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IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

17 December 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

RULING: PERMISSION TO APPEAL

APPEARANCES

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

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

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

A. INTRODUCTION

1. This is the ruling on an application for permission to appeal against the decision of the Tribunal on a preliminary issue handed down on 28 October 2019 ("the Judgment").

2. UK Trucks Claim Ltd ("UKTC") and the Road Haulage Association ("RHA") both issued applications before the Tribunal for a Collective Proceedings Order ("CPO") under s. 47B of the Competition Act 1998 ("CA") in order to pursue as the class representative collective proceedings claiming damages resulting from the infringement of competition law determined by the European Commission in its decision of 19 July 2016 in Case 39824 – *Trucks* ("the Decision"). By the Decision, the 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 between 1997 and 2011. As in the Judgment, the addressees of the Decision will be referred to by the shorthand name of the corporate groups to which they belong: DAF, Daimler, Iveco, Volvo/Renault and MAN; and collectively they will be referred to as original equipment manufacturers or "OEMs".

3. The Respondents to the two CPO applications are all addressees of the Decision, but they are not identical. Iveco and Daimler are respondents to the UKTC application whereas Iveco, MAN and DAF are respondents to the RHA application. However, on the basis that the OEMs who are not respondents to the application expect to be subject to additional claims for contribution or indemnity if a CPO is granted, the Tribunal 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. The Tribunal also directed that the two applications be heard together.

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).

The preliminary issue related to the first of the two statutory conditions. Consideration of the second statutory condition was postponed to await the judgment of the Supreme Court in *Merricks v MasterCard Inc.* More specifically, the preliminary issue was: "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": Judgment, para 6.

5. As stated in the Judgment (para 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.

6. By the Judgment, the Tribunal rejected the first argument, and as regards the second group of arguments the Tribunal held that, with some modification or qualification, the funding arrangements did not provide a reason to refuse to authorise either UKTC or the RHA under s. 47B(8). The present application for permission to appeal concerns only the first argument ("the DBA argument"). Although at the substantive hearing that argument was put forward by DAF, MAN and Iveco, this application for permission to appeal is brought only by DAF.

7. The application was filed on 18 November 2019 and DAF stated that it was content for its application to be determined on the papers. UKTC and the RHA filed written responses pursuant to the Tribunal's direction on 2 December 2019.

8. As DAF recognises, its application raises two threshold issues before the question of whether to grant permission arises: (a) jurisdiction; and (b) standing

as regards the UKTC application, to which DAF was not a respondent. Both these issues depend upon the interpretation of s. 49 CA, which prescribes the rights of appeal from the Tribunal. This provision states, insofar as relevant:

> "**49 Further appeals from the Tribunal**
>
> (1) An appeal lies to the appropriate court-
>
> (a) from a decision of the Tribunal as to the amount of a penalty under section 36; and
>
> (b) …
>
> (c) on a point of law arising from any other decision of the Tribunal on an appeal under section 46 or 47.
>
> (1A) An appeal lies to the appropriate court on a point of law arising from a decision of the Tribunal in proceedings under section 47A or in collective proceedings-
>
> (a) as to the award of damages or other sum (other than a decision on costs or expenses), or
>
> (b) as to the grant of an injunction.
>
> (1B) An appeal lies to the appropriate court from a decision of the Tribunal in proceedings under section 47A or in collective proceedings as to the amount of an award of damages or other sum (other than the amount of costs or expenses)
>
> …
>
> (2) An appeal under this section-
>
> (a) except as provided by subsection (2A), may be brought by a party to the proceedings before the Tribunal or by a person who has a sufficient interest in the matter; and
>
> (b) requires the permission of the Tribunal or the appropriate court.
>
> (2A) An appeal from a decision of the Tribunal in respect of a claim included in collective proceedings may be brought only by the representative in those proceedings or by a defendant to that claim.
>
> (3) In this section "the appropriate court" means the Court of Appeal or, in the case of an appeal from Tribunal proceedings in Scotland, the Court of Session."

