**Trinity Term**
**[2023] UKSC 28**
*On appeal from: [2021] EWCA Civ 299*

# JUDGMENT

# R (on the application of PACCAR Inc and others) (Appellants) *v* Competition Appeal Tribunal and others (Respondents)

before

**Lord Reed, President**
**Lord Sales**
**Lord Leggatt**
**Lord Stephens**
**Lady Rose**

**JUDGMENT GIVEN ON**
**26 July 2023**

**Heard on 16 February 2023**

*Appellants*
Bankim Thanki KC
Rob Williams KC
David Gregory
Ian Simester
(Instructed by Travers Smith LLP)

*2nd Respondent – UK Trucks Claim Ltd*
Rhodri Thompson KC
Judith Ayling KC
(Instructed by Weightmans (London))

*3rd Respondent – Road Haulage Association Ltd*
P J Kirby KC
David Went
Charlotte Wilk
(Instructed by Backhouse Jones Ltd (Clitheroe))

*Intervener – Association of Litigation Funders of England & Wales (written submissions only)*
(Pallas Partners LLP – no counsel instructed)

**Appellants**
(1) PACCAR INC
(2) DAF Trucks N.V.
(3) DAF Trucks Deutschland GmbH

**Respondents**
[(1) Competition Appeal Tribunal]
(2) UK Trucks Claim Ltd
(3) Road Haulage Association Ltd

**Intervener**
Association of Litigation Funders of England and Wales

**LORD SALES (with whom Lord Reed, Lord Leggatt and Lord Stephens agree):**

## 1. Introduction

1. The question which arises on this appeal is whether a form of arrangement for the financing of litigation by third party funders is lawful and effective. This depends on the interpretation of an express definition of a term as set out in a statute. The case concerns the proper interpretation of a definition first used in one statutory context and then adopted and used in another context.

2. It is necessary to consider the meaning of the definition in the first context. Lord Neuberger of Abbotsbury explained the proper approach in *Williams v Central Bank of Nigeria* [2014] AC 1189, at para 50:

> "Where a term in a later statute is defined by reference to a definition in an earlier statute, it seems to me self-evident that the meaning of the definition in the later statute must be the same as the meaning of the definition in the earlier statute. Hence, the meaning of the term in the later statute is determined by the definition in the earlier statute. Further, the adoption of the definition in the later statute cannot somehow alter the meaning of the definition in the earlier statute. It accordingly follows that one has to determine the meaning of the term in the later statute simply by construing the definition in the earlier statute."

We also have to consider whether later legislation throws any light on the proper interpretation of the earlier legislation.

3. The specific issue for determination is whether litigation funding agreements ("LFAs") pursuant to which the funder is entitled to recover a percentage of any damages recovered constitute "damages-based agreements" ("DBAs") within the meaning of the relevant statutory scheme of regulation ("the DBA issue"). This depends on whether litigation funding falls within an express definition of "claims management services" in the applicable legislation, which includes "the provision of financial services or assistance". If the LFAs at issue in these proceedings are DBAs within the meaning of the relevant legislation, they are unenforceable and unlawful since they did not comply with the formal requirements for such agreements.

4. The DBA issue arises in the context of applications to bring collective proceedings for breaches of competition law under section 49B of the Competition Act 1998. The second respondent ("UKTC") and the third respondent ("the RHA") each sought an order from the Competition Appeal Tribunal ("the Tribunal") to enable them to bring collective proceedings on behalf of persons who acquired trucks from the appellants (collectively, "DAF") and other truck manufacturers. The proposed proceedings take the form of follow-on proceedings in which compensation is sought for loss caused by an unlawful arrangement between DAF and other manufacturers in breach of European competition law, as found in an infringement decision by the European Commission dated 19 July 2016 (*Case AT.39824 – Trucks*). It is alleged that the prices paid for trucks were inflated as a result of the infringement.

