Neutral citation [2019] CAT 26

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1282/7/7/18
1289/7/7/18

Victoria House
Bloomsbury Place
London WC1A 2EB

28 October 2019

Before:

THE HON MR JUSTICE ROTH
(President)
DR WILLIAM BISHOP
PROFESSOR STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

UK TRUCKS CLAIM LIMITED

Applicant / Proposed Class Representative

- v -

FIAT CHRYSLER AUTOMOBILES N.V. AND OTHERS

Respondents / Proposed Defendants

- and -

DAF TRUCKS N.V. AND OTHERS

Objectors in Case 1282

AND BETWEEN:

ROAD HAULAGE ASSOCIATION LIMITED

Applicant / Proposed Class Representative

- v -

MAN SE AND OTHERS

Respondents / Proposed Defendants

- and –

DAIMLER AG

Objector in Case 1289

Heard at Victoria House on 4-6 June 2019

JUDGMENT (FUNDING)

APPEARANCES

Mr Rhodri Thompson QC, Mr Adam Aldred, Ms Judith Ayling and Mr Douglas Cochran (instructed by Weightmans LLP) appeared on behalf of UK Trucks Claim Limited.

Mr PJ Kirby QC and Mr David Went (instructed by Backhouse Jones Solicitors and Addleshaw Goddard LLP) appeared on behalf of the Road Haulage Association Limited.

Mr Bankim Thanki QC, Mr Rob Williams and Mr David Gregory (instructed by Travers Smith LLP) appeared on behalf of the DAF Respondents in Case 1289 and Objectors in Case 1282.

Mr Nicholas Bacon QC and Mr Jamie Carpenter (jointly instructed by the solicitors to the Respondents in Cases 1282 and 1289) appeared on behalf of the DAF, Daimler, Iveco and MAN Respondents/Objectors in Cases 1282 and 1289.

Mr Tony Singla (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Iveco Respondents in Cases 1282 and 1289.

Mr Tom Pascoe (instructed by Slaughter and May) appeared on behalf of the MAN Respondents in Case 1289 and Objector in Case 1282.

A. INTRODUCTION

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 s. 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 s. 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 s. 47B(8); and

(b) the claims are eligible for inclusion in collective proceedings in accordance with s. 47B(6).

5. Pursuant to s. 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 a class representative: see [2019] CAT 15.

7. This is our judgment on that preliminary issue concerning the funding arrangements.

8. The opposition to the funding arrangements was advanced in two parts:

(i) DAF, supported by MAN and Iveco, advanced an argument that the Applicants' litigation funding agreements ("LFAs") constituted damages-based agreements ("DBAs") for the purpose of the relevant statutory regulation and were therefore unenforceable and unlawful;

(ii) all the OEMs except for Volvo/Renault advanced arguments as to the nature and adequacy of the funding arrangements.

9. The arguments for the RHA were presented by Mr PJ Kirby QC, appearing with Mr David Went. UKTC was represented by Mr Rhodri Thompson QC, appearing with Mr Adam Aldred, Ms Judith Ayling and Mr Douglas Cochran. The arguments for the OEMs raising point (i) were advanced by Mr Bankim Thanki QC, appearing with Mr Rob Williams and Mr David Gregory. The arguments for all the OEMs raising point (ii) were advanced by Mr Nicholas Bacon QC, appearing with Mr Jamie Carpenter. It is convenient to address those two points separately.

B. DAMAGES-BASED AGREEMENTS (DBAs)

10. The legislative provisions concerning DBAs are part of the progressive statutory revision and control of the permitted forms of funding of civil litigation, overriding the old common law prohibitions of maintenance and champerty.

11. For the purpose of the present applications, the relevant provision is s.58AA of the Courts and Legal Services Act 1990 ("CLSA"), as amended from 2013 by s.45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). This provides, insofar as material, 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 ....
…

(7) In this section-

…

"*claims management services"* has the same meaning as in Part 2 of the Compensation Act 2006 (see s.4(2) of that Act)."

12. Critical to the submissions of the OEMs is the definition of "claims management services". As seen above, this was by cross-reference to s.4(2) of the Compensation Act 2006 ("CompA"). S.4(2)(b) states:

> ""claims management services" means advice or other services in relation to the making of a claim"

And s.4(3) provides:

> "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, ..."

13. By further amendment, with effect from 29 November 2018, for the definition of "claims management services" in s.58AA(7) there is substituted:

> " '*claims management services'* has the same meaning as in the Financial Services and Markets Act 2000 (see s.419A of that Act)."

This amendment takes effect in relation to DBAs entered into on or after 1 April 2019. While the LFA entered into by the RHA precedes that date, the revised LFAs to be entered into by UKTC will come after it. However, the definition of "claims management services" in s.419A of the Financial Services and Markets Act 2000 ("FSMA") is in substantive terms the same as that in s.4(2)

CompA. The reason for the amendment was the transfer of the regulation of claims management activities from the Claims Management Regulation Unit in the Ministry of Justice to the Financial Conduct Authority ("FCA"). While the fact of this amendment in 2018 is relevant to the argument before the Tribunal, the details of the new provisions in FSMA are not.

The contention of the OEMs

14. DAF, supported by MAN and Iveco, submits that the LFAs being employed by both Applicants clearly constitute the provision of financial assistance in relation to the making of the claims comprised in the collective proceedings. Accordingly, the service provided by the litigation funders with whom both the RHA and UKTC are entering into agreements are "claims management services" within the statutory definition in s.4 CompA (and s.419A FSMA). Since the agreements with the litigation funders provide that if the collective actions result in an award of damages then the payment to the funders will be determined by reference to the amount of damages recovered, the LFAs satisfy the definition of a DBA in s.58AA CLSA.

15. Any DBA must comply with regulations made pursuant to s.58AA(4) CLSA. These are the Damages-Based Agreements Regulations 2013 (the "DBA Regulations 2013"). It is common ground that the LFAs entered into (or proposed) by RHA and UKTC do not comply with those Regulations. It follows, submit the OEMs, that the LFAs are unenforceable. Moreover, s.47C(8) CA stipulates that a DBA is unenforceable if it relates to opt-out proceedings, so that in any event since UKTC seeks to bring collective proceedings on an opt-out basis, the funding arrangement which it has proposed for that purpose would be unenforceable (UKTC seeks in the alternative an order for a CPO on an opt-in basis).

16. The argument of the OEMs has the attraction of simplicity. Crucial to the argument is the contention that third party litigation funding ("TPF") constitutes "claims management services" for the purpose of this statutory scheme. For the OEMs, Mr Thanki submits that this is the only permissible, objective construction of the statutory language. The Applicants, in contrast, argue that TPF does not constitute a "claims management service" on the proper

interpretation of these provisions and that these LFAs do not fall within the statutory regime for DBAs.

Discussion

Introduction

17. If the argument of the OEMs is correct, the implications for litigation funding are stark. TPF is a well-recognised feature of modern litigation and facilitates access to justice for those who otherwise may be unable to afford it. As Tomlinson LJ stated in *Excalibur Ventures llc v Texas Keystone Inc (no 2)* [2016] EWCA Civ 1144 at [31]:

> "Litigation funding is an accepted and judicially sanctioned activity perceived to be in the public interest."

However, Mr Leslie Perrin, who is the chairman of the Association of Litigation Funders of England and Wales ("ALF"), states in his witness statement for UKTC that if it was found that the LFAs proposed for UKTC were DBAs on the basis alleged, "that finding would invalidate most if not all LFAs that have been agreed since litigation funding began." He goes on to say that, in consequence:

> "... it would require a radical review not only of these LFAs but of the entire litigation funding sector as it has developed in the United Kingdom."

18. Mr Thanki recognises that the implications of the OEMs' argument are unwelcome or inconvenient for the litigation funding industry and that there may be policy arguments against this result. But he submits that those are beside the point: they are matters for potential legislative change and not for the Tribunal.

19. It is of course correct that if on the proper construction of the legislation an agreement for TPF in consideration for a share of the damages constitutes a DBA within the terms of s.58AA CLSA, the policy implications are not for us. But those implications indicate the importance of scrutinising this argument with care to determine whether that is indeed the correct interpretation of the relevant provisions.

20. Fundamental to that task is the need to interpret those provisions in context. As stated in *Bennion on Statutory Interpretation* (17th edn, 2017), s.9.2, this is one of the key principles of statutory construction. *Bennion* continues:

> "(2) Context here is meant in its widest sense, to include the context of the Act as a whole, and its legal, social and historical context. This is subject to any rules as to the admissibility of external aids to construction."

Thus in *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 ("*NASS*") at [5], Lord Steyn stated:

> "The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it."

21. When addressing claims management services and DBAs, that requires consideration of the circumstances and manner in which the relevant statutory provisions were introduced. Given that the statutory process was convoluted, it seems most helpful to approach this chronologically.

The legislative chronology

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 CompA introduced for the first time provisions for the regulation of claims management services. S.4 CompA is as follows, insofar as relevant:

> **"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 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)."

26. S.6 CompA 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.

27. The context for these provisions is explained in the Explanatory Notes to the CompA:

> "BACKGROUND
>
> 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.
>
> …
>
> COMMENTARY ON SECTIONS: PART 2
>
> *Section 4: Provision of regulated claims management services*
>
> 33. This section prohibits the provision of regulated claims management services by those who are not authorised, exempted from authorisation or

subject to a waiver, or an individual acting otherwise than in the course of a business.

…

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)...."

28. Pursuant to s.4(2)(e) CompA, the Secretary of State made the Compensation (Regulated Claims Management Services) Order 2006 (the "Scope Order"), specifying the activities to be regulated as claims management services and the type of claim for compensation that will be regulated. Article 4 of the Scope Order states:

"**Regulated services**

4. – (1) For the purposes of Part 2 of the Act, services of a kind specified in paragraph (2) are prescribed if rendered in relation to the making of a claim of a kind described in paragraph (3), or in relation to a cause of action that may give rise to such a claim.

(2) The kinds of service are the following-

(a) advertising for, or otherwise seeking out (for example, by canvassing or direct marketing), persons who may have a cause of action;
(b) advising a claimant or potential claimant in relation to his claim or cause of action;
(c) subject to paragraph (4), referring details of a claim or claimant, or a cause of action or potential claimant, to another person, including a person having the right to conduct litigation;
(d) investigating, or commissioning the investigation of, the circumstances, merits or foundation of a claim, with a view to the use of the results in pursuing the claim;
(e) representation of a claimant (whether in writing or orally, and regardless of the tribunal, body or person to or before which or whom the representation is made).

