondents**
and	
THE ASSOCIATION OF LITIGATION FUNDERS OF ENGLAND & WALES ("the ALF")	**Intervener**

AND Claim No: CO/160/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Between :
THE QUEEN on the application of:

(1) PACCAR INC **(2) DAF TRUCKS N.V.** **(3) DAF TRUCKS DEUTSCHLAND GMBH** **(collectively "DAF")**	**Claimants**
- and - **THE COMPETITION APPEAL TRIBUNAL**	**Defendant**
-and- **(1) UK TRUCKS CLAIM LIMITED ("UKTC")** **(2) ROAD HAULAGE ASSOCIATION LIMITED ("RHA")** **(3) MAN SE** **(4) MAN TRUCKS AND BUS AG** **(5) MAN TRUCKS AND BUS DEUTSCHLAND GMBH** **(6) FIAT CHRYSLER AUTOMOBILES N.V.** **(7) CNH INDUSTRIAL N.V.** **(8) IVECO S.P.A** **(9) IVECO MAGIRUS AG** **(10) VOLVO LASTVAGNER AKTIEBOLAG** **(11) DAIMLER AG**	**Interested Parties**
-and- **THE ASSOCIATION OF LITIGATION FUNDERS OF ENGLAND & WALES ("the ALF")**	**Intervener**

………………………

Mr Bankim Thanki QC, Mr Rob Williams QC and Mr David Gregory (instructed by **Travers Smith LLP**) for the **Appellants/Claimants**
Mr Rhodri Thompson QC and Ms Judith Ayling (instructed by **Weightmans LLP**) for **UKTC**
Mr P. J. Kirby QC and Mr David Went (instructed by **Backhouse Jones Solicitors**) for the **RHA**
Mr Max Mallin QC (instructed by **Boies Schiller Flexner (UK) LLP**) for the **ALF,** by written submissions

Hearing dates : 26 and 27 January 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2.00 p.m. on Friday 5th March 2021

Lord Justice Henderson :

Introduction and background

1. This case raises an important issue of general concern to those engaged in the business of litigation funding in England and Wales and their clients. The issue arises in the context of collective proceedings brought before the Competition Appeal Tribunal ("the Tribunal") pursuant to section 47B of the Competition Act 1998 ("CA" or "the Act").

2. The issue, which I will call 'the substantive 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, as would the specific agreements which the Tribunal was asked to approve in the present case.

3. This case also gives rise to a procedural issue, which turns on the scope of the appellate jurisdiction conferred on this court by section 49 of the Act. The Tribunal determined the substantive issue in favour of the applicants for collective proceedings orders ("CPOs") under CA section 47B, and approved (subject to various conditions and amendments) the relevant funding arrangements which were proposed for the initial stages of the proceedings. The DAF parties ("DAF") now wish to challenge the decision of the Tribunal on the substantive issue, but if this court lacks jurisdiction to entertain an appeal on the issue, it is common ground that the challenge can and must be made by way of proceedings for judicial review.

4. In those circumstances, the matter comes before us on applications by DAF for permission to appeal, or alternatively for permission to bring proceedings for judicial review (for which purpose we would sit as a Divisional Court of the Queen's Bench Division), with the substantive hearing to follow in either case if permission is granted.

The substantive issue

5. Over the last thirty years, litigation funding in England and Wales has changed out of all recognition. Third party litigation funding is now a substantial industry which, although driven by commercial motives, is widely acknowledged to play a valuable role in furthering access to justice. Following the recommendations of Sir Rupert Jackson's review of civil litigation costs in 2009, that industry is currently self-regulated, although Parliament enacted provisions in section 28 of the Access to Justice Act 1999 ("AJA 1999") which have never been brought into force but remain on the statute book and, if brought into force, would enable litigation funding agreements ("LFAs") to be regulated by subordinate legislation made by the Lord Chancellor.

6. Other forms of litigation funding have come into existence which, from their inception, have been subject to statutory control. They include (a) conditional fee agreements ("CFAs"), first introduced by section 58 of the Courts and Legal Services Act 1990 ("CLSA 1990"), under which lawyers were permitted in specified circumstances to charge success fees for their litigation and advocacy services; and (b) of particular relevance to the present case, damages-based agreements ("DBAs"), also sometimes called contingency fee agreements, under which (again in specified circumstances) it became permissible for lawyers providing certain types of services to stipulate for remuneration in the form of a share of the damages ultimately recovered by the client.

7. When DBAs were first introduced by section 154 of the Coroners and Justice Act 2009, which inserted a new section 58AA into CLSA 1990, their scope was limited to employment matters. Accordingly, the Damages-Based Agreements Regulations 2010 made by the Lord Chancellor pursuant to section 58AA(4) of CLSA 1990 were confined in their ambit to such matters and had no wider application. However, the limitation to employment matters was removed by section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), which came into force on 19 January 2013. Shortly thereafter, the 2010 Regulations were replaced by the Damages-Based Agreements Regulations 2013 ("the DBA Regulations 2013"), which remain in force today.

8. As amended from 2013 by section 45 of LASPO, section 58AA of CLSA 1990 provides materially as follows:

> "**58AA Damages-based agreements**
>
> (1) A damages-based agreement which satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.
>
> (2) But… a damages-based agreement which does not satisfy those conditions is unenforceable.
>
> (3) For the purposes of this section—
>
> (a) 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 amount of that payment is to be determined by reference to the amount of the financial benefit obtained.
>
> (4) The agreement—
>
> (a) must be in writing;

> (aa) must not relate to proceedings which by virtue of section 58A(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of a description prescribed by the Lord Chancellor;
>
> (b) if regulations so provide, must not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner;
>
> (c) must comply with such other requirements as to its terms and conditions as are prescribed; and
>
> (d) must be made only after the person providing services under the agreement has complied with such requirements (if any) as may be prescribed as to the provision of information.
>
> (5) Regulations under subsection (4) are to be made by the Lord Chancellor and may make different provision in relation to different descriptions of agreements.
>
> …
>
> (7) In this section—
>
> …
>
> "*claims management services*" has the same meaning as in Part 2 of the Compensation Act 2006 (see section 4(2) of that Act)."

9. A DBA is accordingly defined in section 58AA(3)(a) as an agreement between a person providing one of three specified types of services (advocacy, litigation or claims management) and the recipient of those services, which provides for the recipient to make a payment to the provider the amount of which "is to be determined by reference to the amount of the financial benefit obtained". It is the latter aspect of the definition which makes the agreement "damages-based", in the sense that the stipulated remuneration for the services must take the form (broadly speaking) of a share of the damages recovered. That is the critical feature which distinguishes a DBA from a CFA, under which a lawyer may stipulate for a success fee to become payable in specified circumstances, but not for a share of the damages recovered by the client.

10. For present purposes, however, the critical part of the definition lies in the inclusion of "claims management services" in those which may be provided under a DBA. That expression was itself defined by reference to section 4(2) of the Compensation Act 2006, the Preamble to which stated that it was "An Act… to make provision for the regulation of claims management services." By virtue of section 4(1) of the 2006 Act, "A person may not provide regulated claims management services unless – (a) he is an authorised person…". Section 4(2) then states that:

> "In this Part-
>
> …

> (b) "*claims management services*" means advice or other services in relation to the making of a claim,
>
> (c) "*claim*" means a claim for compensation, restitution, repayment or any other remedy or relief in respect of loss or damage or in respect of an obligation, whether the claim is made or could be made-
>
> (i) by way of legal proceedings,
>
> …
>
> (3) For the purposes of this section-
>
> (a) a reference to the provision of services includes, in particular, a reference to-
>
> (i) the provision of financial services or assistance,
>
> …"

It can thus be seen that the definition of "claims management services" in section 4(2)(b) is extended by subsection (3)(a)(i) to include "the provision of financial services or assistance".

11. In general terms, the substantive issue at the heart of the present case is whether a third-party LFA which (as is common) provides for the funder to be remunerated by a share of damages, but not to play any part in the active management or prosecution of the claim, is a DBA within the definition in section 4(2)(b) of the Compensation Act 2006 because the funding provided to the claimant constitutes "the provision of financial services or assistance" and therefore falls within the extended limb of the definition in section 4(3)(a)(i). If the answer to that question is affirmative, it follows that section 58AA of CLSA 1990 would apply so as to render the LFA unenforceable unless it complied with the conditions in subsection (4), including the relevant requirements of the DBA Regulations 2013. It is common ground that the funding agreements with which we are concerned do not comply with those Regulations, and they would therefore be unenforceable as they stand if they are indeed DBAs within the scope of the statutory definition.

12. It is convenient to record at this point that, with effect from 29 November 2018, the definition of "claims management services" in section 58AA(7) was replaced with a cross-reference to the definition of that phrase in section 419A of the Financial Services and Markets Act 2000 ("FSMA"). The amendment took effect in relation to DBAs entered into on or after 1 April 2019. The relevant definition is in substantive terms very similar to that in section 4 of the Compensation Act 2006, as follows:

> "**419A Claims management services**
>
> (1) In this Act "claims management services" means advice or other services in relation to the making of a claim.
>
> (2) In subsection (1) "other services" includes-

(a) financial services or assistance,

…"

It is common ground that the reason for the amendment was the transfer of the regulation of claims management activities from the Ministry of Justice to the Financial Conduct Authority. None of the parties has submitted to us that anything turns on the differences in wording between the statutory definitions of "claims management services" in 2006 and 2018 (when section 419A was inserted into FSMA by section 27(11) of the Financial Guidance and Claims Act 2018). The critical issue upon which we need to focus is therefore the meaning of the phrase as defined by the Compensation Act 2006, when it was first incorporated into section 58AA of CLSA 1990 by the Coroners and Justice Act 2009.

13. I will now describe the circumstances in which the substantive issue comes before us for determination.

Factual background

14. I gratefully incorporate the description of the relevant background given by the Tribunal (Roth J (President) sitting with Dr William Bishop and Professor Stephen Wilks) in its judgment which is now under challenge ([2019] CAT 26) at [1] to [6]:

> "1. By its decision in Case 39824 - *Trucks* adopted on 19 July 2016 (the "Decision"), the European Commission found that five major European truck manufacturing groups had carried out a single continuous infringement of Article 101 of the Treaty on the Functioning of the European Union, by inter alia exchanging information on their future gross prices, over a period of some 14 years between 1997 and 2011. It is convenient to refer to the addressees of the Decision by the shorthand name of the corporate groups to which they belong: DAF, Daimler, Iveco, Volvo/Renault and MAN. Together, they are referred to as original equipment manufacturers or "OEMs".
>
> 2. Two applications have been issued before the Tribunal for a Collective Proceedings Order ("CPO") pursuant to section 47B of the Competition Act 1998 ("CA") in respect of damages claims resulting from what the Commissioner for Competition described as a cartel. The first application is brought by UK Trucks Claim Ltd ("UKTC"), a special purpose vehicle ("SPV") set up to pursue these claims, and was filed on 18 May 2018. The second application is brought by the Road Haulage Association ("RHA"), the well-known trade association of those engaged in the haulage industry. The Respondents to the two applications are addressees of the Decision, but they are not identical. The UKTC application is brought against Iveco and Daimler; the RHA application is against Iveco, MAN and DAF. On 12 December 2018 the Tribunal ordered that the two applications be heard together.

