Neutral citation [2024] CAT 3

Case Nos: 1441-1444/7/7/22

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

17 January 2024

Before:

BEN TIDSWELL
(Chair)
DR CATHERINE BELL CB
DR WILLIAM BISHOP

Sitting as a Tribunal in England and Wales

BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

Applicant / Proposed Class Representative

- v -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA
(4) MASTERCARD/EUROPAY UK LIMITED
(5) MASTERCARD UK MANAGEMENT SERVICES LIMITED
(6) MASTERCARD EUROPE SERVICES LIMITED

Respondents / Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS II LIMITED

Applicant / Proposed Class Representative

- v -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA
(4) MASTERCARD/EUROPAY UK LIMITED
(5) MASTERCARD UK MANAGEMENT SERVICES LIMITED
(6) MASTERCARD EUROPE SERVICES LIMITED

Respondents / Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

Applicant / Proposed Class Representative

- v -

(1) VISA INC.
(2) VISA INTERNATIONAL SERVICE ASSOCIATION
(3) VISA EUROPE SERVICES LLC
(4) VISA EUROPE LIMITED
(5) VISA UK LTD

Respondents / Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS II LIMITED

Applicant / Proposed Class Representative

- v -

(1) VISA INC.
(2) VISA INTERNATIONAL SERVICE ASSOCIATION
(3) VISA EUROPE SERVICES LLC
(4) VISA EUROPE LIMITED
(5) VISA UK LTD

Respondents / Proposed Defendants

Heard remotely on 10 November 2023

JUDGMENT (FUNDING)

APPEARANCES

Alexander Hutton KC, Flora Robertson and James White (instructed by Harcus Parker Limited) appeared on behalf of the Proposed Class Representatives.

Brian Kennelly KC, George McDonald and Isabel Buchanan (instructed by Freshfields Bruckhaus Deringer LLP, Jones Day, Linklaters LLP and Milbank LLP) appeared on behalf of the Proposed Defendants.

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A. INTRODUCTION

1. The background to these proceedings is set out in our Judgment (CPO Applications) at [2023] CAT 38. In summary, the Proposed Class Representatives (the "PCRs") seek to bring opt-in and opt-out collective proceedings against the card scheme operators, Mastercard and Visa (the "Proposed Defendants"), in relation to interchange fees and more specifically alleged overcharges which, it is said, have been suffered by merchant retailers and other similar entities. In June 2023, we declined to grant the PCRs' applications for collective proceedings orders ("CPOs") and instead stayed the proceedings to allow the PCRs to seek to remedy defects we identified in their applications.

2. Shortly afterwards, the Supreme Court delivered its judgment in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 ("*PACCAR*"), in which the majority determined that the litigation funding agreements ("LFAs") in those proceedings fell within the definition of "damages based agreements" ("DBAs") for the purposes of section 58AA of the Courts and Legal Services Act 1990 ("*section 58AA"*), and were (1) unenforceable in opt-out proceedings pursuant to section 47C of the Competition Act 1998 (*"section 47C CA 98"*) and (2) unenforceable in any proceedings unless they complied with section 58AA and the Damages Based Agreement Regulations 2013 (the *"DBARs"*), which those LFAs did not.

3. The relevant part of section 58AA provides as follows:

"(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 that 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. Section 58AA(4) then sets out the conditions referred to in subsection (1), which in turn require compliance with the relevant provisions of the DBARs.

5. However, any DBA which relates to opt-out proceedings is deemed unenforceable, regardless of whether it complies with section 58AA and the DBARs. Section 47C(8) CA 98 provides that *"A damages-based agreement is unenforceable if it relates to opt-out collective proceedings"*.

6. It is common ground between the parties that the LFAs which the PCRs entered into for the purposes of financing the costs of the proposed opt-out proceedings are, as a result of the decision in *PACCAR*, unenforceable in their original form, as they contain a provision by which the funder's return is determined by applying a percentage to the proceeds recovered by the PCRs. It is similarly common ground that the LFAs for the proposed opt-in proceedings are unenforceable as a result of *PACCAR*, as they are recorded in an agreement between the funder and Harcus Parker, the solicitors for the PCRs (the "Solicitors"), rather than between the funder and the PCRs. This was because the return for the funder is determined by reference to a percentage of the amount received by the solicitors, which also engages the terms of section 58AA.

7. Further, it is accepted by the PCRs that none of the LFAs (whether opt-in or opt-out) comply with the requirements of the DBARs. Indeed, the PCRs say that it is, in practice, impossible to comply with those requirements, especially in the

case of the opt-in proceeding, where some of the requirements of the DBARs are more naturally (and have already been) addressed in relation to the contractual arrangements in place between the Solicitors and the PCRs.

8. As a consequence, the PCRs indicated their intention to enter into revised funding arrangements. The parties agreed that it would be sensible for the Tribunal to consider any challenges to the enforceability of these revised arrangements in advance of the date set for the hearing of the revised CPO applications, which is to be held in spring 2024.