(3) The kinds of claim are the following-

(a) claims for personal injuries…;
(b) claims under the Criminal Injuries Compensation Scheme…;
(c) claims for a benefit specified or referred to in article 3 of the Compensation (Specification of Benefits) Order 2006…;
(d) claims in relation to employment…;
(e) claims for housing disrepair…;
(f) claims in relation to financial products or services."

29. The Explanatory Notes to the Scope Order further explain the context of the legislation:

> "**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 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."

30. Statutory provision concerning DBAs was brought in by the Coroners and Justice Act 2009 s.154, which introduced s.58AA into the CLSA. The original s.58AA came into force on 12 November 2009, and applied only to a DBA relating to an employment matter; and pursuant to s.58AA(8) it did not apply to any agreement entered into before the coming into force of regulations to be made pursuant to s.58AA(4). But in other respects the wording of the original provision was as set out at para 11 above, including the definition of "claims management services" by way of cross-reference to s.4(2) CompA.

31. At the same time, in 2009, Jackson LJ was conducting his comprehensive review of civil litigation costs. In his Preliminary Report, published in May 2009, Jackson LJ discussed TPF. The Preliminary Report stated that TPF was at that time unregulated and asked the question, "Should Third Party Funding of Litigation be Regulated and, if so, How?" (chap 15, para 4). The Final Report of Jackson LJ's review was published in December 2009. TPF was discussed

in chapter 11, quite separately from DBAs (there referred to as contingency fees) which were discussed in chapter 12. As regards TPF, Jackson LJ summarised the responses to the question raised in his Preliminary Report and concluded with the recommendation that he did not consider that full regulation of TPF is presently required. Instead, he recommended that a satisfactory voluntary code, to which all litigation funders subscribe, should be drawn up. This constituted recommendation 11 of the Report's final recommendations (page 464). Jackson LJ further recommended that the question of whether to have statutory regulation of TPF should be revisited if and when the TPF market expands.

32. The next step in the chronology was the making of the Damages-Based Agreements Regulations 2010 ("DBA Regulations 2010") by the Lord Chancellor pursuant to s.58AA(5) CLSA. The DBA Regulations 2010 came into force on 8 April 2010, and regulation of DBAs accordingly took effect from that date. Those Regulations include the following definitions (in reg. 1(2)):

> " "client" means the person who has instructed the representative to provide advocacy services, litigation services ... or claims management services (within the meaning of section 4(2)(b) of the Compensation Act 2006) and is liable to make a payment for those services;"
>
> " "representative" means the person providing the advocacy services, litigation services or claims management services to which the damages-based agreement relates."

The requirements set out in the Regulations included the following:

> "2. The requirements prescribed for the purposes of section 58AA(4)(c) of the Act are that the terms and conditions of a damages-based agreement must specify –
>
> (a) the claim or proceedings or parts of them to which the agreement relates;
>
> (b) the circumstances in which the representative's payment, expenses and costs, or part of them, are payable; and
>
> …
>
> 3. – (1) The information prescribed for the purposes of section 58AA(4)(d) of the Act is –
>
> (a) information, to be provided to the client in writing, about the matters in paragraph (2); and

(b) such further explanation, advice or other information about any of those matters as the client may request.

(2) Those matters are –

(a) the circumstances in which the client may seek a review of the costs and expenses of the representative and the procedure for doing so;..."

Like the primary legislation pursuant to which they were made, the DBA Regulations 2010 applied only to a DBA relating to an employment matter.

33. In November 2011, the ALF was founded and, in accordance with the recommendation in Jackson LJ's Final Report, published its first Code of Conduct for Litigation Funders (the "ALF Code").

34. By s.45 of LASPO, s.58AA CLSA was significantly amended to remove the limitation of DBAs to employment matters, subject to compliance with the applicable regulations. This provision came into force on 19 January 2013 and shortly afterwards the Lord Chancellor made the Damages-Based Agreements Regulations 2013 ("DBA Regulations 2013") in place of the DBA Regulations 2010. The definitions quoted above from the DBA Regulations 2010 are identical in the DBA Regulations 2013, and the specified requirements of a DBA set out above were unchanged. The information to be given to the "client" before a DBA was made quoted above from reg 3 of the DBA Regulations 2010 remain in the DBA Regulations 2013 but only as regards a DBA in an employment matter. The DBA Regulations 2013 are the regulations in force today.

35. Finally, by s.27 of the Financial Guidance and Claims Act 2018, FSMA was amended to transfer to the FCA the regulation of claims management services. A new s.419A was accordingly inserted into FSMA, defining "claims management services": see para 13 above. And by the Financial Services and Markets Act 2000 (Claims Management Activity) Order 2018, the definitional cross-reference of "claims management services" in s.58AA(7) CLSA was amended to refer to s.419A FSMA in place of s.4(2) CompA. As noted above, this amendment applies to DBAs entered into after 1 April 2019.

Analysis

36. It is in the somewhat complex context set out above, developing over time, that we address what we consider are the relevant, connected questions of statutory interpretation: (1) do "claims management services" as defined in s.4(2) CompA and now in s.419A FSMA encompass the activity of TPF? (2) does s.58AA CLSA apply to an 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?

37. The Applicants emphasised that in the many years that LFAs have been in use, commonly in a form where the payment to the litigation funder is based on a share of the damages recovered, it has never been held that they constitute a DBA. Indeed, so far as Counsel could establish, this proposition has never been advanced before a court, notwithstanding that the party who had entered into a DBA might have an incentive to make such an argument since if successful it would render the LFA unenforceable and enable that party to avoid paying a share of its damages to the funder. However, the argument is not altogether novel. The potential issue concerning LFAs in the light of the statutory definition of a DBA in s.58AA CLSA was highlighted by Prof Rachael Mulheron, one of the leading academics in the field of civil procedure, in her article, "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 Prof Mulheron considered that the contention was incorrect, she nonetheless suggested that for the sake of clarity the legislation should be amended. The argument was also discussed in the 4th edition of the supplement to the White Book, *Costs & Funding following the Civil Justice Reforms: Questions and Answers* (2018) at para 2-20 (where the editors said that if correct, this would be "a very surprising outcome"), albeit that this discussion was dropped from the subsequent edition of that supplement. However, the fact that the contention has not been the subject of previous judicial consideration, although striking in the circumstances, cannot of itself mean that the contention is misplaced.

38. In our view, beyond the fundamental principle that statutory language is to be interpreted in its context, three further principles of statutory interpretation are relevant:

(1) the Explanatory Notes to a statute may be used as an aid to construction. As stated by Lord Steyn in the *NASS* case at [5]:

> "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 therefore always admissible aids to construction."

(2) the so-called presumption against absurdity, giving 'absurd' a very wide meaning. As stated by Lord Millett in *R (on the application of Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20:

> "116.... The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless.
>
> 117... the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it...."

This principle is extensively discussed in *Bennion*, chap 12, where it is pointed out, as Mr Thanki stressed, that the court may nonetheless be constrained to give effect to the plain meaning of statutory words.

(3) secondary legislation can provide an aid to the construction of the primary legislation under which it is made. As stated by a very strong Court of Appeal (Lord Phillips MR, Robert Walker and Clarke LJJ) in *R (Factortame Ltd) v Secretary of State for Transport (No 8)* [2002] EWCA Civ 932 at [57]:

> "While provisions in a statutory instrument cannot alter the meaning of the primary legislation under which they are made, it seems to us legitimate to refer to them as confirming what appears to be the legislative intention of the provisions of the primary legislation."

39. The context in which the CompA introduced legislation covering claims management services is clear from the Explanatory Notes quoted above. 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. It is true, as Mr Thanki emphasised, that "claims management services" are defined broadly whereas the scheme of regulation applied only to a narrower category within that broad definition. But the basis of the definition was nonetheless the expansive fields of activity of such companies. Although TPF existed well before 2006, there is no suggestion that it was envisaged in the passage of the CompA.

40. Mr Thanki had to accept that the consequence of the extensive meaning which he urged for "claims management services" in the CompA was that it would cover, for example, a bank lending money for the particular purpose of enabling the borrower to fund litigation. The Secretary of State would then be entitled under the legislation to require a bank to be authorised to provide claims management services by the relevant regulator under s.4 CompA (and now, s.419A FSMA) before it could give such loans. In our view, that would be far from what Parliament intended and contrary to the objective of the legislation.

41. We consider that, having regard to the mischief at which this part of the CompA was directed, Mr Kirby was therefore correct in his submission that the reference in s.4(2) read with s.4(3)(a) CompA 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 s.58AA(3) CLSA.

42. We consider that this result is supported by the proper construction of s.58AA itself. When viewed in its context, we think it is clear that s.58AA was never intended to apply to LFAs. On the contrary, in 2009 when s.58AA was introduced, there was already a distinct provision expressly designed to cover LFAs, i.e. s.58B CLSA: see para 23(2) above. It is of course true that this provision had not then been brought into force (nor has it since). Mr Thanki submitted that it was therefore irrelevant to the question of construction. We do

not agree. S.58B CLSA was introduced into the statute book by the AJA, and the wording of s.108 AJA, in a form common to statutory commencement provisions, indicates the clear intention of Parliament that s.58B CLSA is to be brought into force if and when the Lord Chancellor considers it appropriate to introduce legislative regulation of LFAs: see *R v Sec of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513 at 551, 570-571, 575. And when Parliament introduced statutory control of DBAs, by a provision to be inserted into the CLSA immediately after ss.58-58A concerning conditional fee agreements ("CFAs"), that new section was numbered s.58AA and not s.58B. That recognised the fact that there was already a s.58B on the statute book; that there was no intention to repeal it; and that it may in due course be brought into force. As at 2009, when s.58AA was enacted, s.58B was a provision which had been on the statute book for 10 years. Accordingly, as Mr Kirby put it, the arguments that s.58AA should be construed as applying to LFAs "do not bear any relation to the background to the introduction of that section" and would amount to bringing in regulation of LFAs by the back-door.

43. The proper interpretation of s.58AA is further buttressed by the wording of the DBA Regulations made pursuant to s.58AA(4). It would be a curious use of language to refer to a litigation funder as a "representative", nor would a party requesting TPF and entering into a LFA commonly be regarded as a person "instructing" the funder. But those terms are understandable and apposite when applied to a party's lawyer or claims manager as usually understood. This indicates that the DBA Regulations, and thus s.58AA, were never intended to apply to LFAs.