> 3. In each case, several of the addressees of the Decision, although not respondents to the application, have objected to the grant of a CPO, on the basis that they are persons with an interest since they expect that if a CPO is granted they will be subject to additional claims for contribution or indemnity pursuant to rule 39 of the Competition Appeal Tribunal Rules 2015 ("CAT Rules"). The Tribunal therefore allowed DAF, MAN and Volvo/Renault to be heard as objectors to the UKTC application and Daimler and Volvo/Renault to be heard as objectors to the RHA application.
>
> 4. Pursuant to section 47B(5) CA, the Tribunal can only make a CPO if two conditions are satisfied:
>
> (a) the person who brought the proceedings should be authorised to act as the class representative in accordance with section 47B(8); and
>
> (b) the claims are eligible for inclusion in collective proceedings in accordance with section 47B(6).
>
> 5. Pursuant to section 47B(8)(b) CA, the Tribunal may authorise a person to act as class representative only if the Tribunal considers it just and reasonable for them to do so. Pursuant to para 15B of Schedule 4 to the Enterprise Act 2002, rule 78 of the CAT Rules sets out various factors to be considered in that regard. Several of those factors relate to the adequacy of the representative's funding arrangements, both as regards their own costs and their ability to meet the other side's costs.
>
> 6. On 8 May 2019, the Tribunal ruled that in the light of a possible appeal to the Supreme Court in another case concerning a CPO application, *Merricks v MasterCard Inc*, against the judgment of the Court of Appeal that addressed the second of the two statutory conditions (i.e. eligibility of claims), these two applications for a CPO should be adjourned pending the outcome of the application in *Merricks* to the Supreme Court, but that there should be heard as a preliminary issue the question whether as a result of any aspect of the funding arrangements which they have entered into, UKTC and/or the RHA should not be authorised to act as class representative: see [2019] CAT 15."

15. I pause to note that the Supreme Court has recently given its judgment on the appeal in the Merricks case on 11 December 2020: see [2020] UKSC 51. The leading judgment for the majority was delivered by Lord Briggs, with whom Lord Thomas and (before his death on 1 December) Lord Kerr agreed. As Lord Briggs explained, in the introductory section of his judgment:

> "2. The procedure for collective proceedings introduced by the Act applies to claims by two or more persons for damages, money or an injunction in respect of a breach of specified

> provisions of statutory competition law: see sections 47A(2) and 47B(1) of the Act. It enables whole classes of consumers to vindicate their rights to compensation and the large cost of the necessary litigation to be funded, before an expert tribunal, the Competition Appeal Tribunal (CAT), which is given exclusive jurisdiction over collective proceedings. The prospect that the rights of consumers can be vindicated in that way also serves to act as a disincentive to unlawful anti-competitive behaviour of a type likely to harm consumers generally. But collective proceedings may not proceed beyond the issue and service of a claim form without the permission of the CAT in the form of certification by a Collective Proceedings Order ("CPO") under section 47B of the Act...
>
> 3. There are (at least for present purposes) three key features of collective proceedings. The first is that claims by any number of claimants may be pursued on their behalf by a single representative who may, but need not, be a member of the class. The claims need not be identical, and they need not all be against all the defendants, but they must all raise the same, similar or related issues of fact or law. Secondly, the remedy sought may, but need not always, be the award of what are called aggregate damages. This type of damages provides just compensation for the loss suffered by the claimant class as a whole, but the amount need not be computed by reference to an assessment of the amount of damages recoverable by each member of the class individually. Thirdly, the CAT has a discretion as to how aggregate damages (if recovered) are to be distributed among members of the class. Any unclaimed residue of an aggregate award is to be given to a charity specified by the Lord Chancellor, or used to meet the litigation costs and expenses of the representative.
>
> 4. The CAT is given an important screening or gatekeeping role over the pursuit of collective proceedings. First, collective proceedings may not be pursued beyond the issue and service of a claim form without the CAT's permission, in the form of a CPO, for which the representative must apply. The obtaining of a CPO is called certification. Secondly, collective proceedings may be terminated by the CAT at any stage by the revocation of that CPO. Thirdly, the CAT may accede to an application by one or more defendants to strike out collective proceedings if they disclose no reasonable cause of action (or are otherwise abusive) or to an application for defendants' summary judgment, just as in any ordinary civil proceedings."

16. The Supreme Court was divided on the issue of the eligibility of the claims in the Merricks litigation for the making of a CPO. Lord Briggs and the majority held that the claims were eligible, but Lord Sales and Lord Leggatt disagreed. We are not at present concerned with that aspect of the CPO regime, although as the Tribunal noted at [6], in

the passage from its judgment quoted at [14] above, the question of eligibility remains to be determined in the present case now that the Supreme Court has given its judgment in the Merricks case. It is material, however, to note two significant features of collective proceedings under section 47B which were pointed out by Lord Sales and Lord Leggatt in their dissenting judgment at [91], and then amplified at [92] to [97]. The first feature is the provision made in section 47B(11) of the Act for "opt-out collective proceedings", which "means that a person may become a claimant in collective proceedings without taking any affirmative step and, potentially, without even knowing of the existence of the proceedings and the fact that he or she is a claimant in them": see [92]. The second feature is that damages may be recoverable without the need to prove that individual members of the class have suffered loss, it being sufficient to show that loss has been suffered by the class viewed as a whole: see [91] and [95]. Neither of these special features has any parallel in the provisions relating to group actions which have been in force since 2000 in the High Court and the County Court: see CPR rules 19.10 to 19.15 and the associated Practice Direction 19B - Group Litigation.

17. Lord Sales and Lord Leggatt went on to observe, at [98]:

> "A class action procedure which has these features provides a potent means of achieving access to justice for consumers. But it is also capable of being misused. The ability to bring proceedings on behalf of what may be a very large class of persons without obtaining their active consent and to recover damages without the need to show individual loss presents risks of the kind already mentioned, as well as giving rise to substantial administrative burdens and litigation costs. The risk that the enormous leveraging effect which such a class action device creates may be used oppressively or unfairly is exacerbated by the opportunities that it provides for profit. As the Court of Appeal observed in the present case, "the power to bring collective proceedings ... was obviously intended to facilitate a means of redress which could attract and be facilitated by litigation funding": [2019] EWCA Civ 674; [2019] Bus LR 3025, para 60. Those who fund litigation are, for the most part, commercial investors whose dominant interest is naturally to make money on their investment from the fruits of the litigation."

18. Reverting to the present case, the Tribunal recorded at [8] that the opposition to the funding arrangements was advanced in two parts. First, DAF, supported by MAN and Iveco, argued that the applicants' LFAs constituted DBAs for the purposes of the relevant statutory regulations, and were therefore unenforceable and unlawful. Secondly, all of the OEMs, with one exception, advanced arguments about the nature and adequacy of the funding arrangements. The Tribunal then addressed these arguments in turn, beginning with the argument that the funding agreements put in place by the applicants constituted DBAs. The Tribunal's conclusion, at [45], was that section 58AA of CLSA 1990 does not apply to LFAs made with litigation funders. With regard to the critical definition of "claims management services" in section 4 of the

Compensation Act 2006, the core of the Tribunal's reasoning is to be found in [41], where after a full and careful analysis of the legislative context and history it said:

> "We consider that, having regard to the mischief at which this part of the [*Compensation Act*] was directed, Mr Kirby was therefore correct in his submission that the reference in section 4(2) read with section 4(3)(a)… to "the provision of financial services or assistance" "in relation to the making of a claim" is to be interpreted as applying in the context of the management of a claim. This gives effect to the fact that the term employed in the statute, which is the subject of the definition, is "claims management services" and avoids the potential for an undesirable outcome discussed above. Litigation funders, by contrast, are engaged in the funding of a claim, not the management of the making of a claim. On that basis, since litigation funders are not engaged in providing "claims management services", a LFA will not come within the definition of a DBA in section 58AA(3) CLSA."

19. As I have already explained, it was common ground by the time of the hearing before the Tribunal (in June 2019) that the LFAs entered into by UKTC and the RHA with their respective funders would not have complied with the DBA Regulations 2013, had the LFAs been DBAs. Where the proposed collective proceedings are brought on an opt-in basis, it would always be possible, at least in principle, to renegotiate the terms of a funding agreement to make them compliant with the DBA Regulations 2013, were it necessary to do so. That option is not available, however, in relation to opt-out collective proceedings, because CA section 47C(8) provides that:

> "A damages-based agreement is unenforceable if it relates to opt-out collective proceedings."

It is accordingly relevant to note that, although the RHA made its application for a CPO on an opt-in basis only, the same was not true of UKTC, which made its application on both an opt-in and opt-out basis. UKTC's funder was Yarcombe Limited ("Yarcombe"), with which it had entered into two separate LFAs to cover the alternative scenarios of it being granted a CPO on an opt-in or opt-out basis.

DAF's application for permission to appeal, and the procedural issue

20. The Tribunal handed down its judgment on the preliminary issue on 28 October 2019. No separate order was made to give effect to the judgment, but the Tribunal helpfully summarised its unanimous conclusions at [110]. The first of those conclusions was that:

> "a litigation funding agreement in the form of the RHA and UKTC LFAs, whereby the consideration paid to the funder is determined by reference to the amount of damages recovered in the litigation being funded, is not a DBA within the terms of s.58AA CLSA."

The remaining conclusions recorded that the funding arrangements entered into by the RHA and UKTC with their respective funders and after the event ("ATE") insurers, as

amended following the hearing of the preliminary issue, and subject to certain conditions relating to ATE insurance, did not provide a ground for refusing to authorise each of them as a class representative pursuant to section 47B of the Act.

21. On 18 November 2019, DAF filed an application for permission to appeal to this court in relation to the DBA issue. The application was not supported by any of the other OEMs. Written responses to the application were filed by UKTC and the RHA, and the Tribunal gave its ruling (without an oral hearing) on 17 December 2019 ("the PTA ruling"): see [2019] CAT 28.

22. As DAF recognised, its application raised two threshold issues, the first of which was whether the Tribunal had jurisdiction to grant permission to appeal under section 49 of the Act. The second issue, which also turned on the interpretation of section 49, was whether DAF had standing with regard to the application by UKTC, to which DAF was not a respondent.

23. So far as relevant, section 49 of the Act (as amended and as now in force) provides as follows:

> "**49. Further appeals from the Tribunal**
>
> (1) An appeal lies to the appropriate court-
>
> (a) from a decision of the Tribunal as to the amount of a penalty under section 36; and
>
> (b) …
>
> (c) on a point of law arising from any other decision of the Tribunal on an appeal under section 46 or 47.
>
> (1A) An appeal lies to the appropriate court on a point of law arising from a decision of the Tribunal in proceedings under section 47A or in collective proceedings-
>
> (a) as to the award of damages or other sum (other than a decision on costs or expenses), or
>
> (b) as to the grant of an injunction.
>
> (1B) An appeal lies to the appropriate court from a decision of the Tribunal in proceedings under section 47A or in collective proceedings as to the amount of an award of damages or other sum (other than the amount of costs or expenses).
>
> …
>
> (2) An appeal under this section-
>
> (a) except as provided by subsection (2A), may be brought by a party to the proceedings before the Tribunal or by a person who has a sufficient interest in the matter; and

> (b) requires the permission of the Tribunal or the appropriate court.
>
> (2A) An appeal from a decision of the Tribunal in respect of a claim included in collective proceedings may be brought only by the representative in those proceedings or by a defendant to that claim.
>
> (3) In this section "the appropriate court" means the Court of Appeal…"

24. As the Tribunal explained in the PTA ruling at [8], collective proceedings are brought pursuant to section 47B of the Act, whereas section 47A concerns individual (i.e. non-collective) claims before the Tribunal for damages or an injunction, and sections 46 and 47 concern appeals challenging a decision of the Competition and Markets Authority. The Tribunal added, at [9]:

> "Of course, there is no question of excluding further judicial scrutiny of any decision of the Tribunal. Where a decision of the Tribunal is not susceptible to appeal under s.49 CA, it may be challenged by proceedings for judicial review."

