Neutral citation [2024] CAT 10

**IN THE COMPETITION APPEAL TRIBUNAL**

Case No: 1339/7/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

7 February 2024

Before:

BRIDGET LUCAS KC
(Chair)
THE HONOURABLE MRS JUSTICE COCKERILL DBE
MARIA MAHER

Sitting as a Tribunal in England and Wales

BETWEEN:

**MARK McLAREN CLASS REPRESENTATIVE LIMITED**

Class Representative

- v -

**(1) MOL (EUROPE AFRICA) LTD**
**(2) MITSUI O.S.K. LINES LIMITED**
**(3) NISSAN MOTOR CAR CARRIER CO. LTD**
**(4) KAWASAKI KISEN KAISHA LTD**
**(5) NIPPON YUSEN KABUSHIKI KAISHA**
**(6) WALLENIUS WILHELMSEN OCEAN AS**
**(7) EUKOR CAR CARRIERS INC**
**(8) WALLENIUS LOGISTICS AB**
**(9) WILHELMSEN SHIPS HOLDING MALTA LIMITED**
**(10) WALLENIUS LINES AB**
**(11) WALLENIUS WILHELMSEN ASA**
**(12) COMPANIA SUDAMERICANA DE VAPORES S.A.**

Defendants

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**RULING (FUNDING)**

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1. On 13 October 2023, the Class Representative ("CR") wrote to the Tribunal enclosing a revised Litigation Funding Agreement ("LFA") between the CR and Woodsford Group Limited ("Woodsford") entered into on 9 October 2023 ("the Revised LFA"). The revisions were necessitated by the Supreme Court's decision in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 ("the *PACCAR* Judgment") which was handed down on 26 July 2023. The Revised LFA supersedes and replaces the litigation funding agreement dated 18 February 2020 ("the Former LFA"). The Former LFA was the document before the Tribunal when a collective proceedings order ("CPO") was made on 20 May 2022.

2. The Supreme Court, in a majority decision, held in the *PACCAR* Judgment that an LFA that provides for payment to the funder to be calculated as a percentage of the damages awarded falls within the definition of "damages based agreements" ("DBAs") for the purposes of section 58AA of the Courts and Legal Services Act 1990 ("section 58AA"); and is unenforceable insofar as it relates to opt out collective proceedings pursuant to section 47C of the Competition Act 1998 ("section 47C CA 98"), and unenforceable in any proceedings unless it complies with section 58AA(4) and the Damages Based Agreement Regulations 2013, which the LFAs in *PACCAR* did not.

3. For present purposes, the relevant provisions of section 58AA are as follows:

> "(3) For the purposes of this section –
>
> (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. Rule 78 of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules") sets out the criteria to be applied by the Tribunal in assessing whether to

authorise an applicant to act as a class representative in collective proceedings. A class representative's funding arrangements may be relevant to whether they will be able to pay the defendant's recoverable costs if ordered to do so (Rule 78(2)(d)).

5. The Tribunal requested that the parties file brief written submissions explaining how the Revised LFA in this case addresses the issues in the *PACCAR* Judgment. At the request of the parties the timetable for those submissions was fixed so that they would have a reasonable opportunity to consider the decision, ultimately handed down on 21 November 2023, in *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Ltd & Anor* [2023] CAT 73 ("*Sony*"). In that case the Tribunal would be considering the effect of the *PACCAR* Judgment on funding arrangements in collective proceedings, and similar points to those likely to arise in this case would need to be determined.

6. The CR duly provided written submissions on 30 November 2023. In summary, the CR's position is that the Revised LFA does not fall within the definition of a DBA under section 58AA(3), and is not unenforceable in proceedings brought under section 47C CA 98. Under the Revised LFA, the "Funder's Fee" is calculated in two ways. First by reference to a fixed fee, and secondly by reference to a percentage of the proceeds of the litigation. The fixed fee is determined by the amount of the "Funder's Outlay" as at the date when the CR makes any application for an order for the payment of the CR's costs, fees, and/or disbursements, rather than by reference to (or as a percentage of) any damages award or other financial benefit obtained by the CR. The alternative basis calculates the "Funders Fee" by reference to a percentage of the "Proceeds", but that is made conditional upon that mechanism being enforceable and permitted by applicable law ("the percentage payment clause").