44. Furthermore, an important part of the context to s.58AA was the Jackson LJ review of costs. Mr Thanki sought to argue that this was irrelevant to the construction since Jackson LJ's final report came out after s.58AA was introduced. However, the original s.58AA covered only DBAs in relation to employment matters and, we were told that, LFAs were not really used for such cases. Parliament returned to the question of DBAs in 2012, when s.58AA was amended to extend to all kinds of claim. By then, any consideration of costs was made against the background of the Jackson Report. Furthermore, the ALF Code envisaged by Jackson LJ's recommendation had been introduced. In those

circumstances, it would have been flying in the face of Jackson LJ's conclusion on TPF if Parliament had, by amending s.58AA, rendered LFAs subject to statutory regulation as DBAs and rendered unenforceable LFAs which complied with the new Code of Conduct. That approach would indeed have been perpetuated when the definition of "claims management services" in s.58AA was amended in 2018 in the context of the transfer of the regulation of DBAs from the Ministry of Justice to the FCA.

45. For all these reasons, we conclude that s.58AA CLSA does not apply to LFAs with litigation funders. We note that this conclusion appears consistent with the view of Jackson LJ, with all his great expertise on the subject of civil costs, as set out in his 6th lecture in the Civil Litigation Costs Review Implementation Programme, "Third Party Funding or Litigation Funding" (23 November 2011). That lecture was delivered on the occasion of the launch of the ALF Code and while the Legal Aid, Sentencing and Punishment of Offenders Bill (which included the amendment to s.58AA so that it applied to all DBAs and to which Jackson LJ referred) was passing through Parliament. Jackson LJ observed that there was likely to be a greater role for litigation funders in the future. And he stated that the ALF Code marked the satisfactory implementation of recommendation 11 of his report, provided that all reputable litigation funders signed up to it. That recommendation stated that statutory regulation of TPF was not required: see para 31 above.

C. NATURE AND ADEQUACY OF THE FUNDING ARRANGEMENTS

46. As noted above, the OEMs contended that the Tribunal should refuse to authorise either UKTC or the RHA as a class representative because of their respective funding arrangements. To address those arguments, it is necessary to look at those arrangements in some detail. In summary, and as already indicated, both Applicants have an LFA with a third party funder to provide for their own costs. In addition, both applications are supported by after-the-event ("ATE") insurance policies in respect of potential liability for the opposing parties' costs. Because UKTC makes its application in the alternative for an opt-out or opt-in CPO, it has slightly different agreements for these two possibilities, reflecting the statutory restriction regarding costs recovery for opt-out collective proceedings. (Pursuant to s. 47C(5)-(6) CA, in the opt-out case,

the CFA success fee and litigation funder's remuneration can be paid only out of unclaimed damages: *Merricks v Mastercard Inc* [2017] CAT 16).

47. The challenge by the OEMs is directed at both the funding arrangements for the Applicants' own costs and their cover for potential liability for the Respondents' costs. In response to some of the criticisms, both Applicants put forward some changes to the arrangements initially made and UKTC in particular offered further changes after the hearing. That has led to a round of written submissions to address UKTC's revised structure, following which UKTC produced yet further proposed changes to the ATE policies, finally provided on 17 October 2019.

The legislative provisions

48. As stated above, the Tribunal may authorise a person to act as the class representative only if it considers that it is just and reasonable for that person so to act in those proceedings: s.47B(8)(b) CA, reflected in r. 78(1)(b) of the CAT Rules. Rule 78(2)-(3) set out various factors which the Tribunal is to consider for this purpose and the relevant provisions of that rule are as follows:

> "(2) In determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal shall consider whether that person-
>
> (a) would fairly and adequately act in the interests of class members;
>
> …
>
> (d) will be able to pay the defendant's recoverable costs if ordered to do so;
>
> …
>
> (3) In determining whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of paragraph 2(a), the Tribunal shall take into account all the circumstances, including-
> …
> (c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes-
>
> (i) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and
>
> (ii) a procedure for governance and consultation which takes into account the size and nature of the class; and

> (iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide."

49. The Tribunal's *Guide to Proceedings* (2015) (the "Guide"), which has the status of a Practice Direction pursuant to r. 115(3) of the CAT Rules, provides guidance on some of the provisions of r. 78. At para 6.30, the Guide explains that the Tribunal will expect the proposed class representative to have prepared a plan for the collective proceedings, addressing the matters set out in r.78(3)(c). The Guide states:

> "There should be appended to the litigation plan a costs budget to the end of trial. The purpose of the plan is to assist the Tribunal in deciding whether to make a CPO. It does not constrain the jurisdiction of the Tribunal to determine the appropriate procedures and, if a CPO is made, the plan may be subject to revision as the litigation proceeds."

Further, at para 6.33 the Guide explains the approach to r.78(2)(d):

> "6.33 The fourth factor the Tribunal is required to consider relates to the proposed class representative's financial resources: would the proposed class representative be able to pay the defendant's recoverable costs if ordered to do so? (Rule 78(2)(d)) By extension, the proposed class representative's ability to fund its own costs of bringing the collective proceedings is also relevant. In considering this aspect, the Tribunal will have regard to the proposed class representative's financial resources, including any relevant fee arrangements with its lawyers, third party funders or insurers. The costs budget appended to the collective proceedings plan referred to above is likely to assist the Tribunal's assessment in this regard."

50. In addition, it is relevant to note that if a CPO is made, pursuant to s.47B(9) CA the Tribunal may subsequently revoke it. Rule 85 accordingly provides:

> "85. —(1) The Tribunal may at any time, either of its own initiative or on the application of the class representative, a represented person or a defendant, make an order for the variation or revocation of the collective proceedings order,....
>
> (2) In deciding whether to vary or revoke a collective proceedings order, the Tribunal shall take account of all the relevant circumstances, including in particular—
> …
>
> (b) whether the class representative continues to satisfy the criteria for authorisation set out in rule 78 and if not, whether a suitable alternative class representative can be authorised; ..."

51. Moreover, r.4(1) sets out a governing principle for cases in the Tribunal, corresponding to the overriding objective in the CPR:

> "The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost."

Further r.4(4) provides for active case management by the Tribunal.

The Applicant's own costs

52. It is important to bear in mind that the Tribunal's concern in this regard is for the potential class members. The Tribunal seeks to be satisfied that appropriate and adequate arrangements have been made by the proposed class representative to fund the claim it wishes to bring, so that the class members will have the benefit of effectively conducted proceedings. In that respect, since competition damages claims generally involve many stages before a case reaches trial, and it is impossible to predict all that may happen in such litigation, the arrangements may need to be reviewed and revised over time. It is in the context of these preliminary observations that we turn to the specific arrangements made by each of the two Applicants. We deal with specific points on the two agreements first, before turning to consider the overall level of funding.

The RHA

53. The RHA has concluded a LFA dated 8 May 2017 with Therium Litigation Funding IC and its related company, Therium RHA IC, which appears to be a SPV set up for the purpose of these proceedings ("the RHA LFA"). Both companies are incorporated in Jersey, but it is notable that they both assume the obligations of the funder under the LFA (in which they are referred to without distinction as "Therium"). Both companies are associated companies to Therium Capital Management Ltd ("TCML"), which is a UK based entity and part of the Therium Group registered in Jersey. TCML is a founding member of the ALF and adheres to the ALF Code. The chief investment officer of TCML, Mr Neil Purslow, states that the Therium group is one of the longest established litigation funders, which in its 10 year history has raised funds of $1.07 billion, funding claims of about $36 billion.

54. The amount of funding for which provision is made under the RHA LFA was subject to two variations, and now amounts to £27 million. By their skeleton argument, counsel for the OEMs said that there was no evidence of how or

where the two Therium entities that are parties to the RHA LFA acquire their funds nor was it clear that they were "Associated Entities" of TCML for the purpose of the ALF Code. However, Mr Purslow states in his witness statement that they are indeed "Associated Entities" of TCML for the purpose of the Code, and it seems that will be the case if TCML acts as exclusive adviser to the corporate parent of the Therium entities. This means that, pursuant to para 4 of the Code, TCML accepts responsibility to the ALF for their compliance with the Code and, pursuant to para 9.4 of the Code, that it will ensure that Therium will maintain the capacity to meet their funding obligations (see further para 60 below). Of course, this is a voluntary code and not a binding legal obligation, but we think that it is wholly unrealistic to suppose that a leading litigation funder that is commercially active in this field would not honour these commitments to the Association of which it is a founder member, and thus place at risk the whole regime of self-regulation.

55. Under the RHA LFA, the funding from Therium is to be provided in various tranches. The obligation on Therium to extend funding from one tranche to the next tranche was significantly qualified in clause 2 of the original RHA LFA which appeared to leave a broad scope to Therium's discretion. However, in exchanges with the Tribunal in the course of argument, Mr Kirby QC for the RHA accepted that this could probably be amended to make any right to terminate funding subject to the contractual regime set out in clause 16 (essentially requiring that Therium ceases to be satisfied as to the merits of the claim or that it is commercially viable, based on advice from an independent QC). The next day the solicitors to the RHA wrote to state that the RHA and TCML would seek to amend clauses 2.3 to 2.7 accordingly and on 14 June 2019 the solicitors confirmed that these amendments had been made. In our view, that resolves the concern raised by the original wording. Indeed, we did not understand Mr Bacon to argue the contrary.

56. A second concern raised by Mr Bacon related to assignment, since clause 19.1 of the RHA LFA as originally worded appeared to give Therium an unrestricted right to assign its obligations to a third party. That would have given Therium the potential to transfer the obligations to someone who was not bound by the ALF Code or a suitable funder. But Mr Purslow in his witness statement said

that the purpose of the clause was to permit an assignment within the Therium group. Mr Kirby confirmed that a suitable amendment to clause 19.1 could be agreed to limit the right to assign accordingly, and again the RHA's solicitors' letters confirmed that this has been done. That takes care of the point.