25. The Tribunal then considered the jurisdiction issue, concluding at [22] that there was "no jurisdiction to grant permission to appeal the decision on the DBA argument". If that conclusion is correct, it follows (and is not in dispute) that this court would likewise lack jurisdiction to grant permission to appeal under section 49(2)(b), and that the decision could only be challenged by way of judicial review.

26. In case it was wrong on the question of jurisdiction, and because the other issues raised by DAF's application had been fully addressed in the parties' written submissions, the Tribunal went on to express its views on them. On the question of standing, it concluded that DAF had standing to pursue an appeal: see [23] to [27]. On the question of permission to appeal, the Tribunal said at [28] that, had there been jurisdiction, permission would have been refused.

27. One of the grounds relied on by DAF for seeking permission to appeal was that a conflict of first instance authority had allegedly arisen, because in a case heard and decided in the High Court while the Tribunal's judgment on the substantive issue was pending, the court was said to have reached the opposite conclusion on that issue. The case in question was <u>Meadowside Developments Ltd v 12 – 18 Hill Street Management Company Ltd</u> [2019] EWHC 2651 (TCC), [2020] Bus LR 917, which was heard by Mr Adam Constable QC sitting as a Deputy High Court Judge on 25 September 2019, and judgment in which was delivered on 10 October 2019. The Tribunal considered the <u>Meadowside</u> judgment at [31] to [35] of the PTA decision, explaining why in its view it was "entirely consistent" with its own judgment, so no question of conflict at first instance arose. In due course, I will need to return to the <u>Meadowside</u> case, but I can say at once that the Tribunal was in my view correct to regard the funding agreement in that case as one which came within the statutory definition of a DBA. That conclusion, however, turned on the facts of the case, which were very different from the typical case of an independent third-party litigation funder: see [34].

28. Before leaving the PTA decision, I would draw attention to what the Tribunal said about the potential implications of its decision:

> "36. Secondly, DAF relies on the significant implications of the Tribunal's decision for the potential parties in these collective proceedings or directly affected by it. That of course applies to most if not all substantial cases. It is not a good reason for giving permission to pursue an appeal which has no real chance of success.
>
> 37. Thirdly, DAF states that the legal issue is of wide importance not only for litigation funding but for claims management regulation. We fully accept that if we had decided that what is apparently the most commonly used type of LFA fell within the statutory definition of a DBA and was unenforceable, that would indeed have had wide-ranging implications. However, we reached the opposite conclusion, and thus a result consistent with the views and assumptions of other commentators and which does not disturb the existing practice of litigation funding. If an appeal against that conclusion does not stand a real chance of success, we do not see that this provides a compelling reason for the appeal to be heard."

29. In the light of the Tribunal's decision on the question of jurisdiction, DAF now pursues a two-pronged challenge to the decision of the Tribunal on the substantive issue. By two separate appellant's notices filed on 10 January 2020, DAF seeks permission to appeal from this court. In order to protect its position, however, DAF has also begun proceedings for judicial review by a claim form issued on 16 January 2020, naming the Tribunal as the sole defendant, and UKTC and the RHA (together with the other OEMs) as interested parties. The remedy sought in the judicial review proceedings is that the judgment of the Tribunal on the DBA issue be quashed, and declarations made that each of the relevant LFAs are DBAs for the purpose of section 58AA of CLSA 1990, and as such are unenforceable.

30. On 28 April 2020, Patten LJ directed that:

> "The application for permission to appeal and the application by DAF for permission to seek judicial review will be adjourned to an oral rolled-up hearing before the full Court which will also sit as a Divisional Court for the purpose of considering the application for permission to seek judicial review. The hearing will (so far as may be necessary) determine the issue of jurisdiction and if permission is granted the appeal or application for judicial review (as the case may be) will follow."

31. Accordingly, the matter came on for hearing before us sitting both as a constitution of the Court of Appeal and (at first instance) as a Divisional Court of the Queen's Bench Division. In their written submissions, the parties had dealt fully with the jurisdiction issue as well as the substantive issue, and we heard argument on both together (although, in the event, the parties were content to rest on their written submissions so far as the jurisdiction issue was concerned). The parties were represented by the same

leading counsel as had appeared before the Tribunal: Mr Bankim Thanki QC for DAF, Mr P.J. Kirby QC for the RHA, and Mr Rhodri Thompson QC for UKTC.

32. At a relatively late stage, an application was made by the Association of Litigation Funders of England & Wales ("the ALF") for permission to intervene in DAF's applications by way of written submissions only. The application was supported by a witness statement of Susan Dunn, who is the chair of the ALF. On 21 December 2020, I granted permission for the ALF to intervene, and for DAF to file a written response to the ALF's submissions if it wished to do so. Pursuant to that order, the ALF filed written submissions by Mr Max Mallin QC on 29 December 2020, to which DAF responded on 12 January 2021.

33. Since the question of jurisdiction logically comes first, and since its resolution will determine on what basis we have to decide the substantive issue, I will consider it first.

The jurisdiction issue

34. It may at first sight seem surprising that there should be any room for doubt about the availability of a right of appeal to this court (subject to permission being granted) from a decision of the Tribunal on a question of law which is germane to the making of a CPO under section 47B of the Act. But the question must turn on the wording and the correct interpretation of section 49, which specifies the conditions under which a further appeal may lie from a decision of the Tribunal. I have already set out the relevant provisions of section 49 at [23] above.

35. It will be apparent that there are only three references to "collective proceedings" in the relevant parts of section 49, and that none of them is obviously applicable to the decision of the Tribunal which DAF now wishes to challenge. The first reference is in subsection (1A), by which an appeal lies to this court on a point of law arising from a decision of the Tribunal in collective proceedings, but only "as to the award of damages or other sum… or… as to the grant of an injunction". It is not easy to see how the decision of the Tribunal on the substantive issue could properly be regarded as falling under either of those headings, as it bears no direct relation to either the award of damages or the grant of an injunction. The second reference is in subsection (1B), which confers a similar right of appeal "as to the *amount* of an award of damages or other sum". That provision appears to be limited to issues of quantum. The third reference is in subsection (2A), which is concerned with who may bring an appeal in respect of a claim included in collective proceedings, but which does not itself confer any right of appeal. So it throws no light on the present problem. For completeness, I should note that there is another reference to collective proceedings in subsection (1D), but that is a definition provision, which again has no bearing on the present case.

36. Before turning to the authorities and the arguments, I will set out the main provisions of section 47B itself, because the rights of appeal granted by section 49 in its present form need to be read in the context of the provisions governing collective proceedings which were first introduced into the Act by amendment in 2015. Section 47B also needs to be read in conjunction with section 47A, which has for many years enabled individual claims for damages in follow-on (and, later, in stand-alone) claims to be brought before the Tribunal.

37. Section 47B provides:

"**Collective proceedings before the Tribunal**

(1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies ("collective proceedings").

(2) Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings.

…

(4) Collective proceedings may be continued only if the Tribunal makes a collective proceedings order.

(5) The Tribunal may make a collective proceedings order only-

(a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8), and

(b) in respect of claims which are eligible for inclusion in collective proceedings.

(6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.

(7) A collective proceedings order must include the following matters-

(a) authorisation of the person who brought the proceedings to act as the representative in those proceedings,

(b) description of a class of persons whose claims are eligible for inclusion in the proceedings, and

(c) specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings (see subsections (10) and (11)).

(8) the Tribunal may authorise a person to act as the representative in the collective proceedings-

(a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a "class member"), but

(b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings.

> (9) The Tribunal may vary or revoke a collective proceedings order at any time.
>
> …
>
> (12) Where the Tribunal gives a judgment or makes an order in collective proceedings, the judgment or order is binding on all represented persons, except as otherwise specified."

Existing authority

38. There are two decisions of this court in which a similar issue has been considered. In each of them, the leading judgment was delivered by Patten LJ. The first is Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd [2009] EWCA Civ 647, [2010] Bus LR 28 ("Enron"). The second concerned a preliminary issue in the Merricks litigation, seeking determination of the question whether this court had jurisdiction to entertain the proposed representative's appeal from the refusal of the Tribunal to make a CPO: see Merricks v Mastercard Inc and others [2018] EWCA Civ 2527, [2019] Bus LR 1287 ("Merricks (Jurisdiction)").

39. In Merricks (Jurisdiction), Patten LJ explained at [22] how the provisions of CA section 49 "have changed over time as the jurisdiction of the Tribunal has increased":

> "As originally enacted, section 49(1) granted a general right of appeal "on a point of law arising from a decision of an appeal tribunal" or from a decision as to the amount of a penalty. Between July 2004 and September 2015 (in the period pre-dating the introduction of collective proceedings) section 49(1) was in the following terms:
>
> "Further appeals
>
> (1) An appeal lies to the appropriate court –
>
> (a) from a decision of the tribunal as to the amount of a penalty under section 36;
>
> (b) from a decision of the tribunal as to the award of damages or other sum in respect of a claim made in proceedings under section 47A or included in proceedings under section 47B (other than a decision on costs or expenses) or as to the amount of any such damages or other sum; and
>
> (c) on a point of law arising from any other decision of the tribunal on an appeal under section 46 or 47.
>
> …"

40. The issue in Enron, when section 49(1) was in the intermediate form described by Patten LJ, was whether this court had jurisdiction to hear an appeal against the refusal

of the Tribunal to strike out a claim for damages brought by an individual claimant under section 47A of the Act. It was conceded by counsel for the claimant (Mr Beard) that a decision striking out the claim would have been a decision "as to the award of damages … in respect of a claim made in proceedings under section 47A" within the meaning of section 49(1)(b) as it then stood, because such a decision would amount to a rejection of the claim. In deciding that this court also had jurisdiction to entertain an appeal from the refusal of such an application, Patten LJ reasoned as follows:

> "23. The question is whether the rejection of a rule 40 application to strike out a claim is a decision "as to the award of damages or other sum" under s 47A. Mr Beard accepts that a decision to strike out such a claim would be a decision as to the award of damages because it would amount to a rejection of the claim. But a refusal to strike out does no more than to leave the pleaded claim intact and to allow it to proceed to an adjudication at a full hearing. He therefore submits it is not a decision as to the award of damages because it is not determinative of the claim.
>
> 24. I think that this is too literal an approach to the construction of section 49(1). The reference in it to a decision of the tribunal "as to the award of damages or other sum in respect of a claim made in proceedings under section 47A" is simply descriptive of the type of relief available in such claims. It is not in my view intended to limit the disappointed party's right of appeal to decisions of the tribunal either awarding or refusing an award of damages following a full hearing. As mentioned earlier, Mr Beard accepts that the wording is apt to include an interlocutory determination under rule 40 that a section 47A claim to damages should be struck out and it seems to me that that concession is rightly made. However, it is difficult to believe that Parliament intended an unsuccessful claimant to be able to appeal against the dismissal of his claim after a full hearing but not to do so against its dismissal under rule 40. Once one accepts that the wording of section 49(1) is wide enough to cover a rule 40 determination against the viability of the claim it is hard to identify any linguistic or policy barrier to the inclusion of a decision to the opposite effect. In my view, the language of the subsection covers both."

The other two members of the court, Carnwath and Jacobs LJJ, agreed with Patten LJ on the substantive disposal of the appeal, but added nothing on the issue of jurisdiction: see [63] and [64].

41. There were two strands to the reasoning of Patten LJ in Enron. The first strand was that the wording of section 49(1)(b) was "simply descriptive of the type of relief available in such claims." The wording was therefore broad enough to encompass decisions made at an interlocutory stage which had the effect of dismissing the claim to an award of damages. The second strand was that a decision to the opposite effect, which would allow the pleaded claim to proceed to trial, should not be treated differently, because Parliament could not have intended to draw a distinction based on the outcome of an application to strike out the claim. It was enough (although Patten LJ did not use this

precise terminology) that the application to strike out was potentially dispositive of the claim, so an appeal should lie to this court whichever way it was determined.