7. The CR referred us to the judgment in *Sony*. The LFA under consideration in that case ("the Sony LFA") was entered into between the proposed class representative and Woodsford (the same funder as in this case) after the *PACCAR* Judgment. The CR submits that the Sony LFA is in materially similar terms save that the operative clause used to calculate the Funder's Fee in *Sony*

was based upon a multiple of "the Costs Limit", as opposed to a fixed fee. The Sony LFA contained the same conditional wording in the percentage payment clause.

8. The Sony Defendants raised a number of arguments in relation to the Sony LFA and submitted that it was caught by section 58AA and unenforceable in respect of the collective proceedings. The Tribunal dismissed the Sony Defendants' arguments, and found in favour of the proposed class representative. The CR relies upon the decision in *Sony* as applying equally to the provisions under consideration in the Revised LFA.

9. The First to Eleventh Defendants in this case wrote to the Tribunal on 11 December 2023 to confirm that, having had the opportunity to consider the Revised LFA, in light of the judgment in *Sony*, and subject to one caveat, they did not intend to file submissions in response to the CR's funding submissions. Although a copy of the Sony LFA has not been provided to the Defendants in this case they accept that, if its provisions are materially the same, further submissions from them are unlikely to assist us, and we should decide the matter on the basis of the submissions made by the CR. The one caveat is that the Defendants reserve their right to ask the Tribunal to revisit the suitability of the Revised LFA in the future, including in the event of any successful appeal against the Tribunal's decision in *Sony*.

10. The position is, therefore, that the CR has drawn our attention to the two bases upon which the Funders Fee may be calculated. The Defendants have raised no objection to those provisions if they are materially similar to the Sony LFA. No other objections have been raised to the Revised LFA (whether as argued in *Sony* or otherwise).

11. The relevant provisions of the Revised LFA are as follows:

    (1) For present purposes, the "Proceeds" means "all money, including an Order for damages made pursuant to s47C(3) of the Competition Act 1998 or any agreed settlement sum, interest and costs paid or credited

to, in favour of, for the benefit of, or to the order of, the Class Representative or the Class Members" (clause 1.43.1).

(2) The "Costs Limit" means "£15,101,055 (inclusive of VAT) as may be increased from time to time by the Funder in its absolute discretion, and shall exclude, unless otherwise agreed, Adverse Costs and any provision for security for costs" (clause 1.20).

(3) The "Funder's Outlay" means the amount of "Action Costs" (i.e. the aggregate of reasonable costs incurred by the CR in respect of solicitors' fees, counsels' fees and other disbursements and costs as defined – clause 1.2) paid or payable by the Funder pursuant to a "Funding Notice" (i.e. a funding request made by the CR to the Funder – clause 1.34), plus all third party fees/costs or expenses reasonably incurred by the Funder including before the date of the LFA, excluding the Funders Appeal Outlay, and the Funder's JR Outlay, and internal costs and expenses (clause 1.33).

(4) The "Funder's Total Entitlement" means the "Funder's Outlay", the Funder's Appeal Outlay, the Funder's JR Outlay, the Funder's Fee, the Funder's Appeal Fee, the Funder's JR Fee, the Adverse Costs Fee and the Adverse Costs Exit Fee (all as defined in the Revised LFA) (clause 1.28).

(5) Clause 10 imposes an obligation on the CR to pay the Funder's Total Entitlement by paying the Stakeholder Entitlements (out of which the Funder is paid, pursuant to clause 10) into the Stakeholders' Account, being an account held on trust for the benefit of Stakeholders (clause 10.3, clause 1.49).

(6) The Funder is a Stakeholder under the Revised LFA (clause 1.51). "Stakeholder Entitlements" is defined in clause 1.50 to mean: (i) Recovered Costs (being costs recovered pursuant to Rule 104 of the Competition Appeal Tribunal Rules 2015 (the "Rules") (clause 1.44); (ii) any amount paid or payable to the CR in respect of costs, fees or

disbursements ordered pursuant to Rule 93(4) (from undistributed damages) or Rule 94 (in the event of a collective settlement); and (iii) any amount otherwise made available, payable or paid to Stakeholders.

(7) Clause 11 determines the calculation of the Funder's Fee as at the date on which the CR makes any application for an order for the payment of costs, fees and disbursements.