57. The OEMs raised a further objection based on the right of Therium to terminate under clause 16.4 if it reasonably considers that there has been a material breach of the RHA LFA by "the Claimants" which has not been remedied within 20 business days. Mr Bacon pointed out that "the Claimants" as defined includes not just the RHA but also the individual members of the class who have entered into a separate litigation management agreement with the RHA, and that they themselves become parties to the agreement. Clause 9.8 of the agreement provides:

> "The Claimants (other than the RHA) hereby agree with Therium that, in the event that a CPO is made, they shall use their best endeavours to opt in to the Collective Proceedings."

On that basis, Mr Bacon suggested that even if only a few class members who had signed a litigation management agreement then chose not to opt in (particularly if there might be a 'rival' CPO in favour of UKTC which they preferred), then Therium may be able to terminate the RHA LFA for material breach. However, as Mr Bacon and Mr Carpenter themselves submitted, the test should be "whether there is a realistic, as opposed to a fanciful or theoretical, possibility of termination." If Therium had decided that this was a worthwhile claim, in which it had invested very substantial sums in the hope of making significant profits, it would hardly pull out simply because a small number out of the very large class of claimants withdrew. Of course, if very many withdrew, the position might be different, but then the situation is covered by clause 16.3 (commercial viability) and does not rest on this particular provision concerning material breach. We therefore do not regard this objection as well-founded.

UKTC

58. UKTC has a more complex funding arrangement than the RHA. There are two proposed LFAs, one for collective proceedings on an opt-out basis (UKTC's preferred option) and the other for collective proceedings on an opt-in basis. In

both forms, the litigation funder is Yarcombe Ltd ("Yarcombe"), a company incorporated in Guernsey. The LFA for opt-in proceedings (the "UKTC Opt-in LFA") filed with the application was executed on 9 February 2018 and amended by five addenda. An LFA for opt-out proceedings was executed on 30 January 2019 and would take effect and supersede the UKTC Opt-in LFA if an opt-out CPO was granted. In response to some of the concerns raised in opposition by the OEMs, a revised opt-out LFA was agreed by UKTC and Yarcombe, on the basis that it will be executed if an opt-out CPO is granted, and therefore replaces the previous, executed agreement. The argument at the hearing was accordingly conducted on the basis of the revised draft agreement (the "UKTC Opt-out LFA"). In the course of the hearing, UKTC confirmed that corresponding amendments would also be made to the UKTC Opt-in LFA, so that document is to be read subject to the changes set out in the letter from UKTC's solicitors of 5 June 2019. Marked-up copies of both the agreed draft revised UKTC Opt-in LFA and the agreed draft revised UKTC Opt-out LFA, incorporating a few further changes as a result of comments made during the hearing were served after the hearing on 21 June 2019. The maximum amount of funding committed under the two forms of LFA is £24 million, of which £4 million is reserved for insurance premiums.

59. Yarcombe operates under the umbrella of the Calunius group of litigation funds. Calunius Capital LLP ("Calunius LLP") is a well-known litigation funder that has been authorised as an investment adviser by the FCA since 2007. It is a founding member of the ALF and its chairman, Mr Leslie Perrin, became the chairman of the ALF when the Association was established in 2011. Mr Perrin explains that Calunius LLP acts as sole investment advisor to the three Calunius Litigation Risk Funds as regards large-scale commercial litigation and arbitration. Mr Perrin states that the corporate director of the funds used for these proceedings is Calunius GP3 Ltd ("GP3") and that Yarcombe is "wholly controlled by GP3". GP3 is the sole corporate director of Yarcombe.

60. In view of Yarcombe's status as a Guernsey SPV, with no apparent assets, the Tribunal was sympathetic to the concern advanced by the OEMs as to how much reliance could be placed on Yarcombe's contractual commitment to fund the litigation. In addressing that concern, UKTC placed considerable emphasis on

the ALF Code. Clauses 1-4, 9 and 14 of the Code, as revised in January 2018, provide, insofar as relevant:

> "1. This code ("the Code") sets out standards of practice and behaviour to be observed by Funders (as defined in clause 2 below) who are Members of The Association of Litigation Funders of England & Wales ('the Association') in respect of funding the resolution of Relevant Disputes. Relevant Disputes are defined as disputes whose resolution is to be achieved principally through litigation procedures in the Courts of England and Wales.
>
> 2. A litigation funder:
>
> > 2.1 has access to funds immediately within its control, including within a corporate parent or subsidiary ('Funder's Subsidiary'); or
> >
> > 2.2 acts as the exclusive investment advisor to an entity or entities having access to funds immediately within its or their control, including within a corporate parent or subsidiary ('Associated Entity'),
>
> ('a Funder') in each case:
>
> > 2.3 to fund the resolution of Relevant Disputes; …
>
> 3. A Funder shall be deemed to have accepted the Code in respect of funding the resolution of Relevant Disputes.
>
> 4. A Funder shall accept responsibility to the Association for compliance with the Code by a Funder's Subsidiary or Associated Entity. By so doing a Funder shall not accept legal responsibility to a Funded Party, which shall be a matter governed, if at all, by the provisions of the LFA.
>
> …
>
> 9. A Funder will:
>
> …
>
> > 9.4 Maintain at all times access to adequate financial resources to meet the obligations of the Funder, its Funder Subsidiaries and Associated Entities to fund all the disputes that they have agreed to fund and in particular will;
> >
> > 9.4.1 ensure that the Funder, its Funder Subsidiaries and Associated Entities maintain the capacity;
> >
> > > 9.4.1.1. to pay all debts when they become due and payable; and
> > >
> > > 9.4.1.2. to cover aggregate funding liabilities under all of their LFAs for a minimum period of 36 months.
>
> ....
>
> 14. Breach by the Funder's Subsidiary or Associated Entity of the provisions of the Code shall constitute a breach of the Code by the Funder."

61. However, it is Calunius LLP not Yarcombe which is a member of the ALF. The corporate structure of the Calunius group is unclear but it seems that neither GP3 nor Yarcombe is a subsidiary (direct or indirect) of Calunius LLP, nor is Yarcombe a subsidiary of GP3. Although Mr Perrin asserts in his final witness statement, made after the hearing, that GP3 and Yarcombe are both "Associated Entities" for the purpose of cl 2.2 of the ALF Code, there is no evidence that either has access to the necessary funding (i.e. £24 million) "immediately within their control".

62. In his first witness statement, Mr Perrin gave a personal undertaking that Calunius LLP will "use its best endeavours to ensure that Yarcombe will comply with the Code for the duration of these proceedings". In the hearing, the Tribunal expressed concern about reliance on such a personal undertaking from the company's chairman: although there is no question about Mr Perrin's integrity, it is unclear how far he controls Calunius LLP and, in any event, there can be no guarantee that he will still be with the company in several years' time. Mr Bacon also argued that the ALF Code only binds ALF members towards the ALF and expressly has no legal force. In response to these concerns, after the hearing Calunius LLP by its directors on 21 June 2019 gave a written undertaking to the Tribunal that it will itself comply with the ALF Code and that it will use its best endeavours to ensure that Yarcombe will do so for the duration of the proceedings. Mr Perrin explained that Calunius LLP cannot give an absolute undertaking as regards Yarcombe because it has no legal authority to manage or control Yarcombe or to act as its agent.

63. Further, Mr Perrin by his fifth witness statement of 21 June 2019 confirmed that if an opt-out CPO is granted "and any appeals against the order have been fully resolved", Yarcombe would comply with a condition in the order that the balance of the £24 million funding not already expended is deposited in an escrow account "for the purpose of funding the case, pending the termination of the LFA, the conclusion of the proceedings or any revocation or material variation of the [CPO]", reflecting the terms of the LFA. If an opt-in CPO were granted, then Yarcombe would be willing to enter into such an escrow agreement once "Economic Viability" is achieved, as defined in cl 6 of the UKTC Opt-in LFA: i.e., when the total expected value of the claims of all class

members who have opted in by the opt-in deadline exceeds a specified sum. (If the proceedings do not reach Economic Viability, then Yarcombe would in effect cease to fund the action.)

64. The OEMs, by their written response received on 15 July 2019, suggest that a mere "best endeavours" obligation on the part of Calunius LLP may be of little value in the circumstances. Nonetheless, they accept that the proposal for payment into an escrow account would satisfy the concern about Yarcombe's ability to provide UKTC's own funding, subject (a) in the case of an opt-in CPO, to the payment being made immediately and not only upon achievement of Economic Viability; and (b) on the basis of a requirement that the sum should be increased in the event that greater funding is held to be required in the future.

65. We reject the OEMs' stipulation for either of those conditions. The regime of collective proceedings introduced into the CA for competition claims by the Consumer Rights Act 2015 is dependent on TPF for its success since there will be few cases where the class members will themselves be able to fund their claims. The basis of the ALF Code is to provide a satisfactory means of self-regulation of the litigation funding industry for the protection of those in receipt of TPF, and the terms of the ALF Code, on its initial introduction, received the endorsement of Lord Justice Jackson: see his 6th Lecture in the Civil Litigation Costs Review Implementation Programme, para 45 above.

66. There are different models of commercial litigation funding now adopted by members of the ALF (see Rowles-Davies, *Third Party Litigation Funding*, chap 4) and it would be wrong for the Tribunal to seek to place TPF for the purpose of collective proceedings under the CA into a straightjacket. On the contrary, the Tribunal seeks to facilitate the access to justice for claimants achieved by properly constituted collective proceedings. In that regard, the concern of the Tribunal when reviewing a LFA is (a) that the terms of the funding agreement do not impair the ability of the class representative to act fairly and adequately in the interests of the class members, and (b) that adequate funding has been arranged to pursue the litigation effectively in the interests of the class members. By contrast, the concern of the OEMs, inevitably, is not to ensure the effective advance of the claims against them; indeed, it is in their interest to make the pursuit of those claims as burdensome as possible.

67. Although we were not satisfied on the evidence as it stood at the time of the hearing, we consider that UKTC, Calunius LLP and Yarcombe have taken significant steps since the hearing which sufficiently allay our concerns. In our view, the commercial reality is that Calunius LLP has material influence, albeit not legal control, over the conduct of Yarcombe and it is significantly Mr Perrin, as chairman of Calunius LLP, who confirms the escrow arrangement which Yarcombe will enter into. Yarcombe is already funding the CPO application. For the purpose of opt-in proceedings, Economic Viability is determined under the terms of the UKTC Opt-in LFA at the date specified in the CPO by which class members are required to opt-in to the proceedings. If Economic Viability is not achieved, Yarcombe will in effect cease to fund the case further, so the extent of funding required of it beyond the making of the CPO is very limited. As to the risk that the total funding currently committed to UKTC is insufficient, we discuss this below. For the reasons we set out, we do not consider that it is appropriate to resolve this risk now, and the same applies to any requirement to increase the sum deposited in escrow.