9. An order made by the Chair on 4 September 2023 thus provides as follows:

> "1. The Proposed Class Representatives shall file and serve the Revised Funding Arrangements pertaining to the four CPO Applications for consideration by the Tribunal as to their enforceability (but not their adequacy for the purposes of the Revised CPO Applications) by *[…]*"

10. A remote hearing took place on 10 November 2023, at which we heard argument from the parties about the revised funding arrangements.

B. THE FUNDING ARRANGEMENTS

11. As noted above, there are structural differences between the funding arrangements for the opt-in and opt-out arrangements. We will therefore deal with them separately (although the key issues of contention in relation to them are very similar). There are also issues raised about the ATE policies, which we will address separately (although the points of contention have now largely been resolved by a proposed endorsement to the policies).

(1) The Opt-out Funding Arrangements

12. The opt-out funding arrangements are contained in two separate LFAs (one for the proposed proceedings against Mastercard and one for the proposed proceedings against Visa). These are, for all relevant purposes, the same.

13. The original opt-out LFAs are dated 7 March 2022. Draft amended and restated versions were provided in September 2023, and these are the versions which

were the subject of argument at the November hearing. The March versions provided that the PCR would (subject to the Tribunal's approval) pay a percentage of the Proceeds (defined as the damages and costs received by the PCR) by way of a Total Fee, which would then be distributed between the funder, the ATE insurers, counsel and solicitors in accordance with a waterfall set out in Priorities Agreements dated 25 August 2021 (the "opt-out Priorities Agreements").

14. In the September version of the opt-out LFAs, the reference to payment of a percentage has been removed and replaced with a clause (in a new Annex 6) providing that the Total Fee is to be determined by reference to amounts expended by the funder and the insurers, together with a multiple of the amounts expended by the funder. The multiple is 200%, increasing by 50% each January and July. Annex 6 also provides:

> "Notwithstanding any other provision of this Agreement, the Total Fee shall not exceed the portion of the Proceeds that have not been distributed to class members within any period stipulated by the Tribunal for distribution to class members following success in the Claim."

(2) The Opt-in Funding Arrangements

15. The opt-in funding arrangements are again contained in two separate LFAs (one for the proposed proceedings against Mastercard and one for the proposed proceedings against Visa). These are (again), for all relevant purposes, the same.

16. As noted above, the opt-in LFAs are structurally different from the opt-out LFAs. The parties to the opt-in LFAs are (1) the funder and (2) the Solicitors. This difference arises, we were told, because the Solicitors have entered into a DBA with the PCR for the purpose of the proposed opt-in proceedings, under which the Solicitors are entitled to 32% of the damages and costs recovered by the PCR. No question arises about the validity of the DBA between the Solicitors and the PCR. It was common ground between the parties that the relevant documents, for present purposes, were the LFAs between the funder and the Solicitors.

17. The original opt-in LFAs are dated 7 April 2022.[1] They provide that the funder is entitled to receive a share of the Proceeds (being the damages and costs received by the Solicitors) in accordance with the waterfall in Priorities Agreements dated 25 August 2021 (the "opt-in Priorities Agreements").

18. These opt-in Priorities Agreements provide that any Proceeds will be distributed:

    (1) First, to the funder, in an amount equal to the amount funded plus interest at 25% per annum, compounding monthly, and to the ATE insurers, to pay any insured losses.

    (2) Secondly, to pay counsel fees and any uplift under their conditional fee agreements.

    (3) Thirdly, the residue *pro rata* in shares to the Solicitors (23.3%), the ATE insurers (10%) and the funder (66.67%), until the funder has recovered again the value of the amount it funded.

    (4) Fourthly, once the funder had recovered again the value of the amount it funded, *pro rata* in shares to the Funder (42%), the Solicitors (42%) and the ATE insurers (16%).

19. The PCR did not, following delivery of the Supreme Court's decision in *PACCAR,* seek to amend either the opt-in LFAs or the opt-in Priorities Agreements. The Proposed Defendants, in their written submissions filed and served on 6 October 2023, argued that the opt-in funding arrangements were unenforceable DBAs, by reason of the funder sharing on a percentage basis in the amounts received by the Solicitors under those arrangements (for example, as set out in [18 (4)] above). On 6 November 2023, the PCR provided revised versions (the "November versions") of the opt-in LFAs and opt-in Priorities Agreements, by way of draft amended and restated agreements.

[1] There was in fact an earlier version dated 25 August 2021, and we use "original" in the sense that the 7 April 2022 document was the LFA which was before us at the CPO application hearing in April 2023.

20. The November versions of the opt-in agreements were amended in the following material ways:

(1) The reference in the LFAs to the funder receiving a "*share*" of the amount received by the Solicitors is changed to refer simply to a "*payment"*.

(2) The LFAs make that payment to the funder expressly subject to Tribunal approval.

(3) The opt-in Priorities Agreements retain the structure referred to in [18] above, but preface each step with the words: *"subject to this clause […] being enforceable and/or permitted by applicable law, failing which clause […] shall apply in place of this clause […]"*.