As stated above, collective proceedings are brought pursuant to s. 47B CA. S 47A CA concerns individual (i.e. non-collective) claims before the Tribunal for damages or (in England and Wales or Northern Ireland) an injunction. Ss. 46-47 CA concern appeals before the Tribunal challenging a decision of the

Competition and Markets Authority ("CMA"). And s. 36 CA concerns a penalty imposed by the CMA for infringement of competition law, which is susceptible to appeal to the Tribunal pursuant to s. 46(3)(i) CA.

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

B. JURISDICTION

10. The interpretation of s. 49 CA, in its present and previous form, has been addressed by the Court of Appeal on two occasions. In *English Welsh & Scottish Railway Ltd v Enron Coal Services Ltd (in liquidation)* [2009] EWCA Civ 647, the Court considered s. 49 CA as it read prior to amendment by the Consumer Rights Act 2015 which introduced, inter alia, the regime for collective proceedings. The material parts of s. 49 were then as follows:

> "(1) An appeal lies to the appropriate court –
>
> (a) from a decision of the Tribunal as to the amount of a penalty under section 36;
>
> (b) from a decision of the Tribunal as to the award of damages or other sum in respect of a claim made in proceedings under section 47A or included in proceedings under section 47B (other than a decision on costs or expenses) or as to the amount of any such damages or other sum; and
>
> (c) on a point of law arising from any other decision of the Tribunal on an appeal under section 46 or 47."

11. *Enron* was a claim for damages following a decision of the rail regulator that English Welsh and Scottish Railway Ltd ("EWS") had abused its dominant position contrary to both UK and EU competition law. At that time, the jurisdiction of the Tribunal was limited to pure follow-on claims. The defendant (EWS) applied to strike out parts of the claim under rule 40 of the Tribunal's then Rules, on the ground that they were not based on any infringements found by the regulator and thus not a follow-on claim within the Tribunal's jurisdiction. The Tribunal rejected part of the strike-out application and EWS then sought to appeal that decision. On the question whether the rejection of an application to strike out was "a decision ... as to the award of damages" within s. 49(1)(b), the claimant conceded that a decision to strike out the claim would

be a decision as to the award of damages because it would amount to a rejection of the claim. But the claimant argued that a refusal to strike out did no more than leave the claim intact to proceed to adjudication, and so was not a decision as to the award of damages since it was not determinative of the claim.

12. The Court rejected that argument. In his judgment (with which the other two members of the Court concurred), Patten LJ said at [24]:

> "I think that this is too literal an approach to the construction of s.49(1). The reference in it to a decision of the Tribunal "as to the award of damages or other sum in respect of a claim made in proceedings under section 47A" is simply descriptive of the type of relief available in such claims. It is not in my view intended to limit the disappointed party's right of appeal to decisions of the Tribunal either awarding or refusing an award of damages following a full hearing. As mentioned earlier, Mr Beard accepts that the wording is apt to include an interlocutory determination under Rule 40 that a s.47A claim to damages should be struck out and it seems to me that that concession is rightly made. However, it is difficult to believe that Parliament intended an unsuccessful claimant to be able to appeal against the dismissal of his claim after a full hearing but not to do so against its dismissal under Rule 40. Once one accepts that the wording of s.49(1) is wide enough to cover a Rule 40 determination against the viability of the claim it is hard to identify any linguistic or policy barrier to the inclusion of a decision to the opposite effect. In my view, the language of the subsection covers both."