Budgeted amounts

68. As noted above, the RHA LFA, as amended, provides for funding up to £27 million. Out of that total, some £7 million is devoted to the up-front ATE insurance premiums and the cost of additional employees taken on by the RHA for the purpose of the litigation and some other legal advice, leaving about £20 million for the RHA's costs of lawyers and experts.

69. The OEMs contended that in its approach in the CPO application, the RHA recognised that the resolution of the collective proceedings might leave extensive individual issues still to be determined, for which no funding was presently allocated. However, the director of the RHA's solicitors explained that although there is a possibility of such questions as pass-through, interest and tax being dealt with as individual issues, the RHA has assumed that these would, in the first instance at least, be dealt with on a common basis and has taken that into account in its budget. Moreover, if further issues remain to be litigated after the collective proceedings have resulted in a judgment in favour of the claimant class, with then a consequent decision on costs, we think it is very unlikely that there will be difficulty raising funds for the further individual

stages. In any event, in developing litigation with a significant time-frame, we do not think that this needs to be addressed now.

70. The revised UKTC LFA provides for funding of £20 million for UKTC's costs and expenses, plus a further £4 million for additional insurance premiums. As pointed out in argument, clause 2 of the revised UKTC LFA was not very well drafted in that there appeared to be no express obligation to pay up to the £4 million set out in Schedule 1 for insurance premiums. However, Mr Thompson confirmed that this was the commercial intention and the draft amended UKTC LFAs exhibited to Mr Perrin's fifth witness statement now reflect this: see cl. 2.4.

71. The OEMs contended that these sums are inadequate for the respective Applicants to fund the proceedings they wish to bring:

(1) As regards UKTC, the OEMs argued that "only" £4.2 million has been allowed in the costs budget for disclosure, and nothing for third party disclosure which is likely to be required. However, UKTC's solicitors are acting on a full CFA. The detailed costs budget they have prepared, when carefully scrutinised, shows that £12.9 million has been allocated for costs to end of trial (£0.9 million already incurred plus £12 million to come) in the event of an unsuccessful judgment, when neither the CFA success fee nor any additional ATE premium would fall to be paid. That total includes the initial premiums of £2.4 million (for £12 million ATE cover), and a further £1.6 million (to secure additional £8 million cover), i.e. £4 million insurance premiums in total. Thus for UKTC's own costs (disbursements and expert fees) the budget is £10.5 million. That is well covered by the funding of £12 million for legal costs and expenses in the UKTC LFA, which includes an additional contingency of £8 million for further expenses and premiums.

(2) As regards the RHA, its solicitors are not on a CFA and so its pre-judgment legal costs will be significantly higher, although the budget suggests that the internal RHA team being specially employed will undertake some of the more routine work. The way the RHA claim is framed will also lead to higher costs since (a) the claim involves a much

longer post-cartel run-off period in which it asserts that prices were still higher (nine years compared to one year asserted by UKTC); (b) it seeks to include trucks acquired outside the UK and therefore on different national markets; (c) it covers used as well as new trucks; and (d) it includes the effect of the arrangements regarding emissions technology. All that will increase the scope of disclosure and introduce additional complexity. The solicitors to the RHA have prepared a costs budget in broader outline than that submitted for UKTC, showing total expenditure of £10.42 million up to and including the CPO hearing, and a further £16.58 million over the following 2½ - 3¼ years to the end of a 12 week trial. On that basis, they consider that the total funding of £20 million secured under the RHA LFA should be sufficient.

72. Legal and expert fees for one case in excess of £10 million, let alone £20 million, is on any view a very substantial sum of money. We consider that there is an air of artificiality about the submissions for the OEMs on this issue. This litigation is at a very early stage, where the Applicants are putting forward what can only be broad estimates of what the whole case may cost. In arguing that these figures, and thus the funding secured to cover them, are inadequate the OEMs are in effect saying that it will cost the claimants more to pursue the claims against them than the claimants themselves have taken into account.

73. Furthermore, these claims are unusual because of the currency of a series of individual actions brought by major truck purchasers or purchasing groups against many of the same OEMs arising from the same infringement. That is a matter to which we will return below, but some of the fundamental issues in the individual claimant trucks litigation are very likely to feature also in the present collective proceedings, such as what in the Decision is binding for a private claim, whether the unlawful collusion had a price effect and how to estimate it, and the proper approach to pass-through. Those proceedings are much further advanced than these collective proceedings, which are still at the starting gate. Although the decisions in the other actions may not be technically binding here, they are likely to have a significant impact on the shape of the present proceedings if one or more CPOs are granted and thus on the overall costs.

74. The third party funders that have entered into LFAs with the RHA and UKTC have in each case a clear commercial incentive to continue to fund the claims through to judgment (or settlement). They are investing massive sums, and if the claims came to a halt in, say, two years because the money ran out, the funders will recover nothing. We have reviewed the budget estimates provided on behalf of both Applicants but we would emphasise that a CPO application does not involve a full costs budgeting exercise. Altogether we consider that it is quite impossible to find, viewed at this stage, that the estimated budget of either Applicant is clearly unrealistic, or that the very large sums currently secured by way of funding are inadequate. And if at a later stage it should be found that more money is required, we think that commercial reality dictates that there is a reasonable prospect that UKTC and/or RHA would be able to secure further appropriate funding to push the litigation through to a conclusion.

75. Moreover, it is not a requirement under the CAT Rules that the Tribunal must determine the likely costs of the Applicant to the end of trial and be satisfied that the proposed class representative has secured sufficient funding to cover those costs. What is required is for the Tribunal, in deciding whether to authorise a proposed class representative, to take into account the estimated costs and arrangements which the applicant has made in that regard: rule 78(3)(c)(iii). As the Guide states, the proposed class representative's ability to fund its own costs is therefore a relevant consideration. For the reasons explained above, taking into account the detailed arrangements made with the further modifications, we are satisfied that those arrangements as regards these Applicants' own costs and expenses will enable them to act adequately in the interests of the class members in pursuing these claims. In that context, we also have regard to the fact that the RHA is a well-established trade association; and that although UKTC is a SPV set up to pursue this claim, it has a board of directors with extensive experience of the industry chaired by a retired Deputy High Court Judge. There is no suggestion that either Applicant is not acting in good faith with the objective of pursuing effective litigation in order to assist recovery by the proposed class.

Potential liability for costs

76. Rule 78(2)(d) requires the Tribunal to consider whether the class representative would be able to pay the other side's costs if ordered to do so.

77. It is clear that neither Applicant would on its own have the means to meet an adverse costs order, and as already mentioned they have both sought to cover this potential liability by ATE insurance policies, although the structure of those arrangements is rather different:

    (1) The RHA holds a policy covering itself and all claimants in the class for liability for costs of defendants to these proceedings, including any additional defendants joined under rule 39 of the CAT Rules, up to £20 million, provided by seven participating insurers each severally liable for specified tranches (the "RHA ATE Policy");

    (2) UKTC relies on a combination of the UKTC LFA and ATE policies under which the insured is Yarcombe. Pursuant to the LFA, Yarcombe agrees to pay adverse costs payable by either Yarcombe or UKTC up to the limit of indemnity under the ATE policies. There is one policy that will continue to apply in the event that an opt-in CPO is made, and a separate, unexecuted policy that has been agreed by all relevant parties and will come into effect in the event that an opt-out CPO is made. The two policies (the "UKTC ATE Policies") are therefore effectively alternatives and, save for one clause (6.2) to deal with this distinction, their wording is identical; and it has been subject to two revisions since the issue of the application to take account of some points made in the OEMs' joint written response on funding and in their submissions at the hearing. The level of cover provided by four participating insurers under both policies in respect of adverse costs is £12 million.

78. Mr Bacon's objections challenged both the nature of the insurance arrangements and the level of cover. We shall address them in that order.

The nature of the insurance arrangements

79. As a general proposition, Mr Bacon submitted that in addressing the question of the Applicant's ability to pay the other side's costs, the Tribunal should adopt the same approach as on a security for costs application. We do not agree that the approach is necessarily identical and the Tribunal has a distinct power to order security on a defendant's application: rule 59. However, we accept that the authorities regarding security for costs provide a helpful analogy for some of the considerations that are relevant. In particular, the discussion of ATE policies in such cases is of great assistance.

80. In that context, Mr Bacon relied especially on the Court of Appeal decision in *Premier Motorauctions Ltd v PricewaterhouseCoopers llp* [2017] EWCA Civ 1872, concerning an application for security under the CPR where the claimant companies were in liquidation. Recognising that an appropriate ATE policy would be a sufficient answer to an application for security for costs, the court there analysed the policies obtained by the claimants and their liquidators to see if those policies provided sufficient protection. In his judgment, Longmore LJ (with whom the other two members of the Court of Appeal agreed) noted that under the policies the ordinary common law principle that the insurer is entitled to avoid liability if the insured makes any material non-disclosure or misrepresentation applied, and observed, at [10]:

> "One sometimes sees anti-avoidance clauses in ATE insurance policies pursuant to which insurers promise not to avoid or promise only to rely on any non-disclosure or misrepresentation if it is made fraudulently. But there is no such provision in the relevant policies in the present case."

The Court of Appeal disagreed with the view of the judge below that the prospect of avoidance for non-disclosure or misrepresentation was purely theoretical, as Longmore LJ explained:

> "28. The judge felt he could rely on the fact that the proposals to insurers were made by joint liquidators who are independent professional insolvency office holders, and who investigated the claims with the assistance of experienced solicitors and counsel providing a high level of objective professional scrutiny. All this is, of course, true but the best professional advice cannot cater for cases of non-disclosure of matters which the professionals do not know.
>
> 29. Neither of the defendants nor the court have been provided with the placing information put before the insurers but, even if that had been provided, it is unlikely that the court could be satisfied that the prospect of avoidance is

> illusory. Even at the jurisdictional stage of considering security for costs, the defendants must, as Mance LJ said in the *Nasser* case [2002] 1 WLR 1868, para 60, "be entitled to some assurance that [the insurance] was not liable to be avoided for misrepresentation or non-disclosure". I cannot see that on the facts of this case these defendants have that assurance. It follows therefore that there is reason to believe that the Companies will be unable to pay the defendants' costs if ordered to do so and that the jurisdictional requirement of CPR r 25.13 is satisfied."