42. The issue in Merricks (Jurisdiction) was much closer to the present case, because it involved the application of section 49 in its modern form to a refusal by the Tribunal to make a CPO under section 47B(4) of the Act. Permission to appeal was refused by the Tribunal, on the basis that its refusal to grant a CPO was not a decision "as to the award of damages" within the meaning of section 49(1A)(a) of the Act. As in the present case, the claimant then renewed his application for permission to appeal to this court, and as a precaution also began judicial review proceedings on identical grounds. The matter was dealt with by this court as a preliminary issue. The decision of the court was that it did have jurisdiction to entertain the appeal.

43. The basis upon which the Tribunal had refused Mr Merricks' application for a CPO was that, in its view, the claims failed to satisfy the test of being "eligible for inclusion in collective proceedings": see section 47B(5)(b) and (6). The main argument advanced by Mastercard against the existence of a right of appeal to this court was that the wording of section 49(1A)(a) does not extend to a decision refusing to make a CPO, because the effect of such a refusal is to leave the individual claims under section 47A intact and it does not therefore bar the claim to an award of damages. This argument was accepted by the Tribunal, as Patten LJ explained at [21]. In its decision refusing permission to appeal, the Tribunal had said:

> "14. The introduction of a regime for collective proceedings (sections 47B-47C) and for collective settlements (sections 49A-49B) involved major changes to the CA. It appears indisputable that the novel form of decision by the Tribunal making or refusing an order approving a collective settlement under sections 49A(1) or 49B(1) is not susceptible to appeal, although such a decision may undoubtedly be very significant for the parties. Having regard to the structure and framing of the reformulated section 49 CA, we consider that if the legislature had intended that the novel form of decision by the Tribunal making or refusing a CPO should be subject to appeal, the section would have included express provision enabling an appeal to the appropriate court from a decision as to the grant of a collective proceedings order."

44. The reasoning of the Tribunal was, however, rejected by Patten LJ. After quoting the relevant paragraphs from his earlier judgment in the Enron case, Patten LJ continued in a passage which I need to set out in full:

> "24. What is now section 49(1A) adopts much of the terminology used in section 49 prior to the amendments made by [*the Consumer Rights Act 2015*]. The differences are that appeals on quantum are now dealt with separately in section 49(1B) and liability in stand-alone claims in section 49(1C). But section 49(1A) continues to use the phrase "a decision of the Tribunal as to the award of damages" and there is nothing in the structure or terminology of section 49(1A) which suggests that it was intended to be given a more restricted meaning. What has

changed is the inclusion in the opening words of section 49(1A) of a reference to collective proceedings so that the words in dispute now govern both section 47A and collective proceedings and must be given effect accordingly.

25. The concession by Mr Hoskins QC on behalf of the defendants that section 49(1A)(a) would extend to both the grant or refusal of an application to strike out is necessitated by the decision in the *Enron Coal Services Ltd* case [2010] Bus LR 28. But that decision, he submits, is limited to saying that a "decision as to the award of damages" can include a strike-out decision because that involves a determination of the viability of the claim. A decision whether or not to grant a CPO is purely procedural in character and, as the Tribunal accepted, does not bar individual section 47A claims. It merely determines whether or not those claims should proceed individually or on a collective basis.

26. I accept, of course, that the court in the *Enron Coal Services Ltd* case … was only concerned to decide whether section 49(1)(b) as it then was extended to a decision not to strike out a section 47A claim. It was not necessary in that case to decide whether the right of appeal extended to any interlocutory decision. A strike-out decision, whether positive or negative, is a decision on the arguability of the claim and must be a decision as to the award of damages.

27. The present case is said to be of a different kind because it does not address the viability of the underlying claims. But it is, in my view, none the less a decision in collective proceedings as to the award of damages within the meaning of section 49(1A)(a). The refusal of a CPO is a determination by the Tribunal that the eligibility criteria have not been met and the proposed representative is not therefore entitled to seek an aggregate award of damages under section 47C(2) which is a remedy unique to collective proceedings. As explained earlier in this judgment, this class remedy has been introduced by legislation as part of the collective proceedings regime in order to address some of the difficulties inherent in the bringing of individual claims and, as the experience in comparable jurisdictions has shown, is likely to be a critical component for addressing section 47A claims in the collective proceedings regime. As the Tribunal itself observed in para 91 of its CPO decision, a refusal of a CPO is likely to prevent individual members of the represented class who have suffered loss from obtaining any compensation. It is therefore the end of the road for a class action of this kind and, as such, a decision as to the award of section 47C(2) damages. The fact that class members are left with their individual claims is nothing to the point. The disputed words in section 49(1A)(a) have now to be considered

> and construed in the light of the addition to the Tribunal's jurisdiction of collective proceedings and in a way which accommodates the introduction of collective proceedings and the particular remedies available in them. It is not therefore necessary for us to decide whether Ms Demetriou [*counsel for Mr Merricks*] is right in her wider submission that section 49(1A)(a) applies (as it originally did) to any decision of the Tribunal. For the reasons I have given, it does operate to provide a right of appeal on a point of law arising from the section 47B(4) decision in this case."

45. Patten LJ therefore decided the issue on the basis that the refusal by the Tribunal to make a CPO would in practice be "the end of the road for a class action of this kind", with the result that it was "a decision as to the award of section 47C(2) damages." So viewed, the case fell within the principle of the Enron case that "a decision as to the award of damages" can include any decision as to whether such a claim may proceed. This approach was endorsed by Coulson LJ in his short concurring judgment, at [29]:

> "I agree with Patten LJ that the Court of Appeal has jurisdiction to determine this appeal. As he explains in paragraph 27 above, the decision not to grant a CPO is a decision as to the award of damages within the meaning of section 49(1A)(a) because it denies the unique remedy of an aggregate award of damages under section 47C(2). It is not merely procedural in character."

46. The third member of the court, Hamblen LJ, agreed with both judgments: see [30].

The reasoning of the Tribunal

47. The Tribunal dealt with the question of jurisdiction in the PTA decision at [10] to [22]. After describing the earlier decisions of this court in Enron and Merricks (Jurisdiction), the Tribunal considered and rejected an argument by DAF that the position in the present case satisfied the criterion set out in the latter case because the decision on the DBA issue "concerns whether the applicant may continue the action and so pursue an award of damages in collective proceedings". The Tribunal's main reasons for rejecting this submission were stated by it as follows, at [18]:

> "As a matter of principle, a decision refusing to authorise a proposed class representative, unlike a decision that the claims are not eligible for collective proceedings, does not mean that the collective proceedings cannot be pursued. On the contrary, where such a decision concerns the nature of the proposed representative (e.g. because of a potential conflict of interest, or because the plan it put forward for the conduct of the proceedings was unsatisfactory), there is obviously scope for an alternative class representative to be proposed. More specifically, in the present case, if we had held that the current funding arrangements of both UKTC and the RHA constituted DBAs, the consequence would have been that UKTC and the RHA could not be authorised as class representatives so long as they relied on such a basis to fund the proceedings. But there

> would obviously have been scope for them then to put forward an alternative basis of funding, e.g. whereby the third party funder is rewarded not by a percentage of damages recovered but by a multiple of its investment. Indeed, the determination of the second part of the argument involved in the preliminary issue … in favour of UKTC and the RHA, against which no OEM seeks to appeal, was dependent in each case on the applicant making certain amendments to its funding arrangements, most significantly in the case of UKTC. As the RHA states in its response to this application by DAF, if the Tribunal had determined the DBA issue in DAF's favour, "the RHA could simply have entered into a compliant LFA with its litigation funder." A decision accepting the DBA argument would therefore not prevent the award of aggregate damages or the pursuit of collective proceedings by victims of the so-called "Trucks cartel" on an opt-out basis."

48. The Tribunal then considered DAF's alternative, broader, submission that had been left open by Patten LJ in Merricks (Jurisdiction) at [27], to the effect that the language of section 49(1A)(a) is purely descriptive and does not limit the scope of the subsection. This submission was in turn rejected by the Tribunal. As it explained, at [20]:

> "In our judgment, s. 49(1A) CA, when considered in the context of the section as a whole, cannot be read as giving a broad right to appeal on a point of law against any decision made in collective proceedings. S.49 CA is the statutory provision concerning all further appeals from the Tribunal. It establishes, in effect, a hierarchy of the different kinds of Tribunal decision that are susceptible to appeal:
>
> (1) a decision concerning *the amount* of a penalty (on appeal from the CMA) or *the amount* of an award of damages or other sum (apart from costs or expenses), whether in ordinary proceedings under s. 47A or collective proceedings under s. 47B, may be appealed on any ground: s. 49(1)(a) and (1B);
>
> (2) any other decision on an appeal under ss. 46 or 47 may be appealed on a point of law: s. 49(1)(c);
>
> (3) a decision in proceedings for damages or an injunction (whether ordinary proceedings under s. 47A or collective proceedings under s. 47B) as to the award of damages or other sum (apart from costs or expenses), or as to the grant of an injunction, may be appealed on a point of law: s. 49(1A). In a stand-alone claim, that will include a point of law arising from a finding by the Tribunal as to an infringement of competition law: s. 49(1C)."

49. The Tribunal continued, at [21]:

> "The alternative construction put forward by DAF involves interpreting s. 49(1A) as if it had the same effect as s. 49(1)(c), and thus merging categories (3) and (2) above. It would mean that the additional language in the statute at s. 49(1A)(a) and (b) was entirely superfluous. That would be contrary to the presumption against surplussage that is an established principle of statutory construction: see *Bennion on Statutory Interpretation* (7th edn, 2017), para 21.2. We cannot accept that the additional language of (a) and (b) was included merely as descriptive of the proceedings involved: there is no similarly descriptive language in s. 49(1), as regards either the proceedings in which a penalty may be imposed under s. 36 or appeals under ss. 46 and 47. This would infer a different style of drafting for two immediately adjacent subsections in the same statutory provision. Moreover, the parallel language used in the following s. 49(1B), ("as to the amount of an award of damages...") is clearly not descriptive but substantively prescribes the form of decision that can be appealed on fact as well as law. Nor can we accept DAF's argument that unless this wider interpretation is adopted, there is no coherent way in which s. 49(1A) can operate. The Court of Appeal in *Merricks* articulated and adopted a narrower interpretation which, with respect, is entirely coherent."

50. The Tribunal accordingly concluded that it had no jurisdiction to grant permission to appeal.

Submissions

51. In its written submissions, DAF argues that the Tribunal was wrong to reject the two ways in which it had put its case on the jurisdiction issue. On the narrower interpretation of section 49(1A), the Tribunal erred in drawing a distinction between a decision that the proposed claims were not eligible for inclusion in collective proceedings, which would admittedly have grounded a right of appeal to this court, and a decision refusing to authorise a proposed class representative, on the basis that a decision of the latter type would not prevent the collective proceedings from continuing. DAF submits that under section 47B(5), a decision to grant a CPO depends on both statutory criteria being satisfied, that is to say (1) the representative must be a proper person to be authorised, and (2) the claims must be eligible for inclusion in collective proceedings. The Tribunal's conclusion that a statutory right of appeal applies to a decision that the second condition is not met, but that it does not apply to a decision that the first condition is not met, is both arbitrary and artificial. Each condition is equally essential to the grant of a CPO, and Parliament cannot have intended different appeal regimes to apply depending upon which condition was in issue.

52. As to the wider interpretation, DAF finds support in the judgment of Patten LJ in Enron at [24] where he described the words "decision as to the award of damages", in what was then section 49(1)(b), as "simply descriptive of the type of relief available in such claims". The objection that this interpretation renders some of the language in section 49(1A) redundant is said to carry little weight, because the Tribunal failed to recognise that its own interpretation introduces inconsistency and incoherence into the statutory

scheme. More generally, Parliament cannot have intended to enact a patchwork scheme under which certain interlocutory decisions can be challenged by a right of appeal, but others can only be challenged by a claim for judicial review.