13. In *Merricks v MasterCard Inc* [2018] EWCA Civ 2527, the Court considered s. 49(1) in its present form, on the question of jurisdiction for an appeal against a decision of the Tribunal under s. 47B(6) CA dismissing an application for a CPO on the basis that the claims were not suitable for inclusion in collective proceedings. The defendant submitted that the *Enron* case was to be distinguished since a strike out decision, whether positive or negative, is a decision on the arguability of the claim and therefore a decision as to the award of damages, whereas the decision being challenged in *Merricks* merely determined whether or not the claims raised should proceed individually or on a collective basis. The decision being challenged therefore did not address the viability of the underlying claims. Noting that argument, Patten LJ (with whose judgment Coulson and Hamblen LJJ agreed) stated at [27]:

> "... it is, in my view, nonetheless a decision in collective proceedings as to the award of damages within the meaning of s.49(1A)(a). The refusal of a CPO is a determination by the Tribunal that the eligibility criteria have not been met and the proposed representative is not therefore entitled to seek an aggregate award of damages under s.47C(2) which is a remedy unique to collective proceedings. As explained earlier in this judgment, this class remedy has been introduced by legislation as part of the collective proceedings regime in order to address some of the difficulties inherent in the bringing of individual claims and, as the experience

> in comparable jurisdictions has shown, is likely to be a critical component for addressing s.47A claims in the collective proceedings regime. As the Tribunal itself observed in [91] of its CPO decision, a refusal of a CPO is likely to prevent individual members of the represented class who have suffered loss from obtaining any compensation. It is therefore the end of the road for a class action of this kind and, as such, a decision as to the award of s.47C(2) damages. The fact that class members are left with their individual claims is nothing to the point. The disputed words in s.49(1A)(a) have now to be considered and construed in the light of the addition to the Tribunal's jurisdiction of collective proceedings and in a way which accommodates the introduction of collective proceedings and the particular remedies available in them…."

14. In a brief concurring judgment, Coulson LJ added, at [29]:

> "... the decision not to grant a CPO is a decision as to the award of damages within the meaning of s.49(1A)(a) because it denies the unique remedy of an aggregate award of damages under s.47C(2). It is not merely procedural in character."

15. The Court accordingly did not address a wider argument that had been advanced on behalf of the claimant that the words "as to the award of damages" in s. 49(1A)(a) are "merely descriptive of the nature of the claim made in the collective proceedings" and that the subsection therefore confers jurisdiction to appeal any decision of the Tribunal made in proceedings under s. 47A or collective proceedings, other than ones on costs and expenses which are expressly excluded: see at [20].

16. In the present case, DAF submits that the fact that the decision on the DBA argument was made on the hearing of a preliminary issue and not as part of the final decision as to whether or not to grant a CPO should not preclude it from susceptibility to appeal under s. 49(1). We accept that submission. The decision to have a preliminary issue was made by way of sensible case management in the light of the pending appeal to the Supreme Court in *Merricks*[1] and it would be not only unjust but defeat the purpose of efficient handling of these applications if the resulting judgment could not be challenged until the Tribunal ruled definitively on the whole application.

17. However, that is quite different from the question whether the decision that the funding arrangements entered into by UKTC and the RHA do not amount to a DBA constitutes a decision "as to the award of damages" within s. 49(1A)(a).

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[1] The appeal is from the Court of Appeal's substantive decision in *Merricks*; it does not affect the preliminary judgment on jurisdiction (para 13 above) which is relevant for present purposes.

DAF argues that the position here satisfies the criterion set out in *Merricks* because:

> "such a decision concerns whether the applicant may continue the action and so pursue an award of damages in collective proceedings, or whether the claims as brought are instead "*at the end of the road*". Alternatively, such a right of appeal exists where the point of law is (in itself) capable of determining whether the collective proceedings should continue."