The judgment proceeded, at [31], to quote the kind of anti-avoidance provision envisaged in *Nasser*: "The insurer shall not be entitled to avoid this policy for non-disclosure or misrepresentation at the time of placement except where such non-disclosure was fraudulent on your part." Longmore LJ commented:

> "Insurers could therefore avoid for fraud but not otherwise. It may not be a particularly difficult exercise for a judge to assess the likelihood of avoidance if the right to avoid is confined to fraud but, where there is no anti-avoidance clause of any kind, the exercise is very much more difficult and the defendants' need for the assurance to which Mance LJ referred is all the greater."

81. Mr Bacon submitted that the same concern arises on the ATE policies relied on by the present Applicants. To assess that, it is necessary to consider the individual policies and their relevant terms in detail.

The RHA ATE Policy

82. The policy conditions are somewhat complex and interlinked, but in essence there is, first, an exclusion of cover if the class representative, any sub-class representative, or a claimant has "fraudulently, deliberately or recklessly" breached their duty to make a fair presentation of the risks to the insurers: cls 3.10, 3.12 and 3.14. The insurers' right of termination is then set out in cl. 4.2:

> "*4.2 Termination by Insurers*
>
> Save insofar as clause 4.4 '*Withdrawal of Indemnity*' and clause 4.3 '*Cooling off*' provide to the contrary and subject to clauses 3.10, 3.12 and 3.14 *'Fraudulent, deliberate or reckless breach of the duty of fair presentation'* and clauses 4.18, 4.19, 4.23, 4.24, 4.28 and 4.29 *'Fair presentation'*, the Insurers waive their right to rescind, cancel or avoid the Policy, for any reason other than:
>
> (a) any fraudulent, deliberate or reckless breach of [*sic*] the Insured of its duty to make a fair presentation of the risk to the Insurers;
>
> (b) any material increase in Opponents' Cost under this Policy due to breach of any Policy condition by the Insured caused by deliberate or reckless action(s) of Insured, or

(c) subject to the provisions in respect of cancellation for non-payment of premium set out at the commencement of this Policy, non-payment of Paid Premium or Deferred and Contingent Premium (if payable) within due date stated in the Schedule.

For the avoidance of doubt, the burden of proving any entitlement to terminate the Policy to this clause 4.2 shall be on the Insurers."

"Fair presentation" for the purpose of both the exclusions and the right of termination is governed by cls 4.18 and 4.28, which are expressed in parallel terms as regards, respectively, the class representative/any sub-class representative and the claimants:

"4.18 *Fair Presentation*

Without prejudice to clauses 3.10, 3.12, and 3.14 *'Fraudulent, deliberate or reckless breach of the duty of fair representation'* and clause 4.2 *'Termination by Insurers'*.

4.18.1 The Class Representative and/or the Sub-Class Representative's obligation to provide the Insurers with a fair presentation of the risk shall be limited to matters which the Class Representative and/or the Sub-Class Representative's Executives have actual knowledge.

4.18.2 If the Insured fails to provide a fair presentation, but where such failure was neither deliberate nor reckless, the Insurers shall indemnify the Insured in full, subject to the conditions of the Policy. For the avoidance of doubt, it is agreed that the remedies for breaches of the duty of fair presentation which are neither fraudulent, deliberate nor reckless referred to in Schedule 1 of the Insurance Act 2015 shall not apply to the Policy.

4.28 *Fair Presentation*

Without prejudice to clauses 3.10, 3.12, and 3.14 *'Deliberate or reckless breach of the duty of fair representation'* and clause 4.2 *'Termination by Insurers'* above;

4.28.1 The obligation of Claimant(s) to provide the Insurers with a fair presentation of the risk shall be limited to matters of which the Executives of the Claimant(s) have actual knowledge.

4.28.2 If the Claimant(s) fails to provide a fair presentation, but where such failure was neither deliberate nor reckless, the Insurers shall indemnify the Insured in full, subject to the conditions of the Policy. For the avoidance of doubt, it is agreed that the remedies for breaches of the duty of fair presentation which are neither fraudulent, deliberate nor reckless referred to in Schedule 1 of the Insurance Act 2015 shall not apply to the Policy."

However, any breach or provision of information by an individual claimant in the class is treated as severable and not imputed to any other claimant or the class representative: cl 4.29.

83. In our view, these carefully worded provisions satisfy the concerns about avoidance discussed in *Premier Motorauctions*. As the judgment there made clear, the risk of avoidance of the policy, or exclusion of cover (which in practical terms is much the same thing), has to be assessed on the facts of the case itself. In *Premier Motorauctions*, the claimants alleged that a leading firm of accountants and Lloyds Bank had conspired together to depress the companies' assets and then acquire them at an undervalue. The case turned heavily on the truthfulness of the evidence of the managing director of the claimant companies. In a case of that kind, the prospect of insurers after trial having grounds to assert material non-disclosure could not be dismissed as illusory. But the present proceedings have a very different character. These are 'follow-on' claims based on the Decision finding a serious infringement, where the issues are causation and quantum. The RHA is a responsible, well-established body, and we regard as minimal the risk that it would be reckless, let alone fraudulent, in providing information to the insurers. For the same reason, the case of *Lewis Thermal Ltd v Cleveland Cable Co Ltd* [2018] EWHC 2654 (TCC), to which Mr Bacon also referred, is readily distinguishable since that was a claim raising serious allegations of fraud.

84. Reliance was also placed on the fact that cl 4.12 of the RHA ATE Policy excludes rights under the Contracts (Rights of Third Parties) Act 1999 (the "C(RTP)A 1999"), a factor which weighed in the *Lewis Thermal* case against acceptance of the policy as security. However, the claimant there was a dormant company with no activity or assets other than to pursue the litigation. The RHA is clearly in a very different position and there is no basis to suggest that it would not claim under the policy in order to meet an adverse costs order. Moreover, as Mr Kirby pointed out, if the RHA as an English company should become insolvent, when under a liability to the OEMs for costs, the OEMs would have the benefit of the Third Parties (Rights against Insurers) Act 2010, and the rights of the RHA to claim under the policy would vest in them.

85. Finally, Mr Bacon raised concerns that the participating insurers' liability under the policy was only several and not joint and several. The OEMs submitted that this leaves them exposed to the risk of an insurer becoming insolvent. However, we were told that several liability is standard commercial practice when a large

amount of cover is placed in layers, and Mr Bacon did not dispute that. As recorded in RHA's litigation plan, all the insurers are 'A-rated'. The likelihood of insolvency is accordingly very low. Moreover, to insist on cover of this magnitude from insurers being on a joint and several basis might make the obtaining of cover extremely difficult and serve to stifle a bona fide claim. We reject this submission which, to be fair, Mr Bacon did not press very hard.

The UKTC ATE Policies

86. As stated above, the ATE insurance arrangements relied on by UKTC differ in character from those of the RHA in that the insured under the policies is not UKTC itself but Yarcombe, the third party funder. Thus Yarcombe is defined as "the Insured" under the policies whereas UKTC is "the Claimant". The "Insured Liability" is defined as Yarcombe's legal obligation to pay any "Other Side's Costs". The OEMs accept that the policy therefore covers a liability for adverse costs on UKTC for which Yarcombe is liable to indemnify UKTC under the LFA.[1]

87. Several of the clauses in the policy wording[2] seem to be taken from standard wording in a more conventional structure and, as originally worded, were inapt for this arrangement: e.g. cl 3.6.1 required Yarcombe to "instruct" UKTC's solicitors to report all material developments in the proceedings to the insurers, whereas such instructions could only come through UKTC.[3] But we do not think that such awkwardness in the drafting would prevent the effective commercial operation of the policies and on 21 June 2019 Mr Perrin exhibited amended versions of both policies correcting some of these infelicities.

88. However, the OEMs take a more fundamental objection to this structure. A costs order against UKTC will only result in payment under the relevant ATE

[1] In the proposed amended UKTC ATE Policies, the definition of "Insured Liability" is changed to mean UKTC's obligation to pay any "Other Side's Costs": cl 14.13. The OEMs state that the original version is appropriate and that the proposed change should not be made. This is a point of drafting and construction on which we have not heard argument and therefore express no opinion. The objective which UKTC seeks to achieve is not in dispute.
[2] The two policies are identical in these respects.
[3] See also cl 2.1.1 which excludes claims attributable to *Yarcombe's* intentional failure to follow the advice of UKTC's solicitors.

policy if UKTC demands payment from Yarcombe and Yarcombe then makes a claim under the policy. On that basis, the OEMs assert:

> "Since both UKTC and Yarcombe are SPV's without any apparent assets, there is no obvious reason for them to do so. This is not a question of UKTC performing its contractual obligations.... It would have a choice whether to enforce Yarcombe's obligations and it may choose not to do so."

Mr Bacon argued that this structure creates a situation of uncertainty which is unjust for the Respondents.

89. We regard this submission as completely unrealistic. We have referred above to the experienced board of directors of UKTC. If a costs order was made against UKTC, for which it had a right of indemnity from Yarcombe, the suggestion that the directors would choose to default on the company's legal liability rather than enforce its contractual right to ensure payment is in our view fanciful. And if such a demand was made of Yarcombe, there is no conceivable reason why Yarcombe would not claim under the policy for which it had paid very substantial premiums. Although for a claim funded by a third party funder with ATE insurance cover against an adverse costs order it may be more usual to have the claimant as the insured, we do not see that an arrangement where the funder is the insured and assumes an obligation to pay the claimant's liability for adverse costs is in and of itself objectionable. However, there are three further, more particular points advanced by Mr Bacon, which we address in turn.

(i) Potential insolvency of Yarcombe

90. As with the RHA ATE Policy, the UKTC ATE Policies expressly exclude rights under the C(RTP)A 1999: cl 9. But unlike the RHA, Yarcombe is an SPV and there is no information as to its assets: indeed it appears that Yarcombe is essentially a conduit through which funds will be channelled. This raises the possibility, in the event that UKTC loses the litigation, that Yarcombe could go into liquidation. The Calunius group may well choose to support Yarcombe, but that is not guaranteed; and in those circumstances there is a risk that no one would claim under the policy, which means that a costs order could not be satisfied. We think that there is in this regard some parallel with the concern raised in the *Lewis Thermal* case. In this case, the OEMs would not have any protection under the Third Parties (Rights against Insurers) Act 2010 since

Yarcombe is a Guernsey company and therefore falls outside the scheme of the statute.