53. The RHA submits that the Tribunal came to the right conclusion on this issue, essentially for the reasons which it gave. There is a clear distinction between decisions that are inherently dispositive of an action, and decisions whose effect may be dispositive depending on the circumstances. Nor is it right to say that Parliament cannot have intended a patchwork scheme, because Parliament clearly did intend that only certain decisions of the Tribunal in collective proceedings should be subject to the statutory right of appeal. The inevitable consequence of this is that decisions falling outside the scope of section 49 can only be challenged by way of judicial review.

Discussion

54. For the reasons which follow, I consider that the Tribunal came to the right conclusion on this issue.

55. It is convenient to begin with the wide interpretation of section 49(1A), which would treat the words "as to the awards of damages" as purely descriptive of the proceedings in which the decision to be appealed is made. On that approach, an appeal would lie to this court on any point of law arising from any decision of the Tribunal in collective proceedings which have as their object an award of damages, regardless of whether the decision in question determined (or potentially determined) the entitlement of the claimants to such an award. It may be said that such an approach would fit in well with the language of section 47A itself, which provides in subsection (3) that the kinds of claim which may be brought by an individual claimant under the section are:

> "(a) a claim for damages;
>
> (b) any other claim for a sum of money;
>
> (c) in proceedings in England and Wales or Northern Ireland, a claim for an injunction."

The language of section 49(1A)(a) should be read, on this approach, as reflecting the wording of section 47A(3)(a) and (b), but excluding a right of appeal from decisions on costs or expenses, while section 49(1A)(b) reflects the wording of section 47A(3)(c). The need to exclude appeals on costs may help to explain why the drafter of section 49(1A) chose to deal separately with the three kinds of claim which may be brought either under 47A or in collective proceedings. Furthermore, the approach does in my view gain some support from the first strand of the reasoning of Patten LJ in the Enron case, although it was not the basis upon which he ultimately decided the question there in issue.

56. The descriptive approach to the interpretation of section 49(1A) therefore has some attraction, but (in agreement with the Tribunal) I do not think it can be accepted. The fundamental problem, to my mind, is that when the subsection is read in the context of section 49 as a whole, the words "as to the award of damages" can only be read as descriptive of the type of *decision* from which an appeal may be brought, and not as a description of the type of *proceedings* in which the decision is made. As a matter of

grammar, the words "as to the award of damages" must qualify the word "decision" in the opening limb of the subsection, and not the word "proceedings". Had the drafter intended the words to be merely descriptive of the relevant proceedings, one would expect him to have said "for the award of damages" and "for an injunction", as in section 47A(3) itself, rather than "as to" the award of damages or the grant of an injunction. Conversely, the language actually used is entirely apt to describe the nature of a decision from which an appeal may be brought. Moreover, had the intention merely been to describe the nature of the relevant proceedings, the words "as to the award of damages or other sum" and "as to the grant of an injunction" in paragraphs (a) and (b) of subsection (1A) would appear to be wholly superfluous, as the Tribunal rightly pointed out in the PTA decision at [21].

57. Furthermore, as the Tribunal again rightly pointed out (ibid.), the similar language used in subsection (1B) in relation to appeals on quantum "is clearly not descriptive but substantively prescribes the form of decision that can be appealed on fact as well as law". As a matter of grammar, it is clear beyond argument that in subsection (1B) the words "as to the amount of an award of damages or other sum" must qualify "decision", not "proceedings".

58. It remains to consider whether the Tribunal was also right to reject DAF's narrower argument based on what I consider to be the correct construction of section 49(1A). Was the Tribunal's judgment on the DBA issue a "decision… as to the amount of damages" within the meaning of section 49(1A)(a), in the same way as a decision on the eligibility of the claims for inclusion in collective proceedings was held to be in Merricks (Jurisdiction)? The Tribunal's main reasons for rejecting the analogy are contained in the PTA ruling at [18], quoted at [47] above. In the Tribunal's view, a decision refusing to authorise a proposed class representative is unlike a decision on the eligibility of claims, because it "does not mean that the collective procedure cannot be pursued". As the Tribunal explained (ibid.), if it had held that the current funding arrangements of UKTC and the RHA constituted DBAs, "the consequence would have been that [*they*] could not be authorised as class representatives so long as they relied on such a basis to fund the proceedings." Nevertheless, an alternative basis of funding could then have been proposed which would have complied with the relevant requirements of the DBA Regulations 2013, and UKTC could have decided to proceed without its alternative opt-out funding model (which on this hypothesis would have been rendered unenforceable by section 47C(8) of the Act: see [19] above). Either way, the important point is that the decision would not for all practical purposes have been the end of the road, thus barring the recovery of aggregate damages by victims of the cartel. Nor would the pursuit of claims on an opt-out basis necessarily be precluded, because it would always be open to UKTC to maintain its alternative funding model by adopting a form of LFA which was not damages-based.

59. I do not find this an easy question. If the effect of a ruling in favour of DAF on the DBA issue would have amounted to a final determination by the Tribunal that it could not authorise UKTC and the RHA to act as representatives, I would see much force in DAF's argument that this would have been the end of the road as matters then stood, and that there would then be no rational basis to distinguish the position from a decision that the eligibility condition was not satisfied. But approval of the proposed funding arrangements is only one part (albeit an important part) of the matters which the Tribunal has to consider in forming its judgment whether it is "just and reasonable" for

the proposed representative to act as such, and if this were the only objection to the approval of UKTC and the RHA there is in my view every reason to suppose that an acceptable way of dealing with the problem would have been found. That was clearly the view of the Tribunal, which had considered and dealt with other objections to the proposed funding arrangements in the course of and after the hearing, without any of them proving insuperable. On a question of that sort, we should in my view be very slow to differ from the Tribunal's conclusion that a decision in favour of DAF on the DBA issue would not have marked the end of the road for the potential claimants in the collective proceedings, and (by inference) that a solution would probably have been found which would have enabled them to continue with modified funding arrangements which the Tribunal would be able to approve. On that basis, the decision would not have fallen within the principle established by the Enron and Merricks (Jurisdiction) cases, and there would be no other basis (the wider argument having been rejected) for treating the decision as being one "as to the award of damages". On the contrary, the common sense view of the matter is that the decision would have been an interim ruling on an important matter of principle which was relevant to (but not decisive of) the authorisation of the two applicants as appropriate persons to act as representatives in the collective proceedings.

60. For these reasons, I would conclude, if the other members of the court agree, that the applications for permission to appeal must be dismissed for lack of jurisdiction. It would then follow that DAF's challenge to the Tribunal's decision on the substantive issue must be determined in the parallel judicial review proceedings, to which I will now turn.

The substantive issue

61. I have already explained in the introductory section of this judgment how the substantive issue arises, and the critical issue of statutory construction upon which it turns, namely the meaning of the definition of "claims management services" in section 4(2) of the Compensation Act 2006. That definition was imported by Parliament into the definition of a "damages-based agreement" in section 58AA of CLSA 1990, when DBAs were first introduced by section 154 of the Coroners and Justice Act 2009 (although then limited to employment matters): see [7] and [8] above.

62. The terms of the definition in section 4(2) of the 2006 Act are set out at [9] above. By way of summary, "claims management services" are defined in section 4(2)(b) as meaning "advice or other services in relation to the making of a claim". The word "claim" is then very widely defined in section 4(2)(c), while subsection (3)(a)(i) states that, for the purposes of section 4, "a reference to the provision of services includes, in particular, a reference to…. the provision of financial services or assistance".

63. Although the definition of claims management services in section 4(2) of the 2006 Act was not imported into section 58AA of CLSA 1990 until the introduction of the latter section in 2009, the meaning of the phrase must be the same as it was when first enacted in section 4(2). The wording of section 58AA(7) does not modify the original meaning in any way, but simply incorporates it by reference from its original context in the 2006 Act. Nor could any modification of the original meaning have been brought about by section 154 of the Coroners and Justice Act 2009, which inserted the new section 58AA into CLSA 1990. The introduction of DBAs was one of a number of miscellaneous provisions made by the 2009 Act, the long title of which relevantly described its

purpose as being "to make provision… about payments for legal services provided in connection with employment matters". Section 154 itself clearly stated that CLSA 1990 was amended by insertion of section 58AA, the text of which was then set out. The relevant part of the explanatory notes to the 2009 Act simply said that:

> "Subsection (7) defines the terms "payment" and "claims management services" for the purposes of the new section 58AA."

64. It follows, in my judgment, that the relevant search must be for the meaning of the phrase on its first enactment in section 4(2) of the Compensation Act 2006.

Principles of statutory construction

65. The task upon which the court is engaged when construing a statute was expressed with typical clarity by Lord Nicholls of Birkenhead in R v Secretary of State for the Environment, Transport and the Regions, *Ex parte* Spath Holme Limited [2001] 2 AC 349 at 396:

> "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg A G* [1975] AC 591, 613: "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.""

66. In Pollen Estate Trustee Co Limited v Revenue and Customs Commissioners [2013] EWCA Civ 753, [2013] 1 WLR 3785, Lewison LJ described the modern approach to statutory construction in words which have often been cited with approval:

> "The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that

> purpose. … In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole… The essence of this approach is to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, on its true construction, applies to the facts as found."

67. Lewison LJ himself very recently repeated the above passage in his judgment in the first case concerning DBAs to reach this court: see Zuberi v Lexlaw Ltd and The General Council of the Bar of England and Wales [2021] EWCA Civ 16 at [30].

68. An important tool in the search for the appropriate purposive interpretation of a statutory provision is the presumption against absurdity, described as follows by the authors of Bennion, Bailey and Norbury on Statutory Interpretation (8th Ed) at paragraph 13.1:

> "(1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature. Here, the courts give a very wide meaning to the concept of "absurdity", using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.
>
> (2) The strength of the presumption against absurdity depends on the degree to which a particular construction produces an unreasonable result.
>
> (3) The presumption may of course be displaced, as the ultimate objective is to ascertain the legislative intention."