(8) Clause 11 defines the Funder's Fee. Clause 11.1 deals with Payment of Funder's Fee other than from Undistributed Damages. Clause 11.2 deals with Payment of Funder's Fee from Undistributed Damages. Clause 11.1 and 11.2 provide that the Funder's Fee is "the greater of" (i) "a fixed fee" (clauses 11.1.1; 11.2.1) or (ii) "only to the extent enforceable and permitted by applicable law, a percentage of the Proceeds" (clauses 11.1.2; 11.2.2). Each of Clause 11.1 and 11.2 contains a table setting out the relevant fixed fees and percentages.

(9) The applicable fixed fee depends on the amount of the Funder's Outlay as at the date when the CR makes any application (there are 4 different bands of outlay in each table, each with a minimum and maximum threshold according to which the relevant fixed fee is determined) in conjunction with whether the CR makes its application: (i) for payment other than from Undistributed Damages (i.e. prior to the distribution of Proceeds to the class), in which case the fixed fees in the tables at clause 11.1 are used); or (ii) for payment out of Undistributed Damages (i.e. post distribution to the class), in which case the fixed fees in the table at clause 11.2 are used.

(10) Clause 36 provides for severance: (i) so that any provision, or part-provision, which is "illegal, invalid or unenforceable" shall be severable leaving the remainder of the agreement unaffected (clauses 36.1-36.3); and (ii) specifically so that (clause 36.4): "if necessary to ensure the enforceability, legality or validity of this agreement, any provision of this agreement which begins with the words "only to the extent enforceable and permitted by applicable law" shall be severable: (a)

without modifying or adding to other terms of this agreement; (b) with the consequence that the remaining terms continue to be supported by adequate consideration; and (c) without changing the nature of the contract, such that it is not the sort of contract that the Parties entered into at all".

12. We are told that the amounts of the fixed fees in the Revised LFA have not altered from the amounts in the Former LFA: what has changed is that the calculation of the relevant fixed fee based on the Funder's Outlay is now determined as at the date when the CR makes any application for costs, fees or disbursements to be paid (in the Former LFA the calculation of the fixed fee took place on the date when the Proceeds were received). The CR submits that this change in respect of the time at which the fixed fee is set has no relevance to whether the payment provision is caught by section 58AA. It seems to us that is right, and it has not been submitted by the Defendants that we should take a different view.

13. We were provided with the Sony LFA for the purpose of satisfying ourselves that the relevant, material provisions were similar. A copy was not provided to the Defendants, but we note from their 11 December 2023 letter that they are aware that a copy has been sent to us, and have seen what the CR has said in correspondence and submissions about the similarity between it and the Revised LFA, and there is no suggestion that we should not read it. We have, therefore considered the Sony LFA, and we are satisfied that the relevant provisions are indeed materially similar.

14. As such, we see no reason to depart from the reasoning in the *Sony* judgment: in particular, at paragraphs [146] to [159]. For completeness, that means that as regards the two points specifically brought to our attention:

    (1) We are satisfied that the conditional wording in the percentage payment clauses (clauses 11.1.2 and 11.2.2), means that they have no legal effect until the contingency (legislation by Parliament to reverse the effect of the *PACCAR* Judgment) eventuates. As such, there is no payment to the funder which is determined by reference to the Proceeds and so section

58AA is not engaged to make the provisions unenforceable. We are also satisfied that if we are wrong in that, the percentage payment clauses would be severable; and

(2) We are also satisfied that, as regards the fixed fee, the amount of the Funder's Fee is not "determined by reference to the amount of the financial benefit obtained" (i.e. by reference to the Proceeds or sum recovered from the Defendants in the litigation). It is to be determined by reference to two factors: (i) the amount of the Funder's Outlay as at the date when the CR makes an application for payment; and (ii) whether payment is sought other than from Undistributed Damages (i.e. prior to the distribution of the Proceeds to the Class); or from Undistributed Damages (i.e. post-distribution).

15. We are, therefore satisfied that the Revised LFA addresses the issues raised in the *PACCAR* Judgment, and is not a DBA for the purposes of section 58AA, and is not unenforceable pursuant to section 47C CA98. Accordingly, we are satisfied that the CR and its funding arrangements still meet the authorisation criteria set out in Tribunal Rule 78, and that it is appropriate for the CR to continue to act in that capacity in these proceedings. This decision is unanimous.

Bridget Lucas K.C.
Chair

The Hon. Mrs Justice Cockerill

Maria Maher

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

Date: 7 February 2024