(ii) Potential avoidance of the policy by the insurers

91. The UKTC ATE Policies contain much broader termination provisions for the benefit of the insurers. Clause 5.1 provides:

> "The Insurer may cancel this Policy with immediate effect if:
>
> 5.1.1 the Insured fails without good reason to meet any one or more of the Insured's obligations under Section 3 subject always to the Insurer establishing that it has suffered material prejudice as a result of any such failure..."

92. Section 3 imposes a series of obligations on Yarcombe as the Insured. Cl. 3.4 provides that any breach of the duty of fair presentation by the Insured "shall be considered in accordance with the remedies available under the Insurance Act 2015 – Remedies for breach of the duty of fair presentation LMA9121 attached". Those attached remedy clauses include the following:

> "1) If, prior to entering into this insurance contract, the Insured shall breach the duty of fair presentation, the remedies available to the Insurer are set out below.
>
> ...
>
> b) If the Insured's breach of the duty of fair presentation is not deliberate or reckless, the Insurer's remedy shall depend upon what the Insurer would have done if the Insured had complied with the duty of fair presentation:
>
> > i) If the Insurer would not have entered into the contract at all, the Insurer may avoid the contract and refuse all claims, but must return the premiums paid.
> >
> > ii) If the Insurer would have entered into the contract, but on different terms (other than terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms from the outset, if the Insurer so requires.
> >
> > iii) In addition, if the Insurer would have entered into the contract, but would have charged a higher premium, the Insurer may reduce proportionately the amount to be paid on a claim…
>
> ...
>
> Nothing in these clauses is intended to vary the position under the Insurance Act 2015."

93. This of course contrasts with the position under the RHA ATE Policy. Mr Thompson submitted that because in this case there is a direct commercial relationship between the funder and the insurers, the risk of avoidance is very different, and that one was assessing the risk of non-performance of the policy by a reputable funder, a firm of solicitors or an SPV with reputable directors. That is true so far as it goes, but the Tribunal is in no position to assess what information was given to the insurers at the time of placing of the policies and whether there may have been inadvertent breaches of the duty of fair presentation and if so, what effect that may have had.

94. As regards both points (i) and (ii), Mr Thompson stated in his oral submissions:

> "... my client accepts that it would in principle be possible to give additional reassurances to the respondents and objectors either by imposing additional restrictions on the terms on which the insurers could avoid liability or by giving the respondents and objectors direct rights of enforcement, possibly by assignment of the benefits of the policies."

95. Although Mr Thompson informed us, on instructions, that the cost of incorporating additional protection against avoidance in the policy might be significant and urged that this should be left to a later stage should the Respondents subsequently take out an application for security for costs, we consider that these are points that must be resolved now before UKTC could be authorised to act as class representative. As a result of observations made by the Tribunal during the hearing, in his subsequent witness statement of 21 June 2019, Mr Perrin stated that UKTC had ascertained that for a cost of 10% of the limit of indemnity, endorsements could be entered on the policies that would (i) introduce anti-avoidance provisions excluding a right of the insurers to avoid other than for fraud; and (ii) stipulating that any pay-out would be made directly to the "Other Side", as defined in the Policy, rather than to Yarcombe or UKTC, and giving the "Other Side" a direct right of enforcement under the C(RTP)A 1999. Mr Perrin exhibited to his witness statement the form of endorsement to which the insurers had in principle agreed.

96. By their written response, the OEMs accepted that the wording of this anti-avoidance provision is satisfactory. However, as regards protection from insolvency, the OEMs submitted that the form of wording proposed still left payment to the Other Side dependent upon Yarcombe making a claim under the

Policy. As a result, UKTC has agreed with the insurers revised wording to clause 5 of the endorsement, making it clear that the terms of the policy itself may be enforced by the "Other Side" pursuant to the C(RTP)A 1999. This revised form of endorsement is appended to this judgment. It seems to us that the revised wording should resolve this outstanding issue, but if the OEMs contend otherwise then to decide the matter we would need to hear proper argument upon it. The intention of UKTC is clear and we therefore consider that the sensible course is to give permission to the OEMs to make written submissions if so advised on this particular point following the handing down of this judgment, which UKTC could then take up with its insurers. If it cannot be resolved, the matter can be referred back to the President of the Tribunal for determination.

97. However, a separate issue concerns the terms on which this endorsement would take effect. UKTC states that it would be made to the UKTC ATE Opt-out Policy "as a condition of UKTC being granted" an opt-out CPO "that is not subject to appeal", by which is meant once any appeals process has been exhausted. Alternatively, if an opt-in CPO is granted, then the endorsement would be entered into once the proceedings achieve "Economic Viability": see para 63 above. The OEMs by their response take particular objection to the first condition and submit that the endorsement should be a condition of a CPO irrespective of any appeal. Their response states: "UKTC must satisfy the Tribunal that it will be able to pay the Joint OEMs' costs *now*."

98. The reason for the conditional terms for the endorsement, as confirmed in the letter of 1 July 2019 from UKTC's solicitors, is to avoid incurring the additional premium in the event that the collective proceedings do not go forward. Moreover, if an opt-out CPO were to be refused on other grounds, then the question of what ATE Policy is satisfactory would fall away. It is only if an opt-out CPO were to be granted and then challenged on appeal, that the Respondents would be without the protection of the endorsement for the duration of the appeal, and again only if the appeal was successful. The costs being incurred by the Respondents which they might seek to recover are therefore not the costs of the action but the costs of opposing the CPO application. In those circumstances, taking account of the factor set out in rule

78(2)(d), we consider that the risk against which the endorsement is providing protection is outweighed by the substantial additional cost to UKTC of obtaining that extra insurance cover over that limited period, so that the incorporation of this condition does not render it unjust or unreasonable for UKTC to be authorised as a class representative.

(iii) Contribution defendants

99. The third point concerns the costs of other OEMs who may be brought into the action. UKTC seeks to bring collective proceedings against Daimler and companies in the Iveco group, who were all addressees of the Decision. The definition of "Other Side's Costs" in the UKTC ATE Policies relied on at the hearing was confined to the costs of Daimler and Iveco. Accordingly, it did not extend to any additional persons against whom contribution may be claimed by Daimler and Iveco under rule 39 of the CAT Rules ("rule 39 defendants"). Given the size of the proposed claim, the fact that the proposed class members clearly purchased trucks made by other cartel members, and the joint and several liability for damages between all addressees of the Decision, we regard it as inevitable that Daimler and Iveco will bring such contribution claims if a CPO is granted. Indeed, it was on that basis that DAF and MAN appeared as objectors to the UKTC application. Although costs are always in the discretion of the Tribunal, it can be expected that if UKTC's action against the Respondents should fail, there will be an application for costs in the usual way also by rule 39 defendants as against UKTC. Mr Bacon accordingly submitted that it was unsatisfactory that there was no insurance cover against that potential liability.

100. Mr Thompson criticised this point as premature. As we understood his submission, it was that we should assess the adequacy of costs cover on the proceedings as they stand now, and that this can be revisited if and when additional parties are brought into the proceedings. However, on this aspect we think it is Mr Thompson who is being unrealistic. Since we regard that as an inevitable step if a CPO were to be made, we think it would make little sense to ignore it and then have to reassess the whole question of adverse costs cover a few months after making a CPO. Indeed, we note that this is actually anticipated in the UKTC LFA, where "Defendants" are defined, including for the purpose

of the definition of "Adverse Costs", as persons named as "defendant, co-defendant or Part 20 Defendant" to the Proceedings. (Although Part 20 Defendant is a reference to the CPR, we have no doubt that it would be construed as covering the equivalent rule 39 defendant in the CAT.) It is the definition in the ATE Policies which fails to match the definition in the UKTC LFA.

101. We note that in its pleaded Reply, UKTC stated:

> "Insofar as Objectors become Defendants, the ATE policy will be amended to meet a costs order against them and reflect the Tribunal's order."

Mr Thompson added in his oral submissions that there would not be a problem as the insurers are concerned about the level of cover, not the identity of the defendants. In our view, this was a matter that required to be addressed before a CPO could be made, since it would not be just for UKTC to act as class representative so long as the ATE Policies on which it relied did not extend to cover potential costs liability to rule 39 defendants. As a result of the indications to that effect given by the Tribunal during the hearing, UKTC duly went back to the insurers and by letter from its solicitors of 17 October 2019 submitted a revised UKTC Opt-in ATE Policy and a draft revised UKTC Opt-out ATE Policy agreed with the insurers, in which the definition of "Other Side" is changed to cover not only Daimler and Iveco but also any other OEM who is an addressee of the Decision and who is added as a rule 39 defendant. This accordingly now resolves this point.

102. We should add that the OEMs also raised a query regarding the solvency of the four insurers participating in the UKTC ATE Policies, but Mr Perrin testifies that they are all 'A-rated' by Standard & Poor and we see no ground for concern on that score.

The level of cover

103. The RHA ATE Policy provides cover of £20 million; the premiums payable before the event total £3.6 million (plus tax) and there are further substantial ATE premiums. The alternative UKTC ATE Policies each provides cover of £12 million; for this the premiums payable before the event total £2.4 million (similarly with substantial ATE premiums). However, Mr Perrin's third witness

statement said that the insurance brokers acting for Yarcombe "have advised that they expect to be able to source at least a further £8 million of adverse costs cover at a maximum cost of £1.6 million in the event that the Application is successful." On that basis, the alternative UKTC LFAs each makes provision for funding of £4 million on account of insurance premiums, expressly so as to permit cover of £20 million to be obtained. We therefore proceed on the basis that both Applicants can secure adverse costs cover of £20 million, and that any CPO granted to UKTC would be conditional on obtaining the further cover which it anticipates.

