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THE SUPREME COURT DECISION IN *PACCAR*

Today (26 July 2023), the Supreme Court gave judgment in *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28. Jonathan Nash KC and William Edwards review this important decision.

In summary, the majority has concluded that the litigation-funding arrangements in issue in *PACCAR*, typical of those now used in commercial cases, are by statute "unenforceable".

The decision gives rise to many questions which this summary does not seek to answer. Will there be legislative intervention? How, if at all, can current funding arrangements be brought into an enforceable form? Will those who have paid funders under what were thought to be (but now turn out not to have been) enforceable agreements seek to recover what they have paid the funders in a restitutionary claim?

The background

In 2016, the European Commission decided that five truck manufacturing groups had engaged in anti-competitive behaviour. In reliance on that decision, two applications were made to the Competition Appeal Tribunal under section 47B of the Competition Act 1998 to continue follow-on collective proceedings (section 47B(4) provides that "Collective proceedings may be continued only if the Tribunal makes a collective proceedings order"). One application was made by a trade body, the Road Haulage Association, and the other by a vehicle incorporated for the purpose of bringing the claim, UK Truck Claims Ltd. The proceedings were to be funded by arrangements under which the funders would receive a share of any damages recovered.

The truck manufacturers objected to the Tribunal making a collective proceedings order on the ground that the funding arrangements were damages-based agreements which did not comply with the Damages Based-Agreements Regulations 2010 and so were unenforceable. That argument turned on the wording of section 58AA of the Courts and Legal Services Act 1990 as it stands following a complex history of legislative amendment (and it is important to note that the definition of a damages-based agreement, later incorporated in section 58AA, was first contained in Part 2 of the Compensation Act 2006):

- Section 58AA(1) and (2) provide that:

  "(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.

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(2) But … a damages-based agreement which does not satisfy those conditions is unenforceable."

- By section 58AA(3), a "damages based agreement" is defined as

  "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".

- By section 58AA(7), "claims management services" has meaning given by FSMA 2000, section 419A, which provides that:

  "(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,

  […]"

When these definitions are run together (and the immaterial parts excluded) the result is that a damages-based agreement includes:

> "an agreement between a person providing financial services or assistance 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".

It was therefore argued that what has become a common form of litigation funding agreement is a damages-based agreement because it involves the provision of financial assistance "in relation to the making of a claim" with the funder receiving a share of any damages.

The Competition Appeal Tribunal and the Divisional Court ([2021] EWCA Civ 299, [2021] 1 WLR 3648) both rejected that argument, holding that to be within the definition, "claims management services" must be provided in the context of the management of a claim. Henderson LJ concluded at [64] that it is:

> "…. 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."

The result was that conventional litigation funding agreements were held not to be "damages-based agreements" for the purposes of the 1990 Act and so not rendered unenforceable by it, with the result that the objection to the continuance of the collective proceedings against the truck manufacturers failed. From that decision, the truck manufacturers appealed to the Supreme Court.

The Supreme Court's decision

The Supreme Court allowed the appeal by a 4-1 majority. Lord Sales (with whom Lords Reed, Leggatt, and Stephens agreed) gave the judgment. He comprehensively dismissed the analysis of the Tribunal and Divisional Court and concluded that the litigation funding arrangements in issue in *PACCAR* fell within the definition of a damages-based agreement in section 58AA. In the context of that case, it meant that the collective proceedings could not continue. More generally, it means that what has become a common form of litigation-funding agreement is "unenforceable".

Lord Sales' reasoning can be reduced to four core points. First, the words of the statute "read according to their natural meaning" cover funding arrangements such as those in issue in *PACCAR* (see [50]).

Second, when the legislative scheme of Part 2 of the 2006 Act (the definition taken from which then went into section 58AA) is understood, what Parliament intended to do was "to create a broadly framed power for the Secretary of State to regulate in this area" (see [61]) with the Secretary of State able "to decide what targeted regulatory response might be required from time to time as information emerged about what was then a new and developing field of service provision to encourage or facilitate litigation, where the business structures were opaque and poorly understood at the time of enactment" (see [72]).

Therefore, there was no basis to read-down the words of the statute in the way the Tribunal and the Divisional Court had done. Lord Sales said at [67]:

> "The textual and contextual indicators from the 2006 Act itself clearly lead to the conclusion that the definition of 'claims management services' is meant to be wide and is not intended to be coloured by the notion of 'claims management', which is simply inapt to qualify the various aspects of the express definition of the phrase which Parliament has used in section 4(2) and (3). I do not regard this as a case where there is any ambiguity about this."

Third, while there might be nothing objectionable in principle about litigation funding on what has become the conventional model, it does not follow that Parliament must have intended to leave such arrangements outside the scope of the definition because (see [69]):

> "… evidence might emerge of third party funders extracting more than a reasonable share of the recovery, in which case regulation would plainly be fairly and squarely within the purpose of the power in section 4 of the 2006 Act, to protect consumers of such services. Moreover, there might be an element of bundling financial services together with other services as part of an overall package offered to a potential litigant, or the funding provided might be used to pay the fees of other service providers, or the person providing the financial assistance might pay a referral fee to a person promoting the litigation, any of which might require the regulatory power under section 4 to be exercised."

Fourth, none of that was affected by the fact that many agreements have been concluded on the basis that they did not fall within the statutory definition of a damages-based Agreement. As Lord Sales put it at [91]:

> "Participants in the third party funding market may have made the assumption that such arrangements are not DBAs and hence are not made unenforceable by section 58AA(2). But this would not justify the court in changing or distorting the meaning of "claims management services" as it is defined in the 2006 Act and in section 419A of FSMA."

Conclusion

It remains to be seen how this decision, which apparently renders common-form litigation funding agreements unenforceable, will affect the market for ongoing litigation funding, and how the consequences for completed litigation will be worked out. It seems clear, however, that urgent attention must be given to the regulations if litigation funding is to continue its expansion and thus facilitate access to justice.