See further R v McCool [2018] UKSC 23, [2018] 1 WLR 2431, at [23] to [25] (Lord Kerr of Tonaghmore JSC), citing a similar passage in the 6th (2013) edition of Bennion and the observations of Lord Millett in R (Edison First Power Ltd) v Central Valuation Officer [2003] UKHL 20, [2003] 4 All ER 209, at [116] to [117]. As Lord Millett there said:

> "The more unreasonable a result, the less likely it is that Parliament intended it…"

The legal, social and historical context of section 4 of the Compensation Act 2006

69. Like any statutory provision, section 4(2) of the Compensation Act 2006 must be construed in its context. In its judgment at [20], the Tribunal referred to section 9.2 of the 7th (2017) edition of Bennion for the proposition that "[c]ontext here is meant in its widest sense, to include the context of the Act as a whole and its legal, social and historical context." The Tribunal went on to note that the relevant statutory history was "convoluted", so a chronological approach would be most helpful: see [21]. I respectfully agree with that observation, and since all parties accepted that the Tribunal's chronological account at [22] to [35] of its judgment was accurate I will begin by quoting the paragraphs which set the scene for the enactment of the 2006 Act:

> "22. In 1990, Parliament passed the CLSA, which by s.58 allowed conditional fees (i.e. success fees paid to persons providing advocacy or litigation services) to be used in cases to be specified by order made by the Lord Chancellor. Under that provision, the success fee could not be recovered as part of a costs order against the other party. The Lord Chancellor subsequently made the Conditional Fee Agreements Order 1995, which specified a limited range of proceedings for this purpose: essentially, proceedings concerning personal injuries, insolvency and cases before the European Commission and Court of Human Rights.
>
> 23. The Access to Justice Act 1999 ("AJA") set out several amendments to this part of the CLSA. In particular:
>
> (1) By s.27 AJA, the original s.58 CLSA was replaced by a new s.58 and s.58A. These expanded the range of cases in which conditional fees could be used, and also provided that the success fee was recoverable as part of costs.
>
> (2) By s.28 AJA, a new s.58B was inserted into the CLSA, entitled "Litigation funding agreements". This provided that a LFA would not be unenforceable by reason only of being a LFA, provided that it met certain prescribed conditions, including such requirements as the Lord Chancellor may set out in regulations. Those conditions included a requirement that the sum to be paid by the litigant to the funder must consist of any costs payable to the litigant plus an amount calculated by reference to the funder's anticipated expenditure (i.e. not a damages-based payment).
>
> (3) By s.108 AJA, these provisions "shall come into force on such day as the Lord Chancellor may by order made by statutory instrument appoint…"
>
> 24. By the Access to Justice Act 1999 (Commencement No 3, Transitional Provisions and Savings) Order 2000, s.27 AJA (and

> thus the amended s.58 and s.58A CLSA) was brought into force on 1 April 2000. However, s.28 was not brought into force, either then or since, but it has not been repealed.
>
> 25. In 2006, the [*Compensation Act*] introduced for the first time provisions for the regulation of claims management services.
>
> [*the relevant provisions of S.4 of the 2006 Act were then set out*].
>
> 26. [*Section 6*] enabled the Secretary of State by order to make exemptions for certain persons, including by category or as members of a specified body, and thus pursuant to s.4(1) to be exempt from the requirement to be authorised in order to provide regulated claims management services. Barristers and solicitors acting in a professional capacity have been exempted pursuant to this provision."

70. Although section 58B of CLSA 1990 (inserted by section 28 of AJA 1999) has never been brought into force, it remains on the statute book and has never been repealed. Its main provisions were as follows:

> "**58B. – Litigation funding agreements**
>
> (1) A litigation funding agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a litigation funding agreement.
>
> (2) For the purposes of this section a litigation funding agreement is an agreement under which—
>
> (a) a person ("the funder") agrees to fund (in whole or in part) the provision of advocacy or litigation services (by someone other than the funder) to another person ("the litigant"); and
>
> (b) the litigant agrees to pay a sum to the funder in specified circumstances.
>
> (3) The following conditions are applicable to a litigation funding agreement—
>
> (a) the funder must be a person, or person of a description, prescribed by the Lord Chancellor;
>
> (b) the agreement must be in writing;
>
> (c) the agreement must not relate to proceedings which by virtue of section 58A(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of any such description as may be prescribed by the Lord Chancellor;

> (d) the agreement must comply with such requirements (if any) as may be so prescribed;
>
> (e) the sum to be paid by the litigant must consist of any costs payable to him in respect of the proceedings to which the agreement relates together with an amount calculated by reference to the funder's anticipated expenditure in funding the provision of the services; and
>
> (f) that amount must not exceed such percentage of that anticipated expenditure as may be prescribed by the Lord Chancellor in relation to proceedings of the description to which the agreement relates.
>
> (4) Regulations under subsection (3)(a) may require a person to be approved by the Lord Chancellor or by a prescribed person.
>
> …
>
> (6) In this section… "proceedings" includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.
>
> (7) Before making regulations under this section, the Lord Chancellor shall consult—
>
> (a) the designated judges;
>
> (b) the General Council of the Bar;
>
> (c) the Law Society; and
>
> (d) such other bodies as he considers appropriate.
>
> (8) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any amount payable under a litigation funding agreement.
>
> …"

71. Although section 58B of CLSA 1990 was not brought into force, certain forms of litigation funding by third parties had by 2006 become established and were recognised by the courts as not being champertous. A landmark decision in this context was the judgment of this court (Lord Phillips of Worth Matravers MR, Robert Walker and Clarke LJJ) in July 2002 in R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8) [2002] EWCA Civ 932, [2003] QB 381, in which it was held (a) that the provision to the claimants of various accountancy and other services ancillary to litigation by a firm of chartered accountants, in return for 8% of the final settlement received, did not constitute CFAs within the meaning of section 58 of CLSA 1990, with the result that they were not implicitly rendered unenforceable by the provisions of that section; and (b) that in all the circumstances, including the fact

that the agreements ensured the continuation of access to justice by the claimants, the agreements were not champertous.

72. Nearly three years later, in May 2005, this court gave its judgment (Lord Phillips MR, sitting with Brooke and Dyson LJJ) in Arkin v Borchard Lines Ltd (Nos 2 and 3) [2005] EWCA Civ 655, [2005] 1 WLR 3055. This case established the important principle that a non-champertous third-party professional litigation funder could be held liable for a third-party costs order under section 51 of the Supreme Court Act 1981 (now the Senior Courts Act 1981), but that such liability should be limited to the extent of the funding provided (the so-called "Arkin cap"). The court explained its approach at [40] to [43]:

> "40. The approach that we are about to commend will not be appropriate in the case of a funding agreement that falls foul of the policy considerations that render an agreement champertous. A funder who enters into such an agreement will be likely to render himself liable for the opposing party's costs without limit should the claim fail… Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable. Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation.
>
> 41. We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party *to the extent of the funding provided.* The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear…
>
> 42. If the course which we have proposed becomes generally accepted, it is likely to have the following consequences. Professional funders are likely to cap the funds that they provide in order to limit their exposure to a reasonable amount. This should have a salutary effect in keeping costs proportionate… Professional funders will also have to consider with even greater care whether the prospects of the litigation are sufficiently good to justify the support that they are asked to give. This also will be in the public interest.
>
> 43. In the present appeal we are concerned only with a professional funder who has contributed a part of a litigant's expenses through a non-champertous agreement in the expectation of reward if the litigant succeeds. We can see no reason in principle, however, why the solution we suggest should not also be applicable where the funder has similarly contributed the greater part, or all, of the expenses of the action."

73. Against this background, what was the particular mischief that section 4 of the Compensation Act 2006 was intended to remedy? At this point, I need to set out some more of the relevant provisions of section 4, and not just the definition of "claims management services" which I have already recorded at [10] above:

> "**4 Provision of regulated claims management services**
>
> (1) A person may not provide regulated claims management services unless—
>
> (a) he is an authorised person,
>
> (b) he is an exempt person,
>
> (c) the requirement for authorisation has been waived in relation to him in accordance with regulations under section 9, or
>
> (d) he is an individual acting otherwise than in the course of a business.
>
> (2) In this Part—
>
> (a) "*authorised person*" means a person authorised by the Regulator under section 5(1)(a),
>
> (b) "*claims management services*" means advice or other services in relation to the making of a claim,
>
> …
>
> (e) services are regulated if they are—
>
> (i) of a kind prescribed by order of the Secretary of State, or
>
> (ii) provided in cases or circumstances of a kind prescribed by order of the Secretary of State.
>
> (3) For the purposes of this section—
>
> (a) a reference to the provision of services includes, in particular, a reference to—
>
> (i) the provision of financial services or assistance,
>
> (ii) the provision of services by way of or in relation to legal representation,
>
> (iii) referring or introducing one person to another, and
>
> (iv) making inquiries, and

> (b) a person does not provide claims management services by reason only of giving, or preparing to give, evidence (whether or not expert evidence).
>
> (4) For the purposes of subsection (1)(d) an individual acts in the course of a business if, in particular—
>
> (a) he acts in the course of an employment, or
>
> (b) he otherwise receives or hopes to receive money or money's worth as a result of his action."

74. The 2006 Act was accompanied by Explanatory Notes, paragraph 1 of which stated that they had "been prepared by the Department for Constitutional Affairs in order to assist the reader in understanding the Act". Such notes "do not form part of the Act and have not been endorsed by Parliament": ibid. In R (Westminster City Council) v National Asylum Support Service [2002] UKHL 38, [2002] 1 WLR 2956, Lord Steyn confirmed at [5] that:

> "In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are… always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like."

75. The relevant background was described in the Explanatory Notes as follows:

> "28. The Better Regulation Task Force (BRTF) report: *Better Routes to Redress* published in May 2004 found that the "compensation culture" is a myth but that it is a damaging myth that needs to be tackled. The BRTF identified the activities of claims intermediaries as contributing to a 'have a go culture' and recommended that claims intermediaries should be subject to statutory regulation, if self-regulation did not work.
>
> …
>
> 30. The Government published a consultation and responses paper on the simplification of conditional fee agreements (CFAs) in June 2004 *Making Simple CFAs a Reality* which included a discussion of the widespread concern over claims intermediaries' activities and work underway to try to produce a self regulatory solution. The Government responded to the BRTF's report in November 2004 accepting the recommendation that regulation of claims intermediaries should be considered if self-regulation failed.

> 31. The legislative framework is flexible and allows the Secretary of State to designate a body to regulate claims management services, to establish a body to regulate (where he thinks that no existing body is suitable for designation) or to regulate himself. The Act provides the outline regulatory framework to authorise providers who would be required to comply with rules and codes of practice. The Act also includes power for the Regulator to investigate unauthorised activities and to prosecute those who try to evade regulation."

76. The commentary on section 4 itself in the Explanatory Notes included this:

> "34. …Only those claims management services that the Secretary of State prescribes by order under section 4(2)(e) will be subject to regulation. The Secretary of State can therefore target regulation in areas where he considers there to be a particularly high risk to consumers.
>
> 35. *Subsection 3* gives examples of activities which constitute the provision of services (where they are connected with a claim). The list, which is not exhaustive, includes financial services (for example assisting with the purchase of insurance or loans); legal representation (for example acting on a claimant's behalf in pursuing a claim); referring or introducing one person to another (for example referring a claim to a solicitor); and making inquiries (for example contacting witnesses in the course of investigating a claim)…"

77. As the Tribunal records in its main judgment at [28], the Secretary of State made regulations pursuant to section 4(2)(e) of the 2006 Act in order to specify the activities that were to be regulated as claims management services and the kinds of claim which would be regulated: see the Compensation (Regulated Claims Managements Services) Order 2006 ("the Scope Order"). The Explanatory Memorandum to the Scope Order, which was prepared by the Department for Constitutional Affairs and laid before Parliament in order to provide information for the Joint Committee on Statutory Instruments, contained further relevant policy background and commentary:

> "**7. Policy Background**
>
> 7.1 Claims management businesses gather cases either by advertising or direct approach. They then act either directly for the client in pursuing the claim, or as an intermediary between the claimant and a legal professional or insurer. Claims management businesses make money from several sources—from referral fees from solicitors; from commission on auxiliary services; from the sale of after-the-event insurance; and sometimes from loans to their clients. Concerns have grown over the unprofessional conduct by those who are providing the service for commercial gain—particularly as the activities of claims management businesses have extended into many areas of litigation, well beyond personal injury, and even into claims

> for certain kinds of benefits even though no litigation is involved.
>
> …
>
> **Scope Order**
>
> 7.6 The definition of claims management services in the Act is wide to allow new areas to be brought within the scope of regulation where problems arise, and for areas to be removed from scope where problems subside. The intention is that the regulation be applied initially in the areas where there is the greatest potential for consumer detriment. The Scope Order specifies the activities that will be regulated. The activities are those characteristically provided by claims management companies and have been described in such a way as to ensure that similar services provided outside the area of the claims management industry are not inadvertently regulated as claims management services."