18. However, in *Merricks* the Tribunal's decision was that the claims were not eligible for inclusion in collective proceedings. The Tribunal rejected the challenge to the authorisation of Mr Merricks because of his funding arrangements. As a matter of principle, a decision refusing to authorise a proposed class representative, unlike a decision that the claims are not eligible for collective proceedings, does not mean that the collective proceedings cannot be pursued. On the contrary, where such a decision concerns the nature of the proposed representative (e.g because of a potential conflict of interest, or because the plan it put forward for the conduct of the proceedings was unsatisfactory[2]), there is obviously scope for an alternative class representative to be proposed. More specifically, in the present case, if we had held that the current funding arrangements of both UKTC and the RHA constituted DBAs, the consequence would have been that UKTC and the RHA could not be authorised as class representatives so long as they relied on such a basis to fund the proceedings. But there would obviously have been scope for them then to put forward an alternative basis of funding, e.g. whereby the third party funder is rewarded not by a percentage of damages recovered but by a multiple of its investment. Indeed, the determination of the second part of the argument involved in the preliminary issue (see para 5(ii) above) in favour of UKTC and the RHA, against which no OEM seeks to appeal, was dependent in each case on the applicant making certain amendments to its funding arrangements, most significantly in the case of UKTC. As the RHA states in its response to this application by DAF, if the Tribunal had determined the DBA issue in DAF's favour, "the RHA could simply have entered into a compliant LFA with its litigation funder." A decision accepting the DBA argument would therefore not

[2] See rule 78(2)-(3) of the Competition Appeal Tribunal Rules 2015.

prevent the award of aggregate damages or the pursuit of collective proceedings by victims of the so-called “Trucks cartel” on an opt-out basis.

19. Accordingly, we do not think that the decision which DAF seeks to challenge satisfies the criterion set out by the Court of Appeal in *Merricks.* Aware of this possibility, DAF alternatively submits that there is jurisdiction on the wider interpretation of s.49(1) CA, which was argued also in *Merricks* and which the Court of Appeal expressly did not decide: see per Patten LJ at [27]. DAF argues that the language of s. 49(1A)(a) [and presumably s. 49(1A)(b) as well] does not limit the scope of the subsection, and submits that:

> “there is no proper basis on which to treat certain interlocutory decisions on points of law made in the context of collective proceedings as appealable and others as not.”

20. In our judgment, s. 49(1A) CA, when considered in the context of the section as a whole, cannot be read as giving a broad right to appeal on a point of law against any decision made in collective proceedings. S. 49 CA is the statutory provision concerning all further appeals from the Tribunal. It establishes, in effect, a hierarchy of the different kinds of Tribunal decision that are susceptible to appeal:

(1) a decision concerning *the amount* of a penalty (on appeal from the CMA) or *the amount* of an award of damages or other sum (apart from costs or expenses), whether in ordinary proceedings under s. 47A or collective proceedings under s. 47B, may be appealed on any ground: s. 49(1)(a) and (1B);

(2) any other decision on an appeal under ss. 46 or 47 may be appealed on a point of law: s. 49(1)(c);

(3) a decision in proceedings for damages or an injunction (whether ordinary proceedings under s. 47A or collective proceedings under s. 47B) as to the award of damages or other sum (apart from costs or expenses), or as to the grant of an injunction, may be appealed on a point of law: s. 49(1A). In a stand-alone claim, that will include a point of law arising from a finding by the Tribunal as to an infringement of competition law: s. 49(1C).

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

22. We therefore conclude that there is no jurisdiction to grant permission to appeal against the decision on the DBA argument. In the light of that, the other issues raised by DAF's application do not arise, but as they are fully addressed in the application we think we should express our views on them.

C. STANDING

23. The statute has a particular provision concerning the persons who may bring an appeal in collective proceedings. Although s. 49(2) states that in general appeals may be brought by either a party to proceedings or a person who has a sufficient interest in the matter, s. 49(2A) is clearly narrower in prescribing that:

> "An appeal from a decision of the Tribunal in respect of a claim included in collective proceedings may be brought only by the representative in those proceedings or by a defendant to that claim."

24. As stated above, although DAF is a prospective defendant to the RHA claim, it is not a prospective defendant to the UKTC claim or indeed a respondent to UKTC's application. DAF was heard as an objector to UKTC's application, as

explained at para 3 above. DAF would satisfy the standing criteria in s. 49(2) as having “a sufficient interest” but it does not come within s. 49(2A).