5. The RHA's application was for "opt-in" collective proceedings, whereby persons wishing to participate in any award would have to opt in to the class represented by the RHA. UKTC's application was for "opt-out" proceedings, whereby an order would be made for it to represent a specified class of persons who would have the ability to opt out if they did not wish to be represented. UKTC made an application for opt-in proceedings in the alternative.

6. In order to obtain a collective proceedings order from the Tribunal, each of UKTC and the RHA needed to be able to show that it had adequate funding arrangements in place to meet its own costs and any adverse costs order made against it. For this purpose the RHA relied on an opt-in LFA and UKTC relied on an opt-in LFA and an opt-out LFA. The funders under the RHA LFA are entities which together I will call "Therium". The funder under the UKTC LFAs is Yarcombe Ltd ("Yarcombe"). Under each LFA the funder's maximum remuneration is calculated with reference to a percentage of the damages ultimately recovered in the litigation. UKTC and the RHA maintain that these LFAs do not constitute DBAs within the meaning of the relevant legislative provision, section 58AA of the Courts and Legal Services Act 1990 as amended in 2013 ("section 58AA" and "the CLSA 1990", respectively), and accordingly are lawful and effective funding agreements.

7. The appellants, truck manufacturers who are defendants in the proceedings in the Tribunal, maintain that the LFAs in this case constitute DBAs within the meaning of section 58AA. On that basis, the appellants say the LFAs are unenforceable by virtue of section 58AA because they did not comply with formality requirements made applicable by that provision. If this is right, the practical consequence would be that there is no proper basis on which a collective proceedings order could be made by the Tribunal in favour of UKTC or the RHA. The arrangements which have to be in place to support the making of a collective proceedings order include provision for payment of any costs order made in favour of the defendants in the proposed proceedings, and it

would not be fair to authorise collective proceedings against them without proper and enforceable funding in that regard. More fundamentally, if the funding arrangements are not enforceable there is no effective agreement in place pursuant to which the funders will provide the financing necessary for the claims to be brought at all.

8. The Tribunal (Roth J, Dr William Bishop and Professor Stephen Wilks) ordered that the DBA issue be determined as a preliminary issue to be heard together in both sets of proceedings. In determining that preliminary issue, the Tribunal ruled that the LFAs at issue are not DBAs within the meaning of section 58AA, and consequently found that they are lawful and enforceable funding arrangements such as could justify the making of collective proceedings orders in favour of UKTC and the RHA: [2019] CAT 26.

9. The appellants sought to appeal to the Court of Appeal, but also challenged the Tribunal's ruling by way of judicial review in case the Court of Appeal did not have jurisdiction to entertain an appeal. A constitution of the Court of Appeal was convened (Henderson, Singh and Carr LJJ) which could also sit as a Divisional Court to hear the judicial review claim if necessary. The court decided that it had no jurisdiction to entertain an appeal: this is not an issue which arises in the present appeal to this court. Instead, they proceeded as a Divisional Court to grant permission for the appellants' judicial review claim in relation to the DBA issue, which it then dismissed: [2021] EWCA Civ 299; [2021] 1 WLR 3648. The Divisional Court agreed with the Tribunal's interpretation of section 58AA. Henderson LJ gave the sole substantive judgment, with which Singh and Carr LJJ agreed.

10. The appellants now appeal directly to this court against that determination of their judicial review claim under the leap-frog procedure set out in section 13 of the Administration of Justice Act 1969. The Association of Litigation Funders of England & Wales has intervened, with permission granted by this court, to make written submissions.

11. The common law was historically hostile to arrangements for third parties to finance litigation between others. According to the doctrines of champerty and maintenance, such arrangements were generally regarded as unenforceable as being contrary to public policy according to the test identified in *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006: see the discussion in *Giles v Thompson* [1994] 1 AC 142 and *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381 ("*Factortame (No 8)*"). But over the last 30 years there have been substantial changes to litigation funding in England and Wales. Legislation has been passed which has affected the courts' assessment of the extent to which public policy supports the conclusion that

particular funding arrangements are unenforceable: see *Factortame (No 8).* As Henderson LJ observed, funding of litigation by third parties is now a substantial industry which, although driven by commercial motives, is widely acknowledged to play a valuable role in furthering access to justice. The old common law restrictions on the enforceability of third party funding arrangements have been relaxed in various ways, with the result that this industry has developed.