78. Taking stock at this point, it seems reasonably clear to me that the purpose of introducing statutory regulation of claims management services in section 4 of the 2006 Act and its associated Scope Order was to enhance consumer protection in areas where the activities of "claims intermediaries" had been causing widespread public concern. Typical activities of the kind causing such concern might be broadly described as proactive "claims farming" or the formation of books of potential claimants to pursue legal claims, followed by assistance in the formulation and bringing of those claims, in relation to matters such as personal injuries, employment, housing, and financial products or services, in all of which consumer protection is likely to be much needed: compare articles 4(2) and (3) of the Scope Order, set out in the Tribunal's judgment at [28].

79. Conversely, there is no suggestion in any of the material I have reviewed which indicates that regulation of non-champertous funding of litigation by professional third-party funders in return for a reasonable share of the client's recoveries, of the kind exemplified in the Factortame (No 8) and Arkin cases, formed any part of the explicit mischief that section 4 of the 2006 Act sought to remedy. Furthermore, should it prove necessary to regulate activities of the latter kind, Parliament had already enacted section 58B of CLSA 1990, but the Government had chosen not to bring that legislation into force. The natural inference to draw, in my opinion, is not that the legislation was a dead letter, but rather that immediate regulation of the third-party litigation funding sector was not considered necessary, and the continuing presence of section 58B on the statute book (albeit not in force) might meanwhile be expected to help maintain standards and act as a deterrent against abusive practices.

The decision of the Tribunal

80. I have already quoted the key paragraph [41] in its judgment where the Tribunal expressed its conclusion on the substantive issue: see [18] above. In the preceding paragraphs of analysis, beginning at [36], the Tribunal had in summary reasoned as follows:

(1) At [36], the Tribunal identified what it considered to be "the relevant, connected questions of statutory interpretation", namely (a) whether "claims management services" as defined in section 4(2) of the 2006 Act (and now in section 419A of FSMA) encompassed the activity of third party funding, and (b) whether section 58AA of CLSA applies to a LFA, where the amount paid to the litigation funder is determined by reference to the damages recovered by the claimant, on the basis that this constitutes a DBA within the terms of that provision.

(2) The Tribunal next pointed out that the argument now advanced by DAF "is not altogether novel": see [37]. In particular, the issue was raised by Professor Rachel Mulheron, who is "one of the leading academics in the field of civil procedure", in an influential article in the *Cambridge Law Journal* in 2014: see *England's unique approach to the self regulation of third party funding*: *a critical analysis of recent developments* [2014] CLJ 570 at 592-595. Although Professor Mulheron considered the argument to be incorrect, she suggested that for the sake of clarity the legislation should be amended.

(3) In [38], the Tribunal identified what it considered to be the relevant principles of statutory interpretation, beginning with "the fundamental principle that statutory language is to be interpreted in its context".

(4) In [39], the Tribunal described the context in which section 4 of the 2006 Act was introduced, finding it to be clear from the Explanatory Notes that:

> "It arose from widespread concern and disquiet over the activities of claims management companies, some of which appeared to exploit vulnerable consumers. As Mr Thompson put it, the legislation was essentially introduced as a form of consumer protection… Although [*third party funding*] existed well before 2006, there is no suggestion that it was envisaged in the passage of the [*Compensation Act*]."

(5) Finally, at [40], the Tribunal recorded Mr Thanki's acceptance that, on the extensive meaning of "claims management services" for which he contended, "it would cover, for example, a bank lending money for the particular purpose of enabling the borrower to fund litigation." The Tribunal said that, in its view, "that would be far from what Parliament intended and contrary to the objective of the legislation."

81. Having stated its conclusion in [41], the Tribunal then referred to various matters which it considered provided support for that conclusion at [42] to [45]. For present purposes, the only one of those matters to which I think it necessary to refer is the continuing presence on the statute book, although not brought into force, of section 58B of CLSA 1990. At [42], the Tribunal (correctly in my view) rejected Mr Thanki's submission that section 58B was therefore irrelevant to the question of construction. As the Tribunal explained, the section was subject to a common form of statutory commencement provision, whereby it was to be brought into force if and when the Lord Chancellor considered it appropriate to introduce legislative regulation of LFAs. The Tribunal then referred to R v Secretary of State for the Home Department, *Ex parte* Fire Brigades Union [1995] 2 AC 513 at 551, 570-571 and 575. Those passages establish the proposition that a commencement provision of this type imposes a continuing obligation on the Secretary of State to consider whether to bring the relevant statutory

scheme into force, and that this discretion cannot lawfully be fettered while the section in question remains on the statute book unrepealed. As Lord Nicholls put it, at 575:

> "The statutory commencement day power continues to exist. The minister cannot abrogate it. The power, and the concomitant duty to consider whether to exercise it, will continue to exist despite any change in the holders of the office of Secretary of State… This obligation will cease only when the power is exercised or Parliament repeals the legislation. Until then the duty to keep under review will continue."

The submissions of DAF

82. The basic submission advanced by DAF is that the definition of "claims managements services" in section 4 of the Compensation Act 2006 should be given a broad interpretation because (a) that is the natural meaning of the statutory language read in its context, and (b) it forms part of a comprehensive scheme enacted by Parliament for the regulation of such services, both in 2006 and in the foreseeable future. It is wrong, submits Mr Thanki, to characterise the construction of section 4 for which DAF contends as either narrow or unduly literal. On the contrary, both the literal and the purposive contextual interpretations of the section coincide. As Mr Thanki put it in his oral submissions to us, "DAF relies on a literal and purposive contextual interpretation." DAF's submission, in summary, "is that in the context of the widespread risk to consumers and a diverse and changing industry, Parliament established a wide enabling power… in the 2006 Act for the regulation of a whole host of services relating to the making of the claims" (Transcript, day 1, page 27).

83. Viewed in this way, submits Mr Thanki, the definition should be construed as meaning exactly what it says. "Claims management services" means "advice or other services in relation to the making of a claim", and by virtue of subsection (3)(a), the provision of services includes "the provision of financial services or assistance". Each of the proposed funders in the present case undoubtedly contracts to provide financial assistance to the proposed representatives in the bringing of the collective claims. Thus, for example, recital (D) to the LFA dated 8 May 2017 entered into between Therium and the RHA records that:

> "In order to facilitate access to justice, the RHA has sought the agreement of Therium to provide funding in respect of the RHA's costs of pursuing the Collective Proceedings, and/or the Claimants' costs of pursuing the Proceedings, as set out in the Project Plan and on the terms of this agreement…"

Clause 2 then sets out the details of the agreement to fund, and clause 3 provides for Therium's remuneration in terms which include a percentage share of recoveries.

84. Mr Thanki goes on to submit that in 2006 there was no clear-cut distinction between litigation funding and claims management, and no distinct concept of stand-alone funders. He warns us against falling into the trap of assuming that everyone then thought that litigation funders were beyond reproach, while claims managers were

engaged in questionable activities which needed to be regulated in the public interest. He points out that the ALF was not formed until 2011, and none of its current members was in existence in 2006. Against that background, it is inconceivable (he says) that Parliament had by implication intended to exclude stand-alone funders from the scope of the definition in the 2006 Act. Consistently with the explanatory memoranda to the 2006 Act and the Scope Order, Parliament provided a definition of "claims management services" which was "intended to be flexible and future proof. It deliberately cast its net wide…" (day 1, page 60).

85. As to the example of a bank providing a loan to its customer to fund litigation, Mr Thanki does not shrink from submitting that such conduct would potentially fall within the scope of section 4 if the bank explicitly chooses to link the loan to litigation. Whether such loans would in fact be regulated would depend on the scope and extent of regulations made under the 2006 Act, which expressly gives power to the Secretary of State to exclude certain categories of services from regulation.

86. The Tribunal reached its conclusion in [41] of the main judgment by reading into the statutory definition of "claims management services" an additional condition that the service be provided "in the context of the management of a claim". DAF submits that this "creates a vague and circular test which is found nowhere in the statutory language". To the contrary, Parliament expressly adopted a definition which expanded the statutory concept to include matters which are not, in ordinary language, matters of claims management. These include, by virtue of section 4(3)(a), "the provision of services by way of or in relation to legal representation", "referring or introducing one person to another", and "making inquiries", all of which are included in "the provision of services" together with "the provision of financial services or assistance". DAF further submits that there was in 2006 no standard or accepted meaning of what constitutes claims management, and Parliament cannot have intended to make the statutory definition depend on such imprecise language. It is for that reason, says DAF, that the concept of claims management is referred to in the term to be defined, but not in the clarificatory and expansive terms of the definition itself. This submission is coupled with one based on redundancy. If the construction adopted by the Tribunal were correct, the list of included activities in section 4(3)(a) would be largely redundant, because provision of the service of managing the claim would by itself always be sufficient to satisfy the condition. For similar reasons, the exclusion in section 4(3)(b) ("a person does not provide claims management services by reason only of giving, or preparing to give, evidence (whether or not expert evidence)") would not be necessary, because such activities would never take place in the context of the management of a claim.

Discussion

87. The point which we have to decide is ultimately a short question of construction of the definition of "claims management services" in section 4(2) of the 2006 Act. Although on a literal, acontextual, reading of the extended definition, the words "the provision of financial services or assistance" "in relation to the making of a claim" could be read as including the provision of litigation funding by a third party which plays no part in the management of the claim, I consider that the Tribunal was correct to accept the submission of Mr Kirby for the RHA that those words are "to be interpreted as applying in the context of the management of a claim": see the main judgment at [41], quoted at

[18] above. There are two main reasons which in combination lead me to that conclusion.

88. The first reason is that Parliament had already enacted a comprehensive scheme for the regulation of LFAs in section 28 of AJA 1999, inserting a new section 58B into CLSA 1990. It is true that section 58B had not been brought into force by the executive arm of government, pursuant to the commencement provisions in section 108(1) of AJA 1999, before the enactment of the Compensation Act 2006. In my judgment, however, that is beside the point. As I have explained, section 58B remained unrepealed on the statute book in 2006 (as it still does today), and the executive (in the form of the Lord Chancellor or the Secretary of State) is under a continuing duty to consider whether it should be brought into force: see [81] above, and the decision of the House of Lords in the Fire Brigades Union case. Furthermore, if section 58B were in force, there cannot be any doubt that the funding agreements in the present case would fall within its ambit. In terms of the definition in section 58B(2), set out at [70] above, each such agreement is one under which the funder agrees to fund (in whole or in part) the provision of advocacy or litigation services by someone other than the funder to the litigant (i.e. the representative and/or the individual claimants), and the litigant agrees to pay a sum to the funder in specified circumstances.

89. In that situation, it is in my view most improbable that Parliament would have intended by a sidewind to bring LFAs which were potentially liable to regulation under section 58B within the ambit of the scheme for the regulation of claims management services introduced by the 2006 Act. There would then have been two potentially competing regimes for the regulation of the same kinds of litigation funding services, and if that was indeed Parliament's intention, one would then expect section 58B to have been repealed or modified to the necessary extent so as to make it clear that the new regime under the 2006 Act was to prevail. One would also expect the point to have been explicitly addressed in the Explanatory Notes to the 2006 Act. But that is not what happened. There is no hint or suggestion in any of the explanatory material to which we were referred that Parliament intended LFAs which were potentially subject to regulation under section 58B to fall within the scope of the 2006 Act. Nor, apart from the terms of the definition of "claims management services" itself, can any indication be found in the detailed and comprehensive scheme enacted in 2006 that "pure" LFAs of the kind envisaged by the Court of Appeal in the Arkin case should fall within the ambit of "claims management services" merely because they involved the provision of financial assistance to claimants.