(4) The alternative clauses so referred to provide for an approach which is in all material respects the same as the opt-out LFAs and opt-out Priorities Agreements, namely the application of a multiple based on the amount actually funded, increasing each January and July.

(5) A new clause 2.1.7 (again reflecting the structure of the opt-in agreements) is added as follows:

> *"Notwithstanding any other provision of this Agreement, the fees paid pursuant to the above Waterfall (clause 2.1.1 to clause 2.1.6 above) shall not exceed the total amount of the Proceeds."*[2]

(6) An amendment is made to restrict the application of the waterfall in each of the Visa and Mastercard Priorities Agreements to the Proceeds received by the Solicitors in those respective proceedings (which was not the case in the original version).

[2] Note that in the opt-in arrangements the Proceeds are the sums received by the Solicitors under their DBAs, and not the damages and costs which might be received by the PCR.

21. The Proposed Defendants were critical of the late change in approach by the PCR in relation to the opt-in agreements. However, Mr Kennelly KC, appearing for both Visa and Mastercard, helpfully confirmed that he was able to proceed to deal with the new documents at the November hearing despite only having received the draft amendments a few days beforehand.

(3) The ATE Policies

22. The PCRs have adverse costs protection through two policies of insurance issued to them (one for the Visa opt-in and Visa opt-out proceedings, and one for the Mastercard opt-in and Mastercard opt-out proceedings). The terms of the policies are for all material purposes the same. In their original form, these provide, in Appendix 1, for a deferred premium which is payable on a successful outcome, to be calculated as a sum equivalent to a percentage of the net proceeds allocated to the funder.

23. It was said by the Proposed Defendants in their written submissions that this amounted to a DBA, as the provision of insurance was caught within the definition of *"claims management services"*, because the provision of insurance is *"financial services or assistance"* and therefore must be analysed in the same way as LFAs were treated in *PACCAR*. As a consequence, it was argued, the amount of the deferred premium was determined by reference to the proceeds received by the PCRs (albeit, indirectly, to the extent that the funder's return was determined by reference to the proceeds and the deferred premium was determined by reference to the funder's return).

24. In response, the PCRs have procured an endorsement to the ATE policies (Endorsement No. 2) which now provides that the deferred element of the premium will be a fixed sum, which will vary depending on the stage in the proceedings at which a successful outcome is achieved.

C. THE ARGUMENTS

(1) Opt-out Arrangements

25. The Proposed Defendants advance two points which they say render the September opt-out funding arrangements unenforceable:

    (1) The Proceeds Point: The Proposed Defendants submit that payment to the funder under the September arrangements is still (notwithstanding the amendments to the opt-out LFAs) a payment of a share of the proceeds recovered by the PCRs, and is a "payment out of recoveries", which is sufficient to constitute the LFA as a DBA.

    (2) The Cap Point: the Proposed Defendants submit that the amount payable to the funder is capped, either by the proceeds recovered or some subset of that, which means that the amount payable is therefore determined by reference to the proceeds, which falls within the scope of section 58AA.

26. The PCRs dispute both points and submit that the express terms of section 58AA do not apply to the September opt-out LFAs, as they do not provide for any calculation of the funder's fee as a percentage or share of any damages awarded. They submit that the arguments advanced by the Proposed Defendants would extend to any agreement where a liability to a funder is capped or is stated as being paid from proceeds. In particular, the approach would cut across the statutory regime for conditional fee agreements ("CFAs") between solicitors and clients, which in certain circumstances are required by law to include a cap.

27. The Proposed Defendants also submit that the September LFAs create perverse incentives for the funder, which might conflict with the duties of the PCRs, given the profile of the funding costs when calculated on a multiple basis and in particular the way in which multiple increases with the passage of time.

28. The PCRs submit that this is not a concern as the PCRs, not the funder, control the proceedings and any questions about the acceptability of the funding costs should be left to the time when a settlement or judgment has eventuated.

29. As noted in [9] above, the order of 4 September 2023 made it plain that the November hearing would consider the enforceability of the funding arrangements, but not their adequacy for the purpose of any revised CPO applications. We will therefore not deal with the arguments about incentives arising from the funding arrangements in this judgment – that is a matter for any revised CPO application hearing.

(2) Opt-in Arrangements

30. At the commencement of the November hearing, we asked Mr Hutton KC, appearing for the PCRs, whether it was necessary for us to consider more than the enforceability of the arrangements set out in the November versions of the opt-in agreements. Mr Hutton indicated that the PCRs wished to have a ruling on the enforceability of the arrangements in the April 2022 versions. Mr Kennelly noted that he would need to address us on the enforceability of the April 2022 versions unless the PCRs were willing to concede the issue.