25. In its application, DAF submits that the words “in respect of a claim” in s. 49(2A) refers to “decisions in respect of the substantive claims which the representative wishes to continue if authorisation is granted.” A decision concerning the authorisation of the class representative is not such a decision within the scope of subsection (2A) and standing to challenge it is governed by the broader subsection (2).

26. In our view, that interpretation is correct. We think it is significant that s. 49(1A) refers to “a decision of the Tribunal...in collective proceedings” whereas s. 49(2A) refers to “a decision of the Tribunal *in respect of a claim included* in collective proceedings” [emphasis added]. If s. 49(2A) had intended to impose the narrower standing requirement in respect of all decisions in collective proceedings that were susceptible to appeal, the same language would have been used as in s. 49(1A) without these additional words. Indeed, on this question, the presumption against surplussage, to which we referred above, supports DAF’s argument. Accordingly, we hold that DAF has standing to pursue an appeal.

27. Although not the basis of our interpretation, this also avoids the unfortunate situation that DAF would otherwise have standing to seek to appeal the decision on the RHA application (assuming for this purpose that our conclusion on jurisdiction was wrong) but not to appeal the same decision on the UKTC application.

D. PERMISSION TO APPEAL

28. Finally, we should say that if, contrary to our decision above, there was jurisdiction to appeal the decision on the DBA argument, we would have refused permission.

29. The grounds put forward by DAF are essentially a re-run of the contentions advanced at the hearing and which we rejected. There is nothing in the argument as to why s. 58AA of the Courts and Legal Services Act 1990 (“CLSA”) should be interpreted as covering these LFAs which appear to take

the matter further than the submissions previously put forward. DAF does not point to any legislative provisions or statutory context which it contends the Tribunal failed properly to consider. Indeed, its grounds of appeal appear to rely on the proposition that the Tribunal paid too much attention to the statutory context and to other statutory provisions. Accordingly, we do not consider that DAF's DBA argument has a real prospect of success on appeal.

30. In the alternative, DAF relies on the other ground that can support permission to appeal, i.e. that there is some other compelling reason for the appeal to be heard. This ground is therefore to be considered on the basis that such an appeal does not have a real prospect of success. DAF advances three reasons in support of this ground.

31. First, it relies on the recent judgment in *Meadowside Building Developments Ltd v 12-18 Hill Street Management Co Ltd* [2019] EWHC 2651 (TCC), a decision of Mr Adam Constable QC, sitting as a nominated judge in the Technology and Construction Court, delivered on 10 October 2019. That judgment came after the hearing of the present applications. DAF does not suggest that *Meadowside* in itself supports an argument that the Tribunal's judgment was wrong, but submits that it is appropriate that the Court of Appeal should resolve what it describes as "a conflict of first instance authority."

32. *Meadowside* concerned an application for summary judgment to enforce a decision by an adjudicator awarding £26,629.63 (plus VAT) along with his fee and expenses, following an adjudication in which the defendant had not participated on the basis that it considered that the adjudicator had no jurisdiction. Meadowside, which had a claim for the balance due in respect of repair works under a JCT Minor Works contract, had gone into liquidation and the liquidators engaged Pythagoras Capital Ltd ("Pythagoras"), a company which acts on behalf of administrators and liquidators in relation to construction contracts, to take over pursuit of the debt. Pythagoras was appointed to "act as [the liquidator's] agents and take all steps to ascertain and recover the amounts due to [Meadowside]". The judge summarised (at [11]) the evidence of Pythagoras' managing director, Mr McMahon:

> "... when appointed as agent Pythagoras reviews what might be owed by considering the company records and, amongst other things, seeks to ascertain what sums are owed under outstanding final accounts. If Pythagoras establishes that monies are owed to the insolvent company, it takes steps to recover those sums on behalf of the company, and generally does so by funding the pursuit on behalf of the insolvent company because the insolvent companies are usually unable to do so."