90. It is worth emphasising in this context how detailed was the provision made by Parliament in Part 2 of the Compensation Act 2006 for the regulation of claims management services. The relevant provisions are contained in 12 sections, and a schedule with 15 paragraphs headed "Claims Management Regulations". The comprehensive nature of the scheme is illustrated by the provision made empowering the Secretary of State to designate a Regulator to authorise persons to provide regulated claims management services, and to regulate the conduct of authorised persons, as well as to exercise other designated functions: see section 5(1). Section 12 established the Claims Managements Services Tribunal, and empowered the Lord Chancellor to make rules about its proceedings. Section 15 confers wide powers to make orders or regulations under Part 2 by statutory instrument, and the schedule (as I have said) contains detailed provision about the nature and content of such regulations. The

important point for present purposes is that nowhere in this elaborate structure, apart from the contested words in the definition of "claims management service", is there anything to suggest an intention that LFAs were automatically to fall within its ambit, even if they involved no significant element of claims management.

91. My second main reason focuses on the structure and wording of the definition itself. The term defined is the composite phrase "claims management services", which it is common ground was not a phrase with any established legal meaning in 2006. The primary definition in section 4(2)(b) is that the phrase "means advice or other services in relation to the making of a claim". That is then extended by the definition of "claim", in very broad terms, in section 4(2)(c), and by the statement in subsection (3)(a) that "the provision of services" includes, in particular, the four activities then set out, including "the provision of financial services or assistance". The composite nature of the phrase being defined, and the ways in which the drafter chose to extend the primary limb of the definition, seem to me to make this a classic instance where, in construing the term defined, regard must be had to what is sometimes called "the potency of the term defined".

92. The authors of the current edition of Bennion recognise this principle in Section 18.6, under the heading "Defined term may itself colour meaning of definition". The text then reads:

> "In the case of a statutory definition the defined term may itself colour the meaning of the definition.
>
> **Comment**
>
> Whatever definition is given to a term, the natural meaning of the term is likely to exert some influence over the way that the definition is understood and applied by the court. It is impossible to cancel the ingrained emotion of a word merely by an announcement. This is sometimes called "the potency of the term defined".
>
> As Lord Hoffmann said in MacDonald (Inspector of Taxes) v Dextra Accessories Ltd [2005] UKHL 47, [2005] 4 All ER 107, at [18]:
>
> "….a definition may give the words a meaning different from their ordinary meaning. But that does not mean that the choice of words adopted by Parliament must be wholly ignored. If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean."
>
> Likewise in *Birmingham City Council v Walker* [2007] UKHL 22, [2007] 2 AC 262, at [11] Lord Hoffmann said:
>
> "Although successor is a defined expression, the ordinary meaning of the word is part of the material which can be used to construe the definition"."

93. As the second citation in Bennion makes clear, the principle is not confined to cases where there is an ambiguity in the terms of the definition. The point is, rather, that the definition must be read as a whole, and the ordinary meaning of the word or phrase being defined forms part of the material which can be used to throw light on the meaning of the definition. As Lord Hoffmann (again) said, in Oxfordshire County Council v Oxford City Council [2006] UKHL 25, [2006] 2 AC 674, at [38]:

> "… it is true that in construing a definition, one does not ignore the ordinary meaning of the word which Parliament has chosen to define. It is all part of the material available for use in the interpretative process."

See too the judgment of Lord Scott of Foscote at [82], where he endorsed an earlier version of the principle stated in the 4th (2002) edition of Bennion.

94. If the construction of the definition is approached in this way, it seems to me entirely natural to read the words of the definition as both coloured and conditioned by the reference to "claims management" in the phrase which is being defined, so that the "advice or other services in relation to the making of a claim" must be understood as referring to advice or other services of a claims management nature, or having to do with the management of a claim, and the reference in subsection (3)(a)(i) to the provision of financial services or assistance should likewise be read as referring to the provision of such services or assistance in the context of claims management. I do not consider that such an interpretation is open to objection on the ground of circularity. On the contrary, it is an interpretation which gives appropriate recognition to the concept of "claims management" which is central both to the statutory scheme of Part 2 of the Compensation Act 2006 and to the composite phrase which is being defined. Although the Tribunal in one sense read words into the statutory provision (giving rise to the complaint by Mr Thanki that it should not have read words in which are not there), it was in truth doing no more than setting out what is the correct interpretation of the provision when read as a whole.

95. Nor am I able to accept DAF's submission that Parliament cannot have intended to make the statutory definition depend on such an imprecise concept as claims management. To my mind, the very fact that the concept had no standard or accepted legal meaning in 2006 shows that Parliament was content to leave its precise meaning to be developed by the courts in the light of the purpose of the statutory scheme and the guidance which could be obtained from the relatively open-textured terms of the definition. These considerations also seem to me to provide a satisfactory answer to DAF's objections based on alleged redundancy. Precisely because "claims management" was not a concept with a clearly defined existing meaning, it was helpful in elucidating the concept to provide the specific illustrations and guidance contained in section 4. It does not follow from this, however, that the terms of the definition must be applied without reference to the ordinary connotations of the term being defined. That would be to ignore the relevance of the concept of "claims management" as a central factor in delimiting the general nature and extent of the activities which Parliament intended to be subject to the regulatory scheme of the 2006 Act.

96. In reaching its conclusion, the Tribunal was in my view fully entitled to have regard to the presumption against absurdity, as it is broadly stated in cases such as R v McCool, loc. cit. The result of the construction for which DAF contends is in my judgment both

anomalous and unreasonable, because it would bring any form of the provision of financial assistance for the making of a claim within the ambit of the 2006 Act, without regard to the fact that pure litigation funding was not then perceived to be a problem which required fresh legislative intervention, and if its regulation were to be considered necessary in the future, the provisions of section 58B of CLSA 1990 could be brought into force for that very purpose. I also respectfully agree with the Tribunal that the example of a bank lending money to a customer to fund litigation is telling in this context, because there is nothing to indicate that Parliament intended to bring such activities within the purview of the 2006 legislation, but a literal reading of section 4(3)(a)(i) would admittedly have that effect. A degree of legislative "overkill" is sometimes the price to be paid for countering abuse, but if that were the position in the present case, it is inconceivable that the Explanatory Notes would have said nothing on the subject. If, however, the phrase "claims management services" is interpreted with due regard to the central concept of the management (as opposed to the pure funding) of claims, the problem disappears.

97. For these reasons, I would dismiss DAF's challenge to the decision of the Tribunal on the DBA issue on the first ground raised in the claim for judicial review, namely that the Tribunal erred in law in its interpretation of the definition of a DBA in section 58AA of CLSA 1990. If the other members of the court agree, that is sufficient to dispose of the main issue of principle raised by the application. But it is still necessary to deal with DAF's second ground, which relates only to the funding arrangements entered into between UKTC and Yarcombe. The argument, in short, is that even if the Tribunal is right that "claims management services" must be provided "in the context of the management of a claim", the Tribunal nevertheless erred in applying its own construction of the law to the facts.

Ground 2: the insurance arrangements made by Yarcombe

98. The argument which DAF wishes to advance under Ground 2 concerns the insurance arrangements entered into by UKTC's funder, Yarcombe (which is part of the Calunius funding group). It is said that UKTC does more than provide bare funding, because it is Yarcombe, not UKTC, which is the insured party in respect of any adverse costs order under the ATE policy on which UKTC relies in support of its application for a CPO. Accordingly, Yarcombe manages the claim with regard to costs liability and arranged insurance for that purpose. Various objections were raised to this feature of UKTC's application at the hearing before the Tribunal, and as the main judgment records at [86] to [102] numerous amendments were made to UKTC's proposed funding and insurance arrangements in order to meet those concerns. For example, the Tribunal noted at [96] that the ATE premium was to be amended so that Yarcombe as the insured entity would assume direct contractual liability for adverse costs orders to the potential defendants. By virtue of these arrangements, submits DAF, Yarcombe's role in the litigation goes well beyond bare funding, and involves a significant degree of management of the claim.

99. In his oral submissions, Mr Thanki did not elaborate on the four paragraphs of DAF's skeleton argument in which its case on Ground 2 is set out substantially as I have summarised it. In my view, the argument has no merit, and it would also be unfair to permit DAF to rely on it (whether as a ground of appeal or in the judicial review proceedings) because it was not argued as a separate point before the Tribunal and it is too late to advance it now.

100. To begin with the procedural point, Mr Thanki all but conceded that the point had not been taken separately before the Tribunal. He showed us a passage in DAF's written submissions to the Tribunal which included a passing reference to "the purchase of insurance being a specific part of the purpose of the funding provided in the present case", but the point was nowhere identified as a separate argument. The concerns about insurance which were ventilated before the Tribunal did not relate to the question whether UKTC was engaging in claims management by virtue of the ATE insurance taken out by Yarcombe, but rather went to the sufficiency and degree of protection afforded to the defendants by those arrangements. The Tribunal therefore never directed its mind to the former question, and for that reason said nothing about it. Nor was the question raised as a separate proposed ground of appeal when permission to appeal was sought after the main judgment had been delivered. It cannot therefore now be said that the Tribunal erred in its application of the law to the facts concerning Yarcombe's insurance arrangements, for the simple reason that it was never asked to do so.

101. The position might be different if the question were a pure point of law which could be pursued on appeal (or by way of judicial review) without any unfairness to UKTC. But since the argument concerns the application of the law to the detailed facts, I consider that UKTC should have had the opportunity to address it as a separate issue before the Tribunal, and it is now too late for DAF to raise it.

102. In any event, I am satisfied on the material before us that the argument is devoid of merit. The arrangements in question were designed to support and strengthen the ability of UKTC (through Yarcombe) to meet any adverse costs orders which might be made against either of them in the litigation. In other words, it was essentially a funding issue, and had nothing to do with the actual management of the claims to be brought under the relevant CPO. I accept the submission of Mr Thompson for UKTC that the arrangements therefore fell on the right side of the "claims management" line.

103. As an example of a case falling on the wrong side of the line, Mr Thompson referred to the Meadowside case which I have already briefly mentioned at [27] above. As the Tribunal explained in the PTA decision at [32]:

> "Meadowside, which had a claim for the balance due in respect of repair works under a JCT Minor Works contract, had gone into liquidation and the liquidators engaged Pythagoras…, a company which acts on behalf of administrators and liquidators in relation to construction contracts, to take over pursuit of the debt. Pythagoras was appointed to "act as [the liquidator's] agents and take all steps to ascertain and recover the amounts due to [Meadowside].""

One of the ways in which Pythagoras pursued this objective was by engaging in adjudication proceedings leading to awards which could be recovered by an application for summary judgment. As the managing director of Pythagoras explained in his evidence:

> "Pythagoras Capital can use its in-house legal and engineering/ building expertise to run the Adjudication (Pythagoras is not a law firm, but Adjudication proceedings are not a reserved legal activity).

> If Pythagoras Capital makes a recovery for the insolvent company then it will keep a pre-agreed percentage."

104. Against that background, it is unsurprising that the judge (Mr Adam Constable QC) held that the funding agreement between Pythagoras and Meadowside was a DBA within the terms of section 58AA of CLSA 1990, because Pythagoras was engaged in the provision of "claims management services". As the Tribunal observed in the PTA decision at [34]:

> "It is clear that the role carried out by Pythagoras in respect of the claim of Meadowside was very different from that of an independent third party litigation funder… Pythagoras' funding of the claim was part of its overall management of the claim and the decision in *Meadowside* is therefore entirely consistent with the Judgment: see the Judgment at para 41. Accordingly, *Meadowside* does not give rise to a conflict of authority as DAF seeks to suggest."

Conclusion on the claim for judicial review

105. For the reasons which I have given, I would refuse DAF permission to apply for judicial review on Ground 2. The claim in relation to Ground 1, which equates to what I have called the "substantive issue", is in my judgment arguable, and was indeed very well argued by Mr Thanki in his oral submissions. I would therefore grant permission to DAF to apply for judicial review on that ground, but if the other members of the court agree I would dismiss the claim for judicial review on the merits.

Lord Justice Singh:

106. I agree.

Lady Justice Carr:

107. I also agree.

108.

109.