31. After counsel had taken instructions on the issue, Mr Hutton was helpfully able to advise us that the PCRs were not inviting the Tribunal to rule on previous versions of the opt-in funding and insurance arrangements, but only on the most recent versions before us at the November hearing.[3]

32. In practice, that meant that only two questions arose for consideration by the Tribunal at this stage:

    (1) Was it permissible for the opt-in funding arrangements to provide for alternative arrangements (that is, the April 2022 arrangements if enforceable or the November 2023 arrangements otherwise).

    (2) Were the opt-in arrangements otherwise unenforceable as a consequence of the Proceeds Point or the Cap Point?

[3] Transcript page 13, lines 5 to 8.

(3) The ATE policies

33. After the addition of Endorsement No. 2, there is one remaining argument advanced by the Proposed Defendants to the effect that the ATE policies are DBAs. This is that the payments to the ATE insurers are similarly limited by the cap imposed in the LFAs. In other words, if the Proposed Defendants are correct in relation to the Cap Point, then that would infect the ATE policies with unenforceability in the same way as it would the LFAs.

34. It was a matter of dispute between the parties as to whether the ATE policies are subject to section 58AA in any event. We do not intend to decide that point (which concerns whether ATE insurance is an activity that falls within the definition of "financial services or assistance", being the phrase which was held to capture LFAs as "claims management services" in *PACCAR*). That is because any finding in favour of the Proposed Defendants on the Cap Point would render all of the funding arrangements unenforceable, in which case the enforceability or otherwise of the ATE policies would seem to be something of a secondary problem and entirely derivative on the problem with the funding arrangements.

35. We will not therefore deal with the enforceability of the ATE policies any further in this judgment. If the issue of the application of section 58AA to those policies arises at a later date then it can be dealt with at that stage.

(4) Regulatory Concerns

36. In their written submissions, the Proposed Defendants raised concerns about the compliance by the funder with the regulatory framework governing claims management services set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544). They argued that the funder may have been carrying out an unauthorised activity contrary to that framework. The PCRs submitted in response that this was misconceived, and that there was no question of the funder carrying out activity which was governed by the regulatory regime.

37. We asked Mr Kennelly at the hearing whether he sought a ruling from us on the enforceability of the funding arrangements by reason of any non-compliance with the regulatory framework, or whether he was simply putting up a warning shot.[4] He confirmed that it was the latter. Whether or not the Proposed Defendants are correct is a matter in the first instance for the regulator (the FCA) and we do not propose to address that issue further in this judgment.

D. ANALYSIS

38. Given that the arguments relating to the opt-out and opt-in arrangements (including the ATE policies) have effectively become aligned, we are able to deal with the Proceeds Point and the Cap Point as a general matter, applying equally to the proposed opt-out and opt-in proceedings.

(1) The Proceeds Point

39. The question before the Supreme Court in *PACCAR* was one of statutory interpretation, concerning the ambit of the term "claims management services", which was first defined in one statutory context (section 4(1) of the Compensation Act 2006) and then adopted and used in another context (section 58AA).

40. The majority in the Supreme Court (disagreeing with the Tribunal and the Court of Appeal) held that the funding parties to LFAs in two proposed collective proceedings were providing "claims management services". Given that the funders' return under the LFAs was based on a percentage of proceeds recovered by the proposed class representative (and was thereby determined by the amount of the proceeds), the agreements were necessarily DBAs under section 58AA(3). As a consequence (and not disputed), the LFAs were unenforceable by reason of non-compliance with section 58AA(4) and the DBARs and the opt-out proceedings were also unenforceable under section 47C of CA 98.

[4] Transcript page 50, lines 15 to 18.

41. We did not understand any of the parties to suggest that *PACCAR* assists materially in the further question of how to decide whether the amount of a payment to a litigation funder calculated other than on a percentage basis is determined by reference to the amount of proceeds received by the funded party. However, the Proposed Defendants referred to a decision of the Court of Appeal*, Lexlaw Ltd v Zuberi* [2021] EWCA Civ 16, which they submit assists with that task.

42. In that case, solicitors had a contract of retainer with a client by which the solicitors were entitled to a percentage of damages recovered by the client if she was successful. The client settled the claim and the solicitors sought payment. However, the client argued that a further provision in the retainer which required her to pay the solicitors costs in the event of termination meant that the retainer, being a DBA, was not compliant with the DBARs and was therefore unenforceable. The solicitors sued to recover their percentage share.

43. The solicitors succeeded at first instance and also on appeal. In the Court of Appeal, Lewison LJ delivered the leading judgment, in which he distinguished between the part of the retainer which dealt with payment out of damages in a successful outcome and the part of the retainer which dealt with termination. He held that only the former was a DBA.

44. Newey LJ held that the DBARs did not apply to the termination provisions, so that the retainer was not in fact unenforceable. Coulson LJ agreed with Lewison LJ but also agreed with Newey LJ in the event that Lewison LJ's approach was wrong.