12. In particular, the effectiveness of group litigation may depend on the use of third party funding, since such litigation often involves high numbers of claimants who have individually suffered only a small amount of loss, where the pursuit of claims on any other basis would be uncommercial. Third party funding arrangements based on the right of the funder to take a share of any compensation recovered in the proceedings have proved to be an attractive and effective model in other jurisdictions and claimants and third party funders have sought to adopt that model in proceedings in the United Kingdom.

13. Against this background, the implications of the issue in the appeal are significant. Section 58AA provides that where a third party litigation financing arrangement takes the form of a DBA it will be unenforceable unless certain conditions are complied with. Such conditions have not been complied with in relation to the arrangements entered into by UKTC and the RHA, nor is it usual for them to be met in relation to other cases where the third party funding arrangements are based on the funders sharing in the compensation which might be awarded. The assumption has been made that third party funding arrangements such as those in issue in these proceedings, which assign a passive role to the funders in relation to the conduct of the litigation, are not DBAs within the meaning of section 58AA, are not contrary to public policy, and so are enforceable as ordinary binding contractual arrangements. The court was told that if LFAs of this kind, whereby the third party funders play no active part in the conduct of the litigation but are remunerated by receiving a share of any compensation recovered by their client, are DBAs within the meaning of section 58AA, the likely consequence in practice would be that most third party litigation funding agreements would by virtue of that provision be unenforceable as the law currently stands.

## 2. The Relevant Statutory Provisions

### (a) The Compensation Act 2006

14. Although the appeal is concerned with section 58AA, it is necessary to go back to an earlier provision in the Compensation Act 2006 ("the 2006 Act") which set out

the definition of a DBA which section 58AA later incorporated and utilised. The 2006 Act received Royal Assent on 25 July 2006. As stated in its long title, the 2006 Act is an Act to make provision, among other things, for the regulation of claims management services. This it does in Part 2, which begins with section 4.

15. The relevant provisions in Part 2 were brought into force by orders made by the Secretary of State pursuant to section 16(1). Section 4(2), (3), (5) and (6) was brought into force on 1 December 2006 by the Compensation Act 2006 (Commencement No 1) Order 2006 (SI 2006/3005) and section 4(1) and (4) was brought into force on 23 April 2007 by the Compensation Act 2006 (Commencement No 3) Order 2007 (SI 2007/922).

16. Section 4(1) provides:

> "***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."

17. A claims management service is defined in section 4(2)(b) of the 2006 Act to mean "advice or other services in relation to the making of a claim".

18. Section 4(3) of the 2006 Act provides:

> "(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)."

19. As is clear from section 4(1), the mere fact that a claims management service is provided does not attract the regulatory restrictions set out in that provision. They only apply in relation to *regulated* claims management services. Section 4(2)(e) provides that:

"services are regulated if they are-

(i) of a kind prescribed by order of the Secretary of State, or
(ii) provided in cases or circumstances of a kind prescribed by order of the Secretary of State."

It is an important feature of the legislative scheme in the 2006 Act that it gives the Secretary of State power to choose which claims management services should be subject to regulation.

20. Section 6 of the 2006 Act also gives the Secretary of State power to exempt persons from the scope of regulation even if they provide regulated claims management services:

"**6 Exemptions**

(1) The Secretary of State may by order provide that section 4(1) shall not prevent the provision of regulated claims management services by a person who is a member of a specified body.