104. The OEMs object strongly that this level of cover is nothing like sufficient. They variously assert, through evidence from their solicitors, that their individual costs will be such that the total adverse costs facing either Applicant if the collective proceedings go through to the end of trial will be very substantially in excess of this sum. Thus, on the basis of a time estimate for trial of 14 weeks:

(1) Mr Jenkin for DAF said that DAF was likely to incur total costs of £20,130,000 in the RHA application and £18,830,000 in the UKTC application. This allowed for the costs of all stages to trial, such as the costs up to and including the CPO hearing (estimated to be £2.28 million in the RHA application to which DAF is a respondent and £980,000 in the UKTC application in which DAF is an objector), and disclosure (estimated to be £3,820,000 in each application). In addition, there were other costs, such as the costs of foreign lawyers, expert accountants and the resolution of individual issues, which Mr Jenkin expected to be recoverable but which had not been included in the costs estimate.

(2) Mr Bronfentrinker for Daimler, whilst acknowledging that there is a great deal of uncertainty in estimating the costs of collective proceedings given the lack of precedent, estimated that the total costs Daimler would incur in defending a single collective proceeding would be £22,944,456, almost half of which would be accounted for by the costs of the CPO hearing (£1.86 million) and disclosure (£8.25 million).

(3) Mr Farrell for Iveco similarly referred to the difficulties of providing complete costs estimates given the number of uncertainties around the form and scope of any CPO ultimately made. He said that it was nonetheless possible to demonstrate with very considerable certainty that even £4 million of adverse costs cover (i.e., the effective amount of the RHA's cover per defendant group based on £20 million cover across five defendant/rule 39 defendant groups) would be inadequate, since for the trial phase alone the combined costs of Iveco's solicitors, counsel and experts would be in the region of £5.94 million.

105. Mr Bacon submitted that rule 78(2)(d) is in effect mandatory, such that unless the Tribunal finds that the applicant for a CPO will be able to pay the defendant's recoverable costs to the end of trial if ordered to do so, the Tribunal cannot find that it is just and reasonable for that person to act as the class representative. We reject that submission. The factors set out in rule 78(2) must be considered by the Tribunal and they are obviously significant. But complete satisfaction of each relevant factor is not a condition to finding that it is just and reasonable for the applicant to be authorised: cp the wording of rules 78(1)(b) and 79(1).

106. In our judgment, the enumerated factors under rule 78(2) are not necessarily of equal weight. Indeed, given that the Tribunal's decision under rule 78 is made at a very early stage of the proceedings, before even defences have been served, there is inevitably uncertainty even as to the likely level of defendants' costs, such that it would be impossible for the Tribunal to be satisfied that the class representative "will be able to pay the defendant's recoverable costs". None of the OEM's solicitors who has given evidence suggests that it is possible at this point to provide a firm estimate of their client's likely costs and it is notable that there is considerable variation in their figures, with several of them reserving the right to revisit funding issues later in the proceedings if a CPO is granted.

107. We emphasise that this does not mean that the question of the adequacy of adverse costs cover is of little weight or should only lightly be scrutinised. On the contrary, we have made clear above, first, that we would have required UKTC to have its ATE Policies amended to cover also the costs of rule 39 defendants, if the Policies had not now been revised accordingly; and, secondly,

that we would require UKTC to obtain the additional cover up to £20 million which it states is available. On any view, £20 million is a very substantial sum for the defendants' costs of litigation. In our consideration of that figure and the various estimates put forward by the OEMs, we regard the following to be relevant:

(1) The adverse costs that are recoverable are only the reasonable and proportionate costs. In that regard, costs of the level referred to by the OEMs will invite thorough scrutiny.

(2) These are follow-on claims, where the Respondents and any rule 39 defendants have already been found to have participated in the infringement over the specified period. Accordingly, the issues at trial concern causation and quantum (including pass-through). Experience to date shows that many of these claims settle before trial.

(3) As with all collective proceedings, these claims would be intensively case managed by the Tribunal, including with a view to controlling costs.

(4) We think that for this exercise little account should be taken of the costs of the OEMs in resisting the grant of a CPO. If a CPO is refused the proceedings come to an end. Their costs will then be much lower and indeed the issue does not arise. If a CPO is granted, then that means their opposition to a CPO has failed. We obviously cannot now express a firm view of how the costs of the CPO application would then be determined and those costs may not all be one way. But we think it would be surprising if the OEMs were to recover all their costs of their sustained but unsuccessful resistance to the grant of a CPO: cp *Merricks v MasterCard Inc (Costs)* [2017] CAT 27 at [16], [20]-[21], where the Tribunal observed that there should be a level of consistency as regards the approach to costs on CPO applications and held that the bulk of the respondents' costs relating to the authorisation of the class representative, on which they were unsuccessful, should be disallowed, and indeed that the applicant would be entitled to a part of his costs in meeting those arguments.

(5) These collective proceedings are unusual in that they involve many of the same issues being raised in the various individual actions brought against the same OEMs currently pending before the Tribunal. Very extensive disclosure from the OEMs is under way in those actions and it is to be expected that there will be substantial overlap with the disclosure that would be sought from the OEMs in these proceedings. The OEMs are already engaged in extensive analysis of the legal and economic issues in those cases, as they are in other claims against them brought in other jurisdictions. We of course recognise that there will be differences in the approach of the economic experts when being applied on a class basis, although it is worth noting that at least one of the "individual" actions has 339 claimants. Those actions are far in advance of these collective proceedings, the more so as the applications for CPOs have been stayed pending the outcome of the appeal to the Supreme Court in *Merricks*. We think that all this will lead to a substantial saving in the OEMs' recoverable costs and we are not satisfied as to the extent to which or manner in which the estimates referred to above have properly taken this into account.

108. Moreover, there is a further consideration that we regard as relevant. The costs figures are partly so high because this infringement was so long in duration, involved so many manufacturers and was so extensive in scope: according to the Commission's press release, the cartel participants accounted for 90% of all medium and heavy trucks sold in the EEA over a 14 year period. That obviously increases the number of defendants and rule 39 defendants, vastly expands the range of disclosure and factual evidence, and makes more complex the expert evaluation of likely damages. The consequence is that the more heinous a cartel infringement of competition law, the greater the costs for victims of the cartel in recovering compensation, and thus the harder it is for them to bring collective proceedings. Mr Bacon suggested that a "conservative" estimate for all the defendants' costs for which the Applicants should have ATE cover is £60-65 million. We resist an approach whereby it is only "just and reasonable" to authorise someone to act as the class representative if that person has adverse costs insurance at a level which may make the obtaining of such cover prohibitive.

109. Where the Tribunal finds that there is no other reason to refuse authorisation of a class representative under rule 78, we consider that the proper approach to such a very high costs case is to determine that the class representative has at the outset the ability to pay a substantial level of adverse costs cover which should be sufficient for at least a significant part of the proceedings. Authorisation should not then be refused on the basis that this may prove insufficient to the end of trial. As the proceedings advance, and the defendants' costs become much clearer, the issue can be revisited under rule 85 and the Tribunal can vary or revoke the terms of the CPO accordingly.

D. CONCLUSION

110. For the reasons set out above, we unanimously conclude that:

(1) 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;

(2) the funding arrangements entered into by the RHA with Therium and its ATE insurers, as amended following the preliminary issue hearing, do not provide a ground for refusing to authorise the RHA as a class representative pursuant to s. 47B CA;

(3) the funding arrangements proposed to be entered into by UKTC with Yarcombe, as exhibited to the 5th witness statment of Mr Perrin of 21 June 2019, as supported by the written undertaking given to the Tribunal by Calunius LLP on 21 June 2019, and the ATE insurance policies executed or proposed to be executed by Yarcombe, in the form enclosed with the letter from UKTC's solicitors of 17 October 2019, do not provide a ground for refusing to authorise UKTC as a class representative pursuant to s. 47B CA, on the condition that:

(a) in the event that the Tribunal makes an opt-out CPO, on the final resolution of any appeals against that decision of the Tribunal:

(i) the balance not already expended of the funding of £24 million committed by Yarcombe will be paid into an escrow account; and

(ii) the Opt-out ATE insurance policy will incorporate the endorsement appended to this judgment; alternatively

(b) in the event that the Tribunal makes an opt-in CPO, on the proceedings achieving "Economic Viability" as defined in cl. 6 of the UKTC Opt-in LFA:

(i) the balance not already expended of the funding of £24 million committed by Yarcombe will be paid into an escrow account; and

(ii) the ATE insurance policy to be entered into by Yarcombe will be amended to incorporate the endorsement appended to this judgment.

(4) the Respondents and the objecting OEMs have liberty to apply in writing within 14 days of the handing down of this judgment if they seek to contend that cl. 5 of the endorsement to the UKTC ATE policies, as set out in the Appendix to this judgment, does not give them an effective right to claim under the policies pursuant to the C(RTP)A 1999.

The Hon Mr Justice Roth President	Dr William Bishop	Professor Stephen Wilks

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 28 October 2019

APPENDIX

ENDORSEMENT TO UKTC ATE POLICIES

1. The Insurer confirms that this Policy is non-voidable and non-cancellable and any claim made against it will be honoured in full irrespective of any exclusions or any provisions of the Policy or of the general law, which would have otherwise rendered the Policy or the claim unenforceable or entitled the Insurer to avoid, rescind, discharge, cancel or vitiate the Policy or avoid, reduce, exclude or deny cover or otherwise repudiate liability under the terms of the Policy. However, if any payment is, or has been made, under this Policy due to fraud by the Insured, the Insurer reserves the right to reclaim such costs directly from the Insured.

2. The Insured irrevocably authorises and instructs the Insurer to pay, and the Insurer agrees to pay, any claims payment to the Other Side by paying such claims payment to such bank account as the Other Side may jointly from time to time specify to the Insurer in writing at the address given at Clause 7.1 of the Policy. No instruction whether by the Insured or by any other person other than the Other Side to make payment to any other entity or account shall be honoured by the Insurer unless also independently given by the Other Side jointly to the Insurer in writing.

3. The arrangements contained in this Endorsement shall continue to apply notwithstanding the liquidation or insolvency of the Insured or the Insurer.

4. No material changes to the terms of the Policy which limit the cover available to the Insured (including but not limited to reductions of the Limit of Cover, reduction of the risks covered, or widening of the exclusions) shall be made without the written consent of the Other Side as well as of the Insured.

5. The parties to this Policy agree that irrespective of any other provisions of the Policy the terms of this Endorsement and this Policy are intended to benefit the Other Side and may be enforced by the Other Side directly pursuant to the provisions of the Contracts (Rights of Third Parties) Act 1999. No other third party is entitled to the benefit of or to enforce any term of this Endorsement under any provision of the Contracts (Rights of Third Parties) Act 1999 or otherwise.