45. The Proposed Defendants submitted that the following passage from Lewison LJ's judgment supported their argument on the Proceeds Point:

> *"33. There are two possible views of what the DBA consists of. One view is that if a contract of retainer contains any provision which entitles the lawyer to a share of recoveries, then the whole contract of retainer is a DBA. In other words, a DBA is a contract which includes a provision for sharing recoveries. But another view is that if a contract of retainer*

contains a provision which entitles a lawyer to a share of recoveries; but also contains other provisions which provide for payment on a different basis, or other terms which do not deal with payment at all, only those provisions in the contract of retainer which deal with payment out of recoveries amount to the DBA.

34. In my judgment, there are good reasons for preferring the latter view. First, the object of the legislation was to permit the remuneration of lawyers by means of a share of recoveries. Second, the only part of the common law that needed to be changed to achieve that purpose was the rule against champerty. As I have said, at common law the contract of retainer, shorn of clause 9.1, would have been enforceable. There was no particular reason for Parliament to modify the other statutory and regulatory controls over lawyers' fees. Third, there is a presumption that Parliament does not intend to change the common law, except expressly or by necessary implication. There is no express provision which displaces the common law (except the rule against champerty). Fourth, the legislation cannot be said to be undermined by the co-existence of the common law. Fifth, the legislative scheme is far from comprehensive."

46. Mr Kennelly invited us to read the repeated references to sharing recoveries or payment out of recoveries in these paragraphs as amounting to a statement of the proper test for determining whether an LFA is a DBA. In other words, all that was necessary in order to engage section 58AA was whether the payment to a funder is "for a share of recoveries" or "out of recoveries". If they are, then the test laid down by Lewison LJ is satisfied and the LFA is a DBA.

47. As we understood Mr Kennelly's argument, this approach by Lewison LJ reflects the proper construction of section 58AA(3), which (the Proposed Defendants submit) extends to every situation where there is some connection between the funder's fee and the damages recovered. That was put as a point of public policy, to ensure that there is proper regulation (through the DBARs and other measures that might be implemented) of any payments to litigation

funders which are made directly from the spoils of litigation, however they are calculated.

48. We do not accept this argument. Lewison LJ's observations in [33] and [34] follow immediately from a paragraph setting out the terms of section 58AA(3). There is no suggestion in his judgment that he intends to interpret or restate the requirement that "*the amount of that payment is to be determined by reference to the amount of the financial benefit obtained*", as set out in section 58AA(3)(ii).

49. Instead, it is plain that the references to "a share of recoveries" or "out of recoveries" is merely shorthand for the requirements of section 58AA(3)(ii), in order to describe the two views set out in [33] and [34]. There was no need for Lewison LJ to address the ambit of section 58AA(3)(ii), as in that case there was a part of the retainer which obviously fell within that definition (the percentage based recovery) and a part which obviously did not (the termination provisions). There was no need to get into the question of how one determined what was or was not "determined by reference" to the proceeds.

50. Turning to the wider "public policy" point, we see no basis on which to read section 58AA(3) as widely as the Proposed Defendants suggest. The test set out in section 58AA(3)(ii) requires an assessment of the nature of connection between the calculation of the funder's fee and the proceeds of the litigation. The Proposed Defendants' argument would make that test redundant and would apply section 58AA to any litigation in which damages were recovered, regardless of the nature of the connection. Such an argument is inconsistent with the plain words of the legislation and contrary to common sense. We therefore reject it.

(2) The Cap Point

51. The funding arrangements for the opt-out and the opt-in proceedings both contain express provisions capping the funder's fee at the amount available for

distribution.[5] We understand the commercial purpose of these provisions is to ensure that in no circumstances will the PCRs be liable to the funder for amounts beyond the amount of damages and costs recovered by the PCRs, thereby limiting the PCRs' potential exposure.

52. The Proposed Defendants submit that the cap means that the funder's fee is "determined by reference to" the damages recovered, as set out in section 58AA(3)(ii). They also put forward examples of ways in which funding arrangements could be designed to utilise a cap to, in effect, create a percentage based recovery for a funder. For example, Mr Kennelly put to us that:[6]

> *"They could say 50 per cent of the proceeds capped at five times the capital outlay. Well, that is a DBA say the PCR, but something that would produce precisely the same result, so five times capital outlay, capped at 50 per cent of the proceeds, that wouldn't be a DBA."*

53. It was said that this kind of drafting would circumvent the broad scope of section 58AA and the DBARs, if the PCRs' construction was permitted. The Proposed Defendants therefore argue that there is no reason why a cap by reference to 100% of proceeds (or 100% of a subset of proceeds) should be treated differently.

54. In *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited and ors* [2023] CAT 73, the Tribunal considered a similar argument, albeit in the absence of any express provision in the contractual arrangements applying a cap.[7] The Tribunal there held:

> "158. We do not accept Sony's submission [that the Proceeds are a natural cap on the amount which can be paid to the funder, so that there is inevitably a reference to the amount of financial benefit obtained by the PCR in determining the Funder's Fee][8] for the following reasons:

[5] Annex 6 of the opt-out LFAs and clause 2.1.7 in the opt-in Priorities Agreements.
[6] Transcript page 29, lines 12 to 15
[7] This judgment was handed down after the funding hearing on 9 October 2023 in this case. The parties were asked if they wished to make further submissions on the judgment and did so in letters of 21 December 2024 (the Proposed Defendants) and 22 December 2024 (the PCRs).
[8] We have for convenience inserted into this paragraph the submission which is recorded in [154] of the judgment.