And he quoted Mr McMahon as explaining:

> "Clearly the Adjudication procedure is incredibly useful in this regard. The issue of Adjudication proceedings often leads to an amicable settlement (during the Adjudication or after a decision is delivered). It is also helpful because Pythagoras Capital can use its in-house legal and engineering/building expertise to run the Adjudication (Pythagoras is not a law firm, but Adjudication proceedings are not a reserved legal activity).
>
> If Pythagoras Capital makes a recovery for the insolvent company then it will keep a pre-agreed percentage".

33. One of the issues was whether the funding agreement between Pythagoras and Meadowside was a DBA within the terms of s. 58AA CLSA. That in turn depended on whether Pythagoras could be regarded as providing "claims management services". After quoting the original and revised definitions of "claims management services" incorporated in s. 58AA(7) – see the Judgment here at paras 12-13 – Mr Constable set out his analysis as follows:

> "97. [Counsel for the defendant] argued that under either definition, Pythagoras falls to be considered as providing advice and/or other services in relation to the making of insolvent contractors' claims in both adjudication and enforcement proceedings, and this amounts therefore to 'claims management services'. Indeed, it is said that Pythagoras may provide each of the 'other services' within the definition (which is not an exhaustive list). I agree. It could not be sensibly disputed that Pythagoras is providing (for example) financial assistance in relation to the Liquidator's claim. This is at the very heart of Pythagoras' services and it is that which enables the claims to be ascertained and pursued. In reality, it is also providing advice and other services to ascertain and, if appropriate, recover the debt.
>
> 98. I therefore accept that the description of Pythagoras' work on behalf of the Liquidator, as described by Mr McMahon and quoted in paragraph 10 above, would include 'advice or other services' as described in either Act."

Indeed, the judge proceeded to observe that this was accepted by counsel for Meadowside, whose argument was that what constitutes "claims management services" should be restricted by reference to those types of activities which are regulated, an argument which the judge rejected: see at [99]. And the judge summarised his conclusion in these terms at [114]:

> "... the agreement for the services of financing, ascertaining and recovering a debt through adjudication and litigation (whether as 'agent' or otherwise) is one to which the DBAR 2013 applies."

34. It is clear that the role carried out by Pythagoras in respect of the claim of Meadowside was very different from that of an independent third party litigation funder, and in those circumstances the conclusion that its agreement came within the statutory definition of a DBA was clearly correct. Pythagoras' funding of the claim was part of its overall management of the claim and the decision in *Meadowside* is therefore entirely consistent with the Judgment: see the Judgment at para 41. Accordingly, *Meadowside* does not give rise to a conflict of authority as DAF seeks to suggest.

35. We should add that Mr Constable did not have to decide whether the provision of funding alone, without the various other services provided by Pythagoras, would have satisfied the statutory definition. But insofar as para [97] of his judgment may be regarded as supporting that view, we note that the judge did not have the benefit of the extensive argument and analysis of the legislative history and context that was addressed to the Tribunal.

36. Secondly, DAF relies on the significant implications of the Tribunal's decision for the potential parties in these collective proceedings or directly affected by it. That of course applies to most if not all substantial cases. It is not a good reason for giving permission to pursue an appeal which has no real chance of success.

37. Thirdly, DAF states that the legal issue is of wide importance not only for litigation funding but for claims management regulation. We fully accept that if we had decided that what is apparently the most commonly used type of LFA fell within the statutory definition of a DBA and was unenforceable, that would indeed have had wide-ranging implications. However, we reached the opposite conclusion, and thus a result consistent with the views and assumptions of other commentators and which does not disturb the existing practice of litigation funding. If an appeal against that conclusion does not stand a real chance of success, we do not see that this provides a compelling reason for the appeal to be heard.

CONCLUSION

38. Permission to appeal is therefore refused.

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

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 17 December 2019