> (1) Sony could not point to any provision in the Current LFA by which the amount of the Funder's Fee was limited by the amount of the Proceeds. The Current LFA is not therefore "an agreement…which provides that…the amount of the [Funder's Fee] is determined by reference to the amount of the [Proceeds]", as section 58AA requires.
>
> (2) It is in fact the Tribunal, exercising its discretion under Rule 93, that will determine the Funder's Fee in the event of any judgment. In a settlement, the Funder's Fee will be determined by the terms of the settlement, if approved by the Tribunal, in accordance with Rule 94.
>
> (3) It may well be the case, in either scenario, that the size of the Proceeds will be a relevant consideration for the Tribunal (or indeed the parties, in a settlement), not least to ensure that the Funder's Fee (together with other Stakeholder payments) does not eliminate or unfairly reduce the benefit of the collective proceedings to class members. That is entirely beside the point, as far as section 58AA is concerned. Neither situation will give rise to an agreement between the funder and the PCR by which the amount payable to the funder is determined by reference to the amount of the financial benefit obtained by the PCR.
>
> (4) In this regard, we note that Lord Sales JSC dealt with an argument about the significance of the Tribunal's intervention in [96] to [99] of the majority judgment in PACCAR, in which he said that the Tribunal's discretion in settling the return to the funder did not prevent a percentage based funder's fee from being a DBA. That must, with respect, be correct, but it is quite a different position from this case, where there is no effective provision for a percentage based funder's return. In this case, Sony is arguing that the exercise of discretion by the Tribunal, in referring to the size of the Proceeds, itself gives rise to a DBA. We do not think that PACCAR assists on that point.
>
> (5) Finally, we have already dealt with Sony's argument that PACCAR has materially changed the way that the Tribunal should approach the question of whether a funding agreement is a DBA (see [144] above). We do not, as Sony suggested, consider that the approach we have accepted above is a mechanistic one which ignores the reality of the funding arrangements. On the contrary, our conclusions reflect the reality of the situation, and we reject the artificial approach urged on us by Sony."

55. Mr Kennelly accepted in argument that his position would be more difficult (in relation to the Cap Point at least) if there were no contractual provisions in the funding arrangements in this case.[9] We pointed out that it seemed a rather arbitrary result for the LFAs to be DBAs because of an express provision, put in to protect the PCRs, about a cap on the funding obligations, whereas the LFAs would not be DBAs if there was no express provision, but the PCRs would be exposed to potentially greater risk. Mr Kennelly's answer was that this consequence flowed from the exercise of statutory construction and in particular

[9] Transcript page 27, line 15.

the broad scope of the language, which was designed to regulate funding arrangements across the entire legal market.

56. We think that fails to address the unsatisfactory nature of the Proposed Defendants' arguments on the Cap Point and exposes the need to approach the assessment of funding arrangements by reference to section 58AA(3) on a more holistic, common sense basis.

57. As the Tribunal in *Neill v Sony* noted, there are various ways in which circumstances might give rise to some adjustment in the amount of the funder's fee. These include the size of proceeds from which the funder's fee might be paid (at an aggregate or a disaggregated level), the oversight of the Tribunal, or the specific terms of a settlement. Some of these may be reflected contractually in the funding arrangements themselves.

58. However, it does not follow that every such factor "determines" the amount of the funder's fee, in the way required by section 58AA(3)(ii). We consider there to be a difference between a factor which might have an influence, and one which is determinative in the sense of being the substantive mechanism by which the funder's fee is arrived at. In other words, it is necessary to form a view about the true nature of the contractual arrangements and what can be said to be the real and substantive basis on which the funder's fee is determined.

59. That is likely to involve some exercise of identifying particular factors and the closeness and quality of the causative connection between the factors and the funder's return. However, the exercise should also involve standing back and asking what the true commercial arrangement is, and whether that commercial arrangement is substantially based on the size of the proceeds determining the size of the funder's fee.

60. Mr Hutton made submissions about the potential for inconsistency between the regime for CFAs and the regime for DBAs if the Cap Point is correct. Mr Hutton

pointed out that certain CFAs[10] are required to comply with a statutory obligation to include a cap on fees, which would (on the Proposed Defendants' arguments) convert those CFAs to DBAs, in which case it would be impossible to comply with the requirements of both.

61. Mr Kennelly pointed out that the provisions which implement a cap on certain CFAs all postdated section 58AA by some four years and were, at least in part, secondary legislation, both of which were disapproved of in *PACCAR* as aides to statutory construction of a clause in primary legislation.[11] It is not necessary to resolve that dispute, as our conclusion about the correct approach to applying the test in section 58AA(3) is to use common sense by reference to the plain meaning of the words.

62. There is potential danger in taking too narrow an approach to the assessment of an LFA, by an overly forensic analysis of the causative effect of any particular factor that might affect the amount of the funder's fee. In other words, it is possible to lose the woods for the trees, if one does not stand back and look at the substance of the agreement as a whole.

63. There is nothing in the wording of section 58AA(3) which requires such a forensic approach. On the contrary, we consider that the words "*the amount of that payment is to be determined by reference to the amount of the financial benefit obtained*" naturally anticipate the application of common sense and a focus on the real substance of the arrangements in question.

64. In the extract from *Neill v Sony* quoted above, the Tribunal referred to a passage in *PACCAR* and the "spoils" in order to decide whether the connection "determines" the fee. In [96] to [99] of *PACCAR*, Lord Sales JSC considered an argument by the one of the proposed class representatives (UKTC) that the authority of the Tribunal to determine the funder's fee, as part of the Tribunal's

[10] See for example section 58(4B)(a) of the CLSA 1990, which provides that a success fee in a CFA under that section must be subject to a maximum limit and the Conditional Fee Agreements Order 2013, paragraph 5(a), which sets that maximum for certain purposes at 25%.
[11] See *PACCAR* at paras [47] and [93] to [94].

oversight of the regime for distribution of damages, meant that the relevant LFA was not a DBA.

65. Lord Sales JSC rejected that argument at [98]:

> "98. Under the opt-out LFA Yarcombe's funder's fee is expressed to include a percentage of the proceeds of the litigation. As the appellants point out, according to the procedural rules in the Tribunal and by virtue of the Competition Act 1998 the funder of opt-out proceedings always takes the risk that all of the damages recovered will be distributed to members of the class with the result that there will be nothing left to pay its fee and also takes the risk that the Tribunal might decline to exercise its discretion to order a payment in favour of the funder. UKTC is the proposed representative in the opt-out proceedings and, if those proceedings succeed, will obtain an award of damages on behalf of the class represented. Distribution of the damages is governed by rule 93 of the Competition Appeal Tribunal Rules 2015 (SI 2015/1648). Members of the class who claim their share of the damages in time are to be paid; but it is in the nature of opt-out proceedings brought on behalf of a wide class of people, many of whom may be unaware of or uninterested in the proceedings, that there may be a substantial amount which is not collected. Rule 93(4) enables the Tribunal to order payments out of undistributed damages in respect of the representative's costs, fees and disbursements and it has been established that this also permits payment of a funder's fee: Merricks v Mastercard Inc [2017] 5 CMLR 16, paras 117 and 127. The terms of the opt-out LFA between UKTC and Yarcombe are structured to take this mechanism into account. Clause 10.1 imposes an obligation on UKTC to pay the funder's fee (including the stipulated percentage share of the damages) save to the extent that the aggregate amount ordered by the Tribunal to be paid to UKTC in respect of that obligation falls below the funder's fee, and by clause 3.1.4 UKTC warrants that it will use its best endeavours to obtain such an award.
>
> [99] None of this affects the application of section 58AA(3). The LFA provides that payment of the funder's fee is conditional on UKTC receiving a "specified financial benefit" in the litigation. The payment to be made is obviously a success fee. As the appellants submit, the fact that a claims management service provider enters into an agreement which adds a further condition which must be met before a payment is due does not deprive the remuneration being of the character of a specified financial benefit within the meaning of section 58AA(3)(a)(i). This is a general point which has particular force when, as here, the additional condition simply reflects the mechanism in the Tribunal Rules which allows such a payment to be made. It also remains the case that the amount of the payment due to Yarcombe is to be determined by reference to the amount of the financial benefit obtained", so as to satisfy the condition in section 58AA(3)(a)(ii) as well, even though the structure of the opt-out regime according to the Competition Act 1998 and the Tribunal Rules means that this is treated as capable of being departed from in certain circumstances. Yarcombe's primary contractual entitlement is to payment of an amount determined as stated in that sub-paragraph, even if there may be a departure from that in certain identified circumstances. As a matter of substance, the LFA retains the character of a DBA as defined. It is inherent in any DBA that risk is shared by the funder, so the fact that under the opt-out LFA Yarcombe as funder shares the

> financial risks associated with the litigation provides no basis to say that this LFA falls outside the statutory definition of a DBA."

66. Mr Kennelly suggested that this reasoning supported the Proposed Defendants' argument, by making it plain that the potential intervention of the Tribunal did not convert an unenforceable LFA into an enforceable one. In our view, it supports our previously expressed view that the true substance of the funding arrangement needs to be looked at in the round, and not with a narrow focus on particular factors. Lord Sales JSC refers to the substance of the character of the LFA in that case as being plain. In order to reach a conclusion in relation to the funding arrangements in these proceedings, a similar focus on the substance of the character of those arrangements is required.

67. We consider that, as a matter of substance, the funding arrangements with which we were presented for the November hearing (the September opt-out arrangements, the November opt-in arrangements and the ATE policies) do not have the character of a DBA, as defined. They are all firmly and primarily based on a determination of the funder's fee by reference to a multiple of outlay by the funder (or insurer), and not by reference to sharing in a percentage or other proportion of the amount of financial benefit received by the PCRs (the opt-out arrangements), the Solicitors (the opt-in arrangements) or the Insurers (the ATE arrangements). The fact that other factors (apart from the multiple calculation) might affect the actual fee in certain circumstances does not change that analysis.

68. We can test that approach by reference to Mr Kennelly's example, where the cap is something less than 100% of the amount of financial benefit to the funded party. It might well be asked what the purpose of that cap is. It would presumably not be for the purpose advanced in relation to the caps in these proposed proceedings, which is to protect the PCRs from having to pay what they do not have. Each case will obviously turn on its own facts, but we suggest that in such a case there might be a very real question as to whether the cap at a level below 100% of the relevant proceeds was, as a matter of substance, creating the character of a success fee.

69. The Proposed Defendants argue that Parliament used broad wording in section 58AA(3) to ensure it captured a wide range of potentially problematic agreements. That, it is said, is consistent with the historic limitations at common law on champertous agreements. We disagree. The scope of section 58AA(3), as argued for by the Proposed Defendants, would be unreasonably wide, capturing agreements where there was no obvious reason why they should fall within the regime created by section 58AA and described in detail in *PACCAR,* and despite the substance of the arrangement providing no basis for that.

70. For these reasons, we reject the Proposed Defendants' Cap Point. The September opt-out arrangements, the November opt-in arrangements and the ATE policies are, in our judgment, enforceable arrangements by reference to section 58AA and section 47C CA 1990.

(3) The Contingency for the Opt-In Arrangements

71. It will be recalled that the Priorities Agreements for the proposed opt-in proceedings provide for two regimes to operate:

(1) Subject to being enforceable and or permitted by applicable law, the original percentage share of recovery set out in the April 2022 arrangements.

(2) If (1) above is unenforceable, the multiple based funder's fee set out in the November 2023 arrangements.

72. The Proposed Defendants argue that the retention of the percentage share provisions is contrary to public policy and should not be permitted. It was said by Mr Kennelly that the continued presence of a percentage based formula, even if contingent, represented an incentive which was contrary to the scheme (under section 58AA) by which such arrangements were made illegal. We were given the example of a contract which provided that a payment that was obviously a bribe could be paid if the Bribery Act 2010 were to be repealed. It was not entirely clear whether this example contemplated no payment being paid other than in circumstances in which it was entirely legal, but if that was the case we

see no reason why it should be contrary to public policy. The example was described as a "really extreme" one, but that is only the case because paying bribes is obviously deeply unattractive as a matter of principle and no one thinks it is likely that it will become legally permitted at any time in the future. It is therefore somewhat unhelpful as an analogy.

73. This issue was raised in *Neill v Sony* and a similar argument from the proposed defendant was rejected by the Tribunal.[12] We agree with the reasoning expressed there. We view the contractual provisions as creating a contingency that will only have any effect if Parliament was in terms to permit funding arrangements of this sort to be enforceable. Section 58AA cannot apply to make the provisions unenforceable, as the premise of the contingency is that section 58AA no longer operates to that effect.

74. While the wording of the provisions in the Priorities Agreements differs from that of the LFA in *Neill v Sony,* they are to the same effect, which is that a percentage based return will only apply if that mechanism is lawful (i.e., by reason of a change in the law). Absent that, the return is based on a multiple of outlay, which we have decided is not caught by section 58AA and is not for that reason unenforceable.

75. We also disagree with the Proposed Defendants' argument that the creation of incentives that mirror those made unenforceable by section 58AA is contrary to public policy. Either the LFAs are caught by the statutory scheme or they are not. In the latter case, it is difficult to see what public policy considerations would arise. We see no reason why the contingencies set out in the Priorities Agreements should offend public policy and we were not cited any authority to support that proposition.

76. We therefore reject the Proposed Defendants' arguments on this point.

[12] See *Neill v Sony* at [146] to [148]

E. DISPOSITION

77. We reject the arguments advanced by the Proposed Defendants by way of the Proceeds Point and the Cap Point. We also reject the argument that the contingency elements in the Priorities Agreements are contrary to public policy.

78. In these circumstances, the arguments about the enforceability of the funding arrangements for the proposed collective proceedings, in the form those funding arrangements were put forward at the November hearing, fail. In our judgment, the funding arrangements so put forward are enforceable for the purposes of section 58AA.

79. Any further arguments about the adequacy of the funding arrangements for the purposes of the revised CPO applications can be dealt with at the hearing of those applications.

80. This judgment is unanimous.

Ben Tidswell
Chair

Dr Catherine Bell CB

Dr William Bishop

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 17 January 2024