(2) The Secretary of State may by order provide that section 4(1) shall not prevent the provision of regulated claims management services-

(a) by a specified person or class of person,

(b) in specified circumstances, or

(c) by a specified person or class of person in specified circumstances…"

21. By virtue of section 15 of the 2006 Act, before making an order for the purposes of section 4(2)(e) the Secretary of State is subject to a duty of consultation with the Competition and Markets Authority (or previously, until amendment in 2013, with the Office of Fair Trading) and such other persons as he thinks appropriate, and such an order has to be approved by each House of Parliament according to the positive resolution procedure. Also, the first order made under section 6 and any order thereafter which removes or restricts an exemption from section 4(1) have to be approved according to the same procedure; any other order under section 6 is subject to the negative resolution procedure.

22. Pursuant to sections 4(2)(e) and 15, on 12 December 2006 the Secretary of State made the Compensation (Regulated Claims Management Services) Order 2006 (SI 2006/3319) ("the Scope Order"). Article 4(1) provided that for the purposes of Part 2 of the 2006 Act services of a kind specified in article 4(2) are prescribed (so as to be regulated) if rendered in relation to claims described in article 4(3), including for example claims for personal injuries and claims in relation to employment. Article 4(2) specified the following kinds of service:

"(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)."

Article 4(4) provided that, despite article 4(2)(c), "the service of referring a claim's or a claimant's details to another person is not a regulated claims management service if it is not undertaken for or in expectation of a fee, gain or reward."

**(b) The Financial Services and Markets Act 2000**

23. As of 1 April 2019 responsibility for the regulation of claims management services was transferred from the Ministry of Justice to the Financial Conduct Authority pursuant to amendments to the Financial Services and Markets Act 2000 ("FSMA"), and the relevant provisions of the 2006 Act were repealed. Section 419A of FSMA defines claims management services in materially the same terms, as follows:

"**419A Claims management services**

(1) In this Act 'claims management services' means advice or other services in relation to the making of a claim.

(2) In subsection (1) 'other services' includes –

(a) financial services or assistance,

(b) legal representation,

(c) referring or introducing one person to another, and

(d) making inquiries,

but giving, or preparing to give, evidence (whether or not expert evidence) is not, by itself, a claims management service."

24. As under the 2006 Act, provision of a claims management service is only a regulated activity if specified in an order made by the Treasury: section 22(1B) and (5) of FSMA. Where the effect of such an order is that "an activity which is not a regulated activity would become a regulated activity", the approval of each House of Parliament is required under the positive resolution procedure: para 26 in Part III of Schedule 2 to FSMA. However, this power to regulate financial services or assistance in relation to the making of a claim has not been exercised.

**(c) The Courts and Legal Services Act 1990**

25. Section 58 of the CLSA 1990 introduced conditional fee agreements ("CFAs") under which lawyers were permitted in certain circumstances to charge success fees for their litigation and advocacy services. These are distinct from DBAs (sometimes called contingency fee agreements) of the kind in issue in this appeal, under which those providing litigation and other services charge a fee in the form of a share of the compensation recovered by the client.

26. Section 28 of the Access to Justice Act 1999 ("the AJA 1999") made provision for a new section 58B to be inserted into the CLSA 1990 to make enforceable certain litigation funding agreements which were otherwise thought to be unenforceable at common law ("section 58B"). Section 108 of the AJA 1999 provided that section 28 should be brought into force on a date appointed by the relevant Minister, but no commencement order has been made. Section 58B provides in relevant part as follows:

“**58B Litigation funding agreements**

(1) A litigation funding agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a litigation funding agreement.

(2) For the purposes of this section a litigation funding agreement is an agreement under which—

(a) a person (‘the funder’) agrees to fund (in whole or in part) the provision of advocacy or litigation services (by someone other than the funder) to another person (‘the litigant’); and

(b) the litigant agrees to pay a sum to the funder in specified circumstances.

(3) The following conditions are applicable to a litigation funding agreement—

(a) the funder must be a person, or person of a description, prescribed by the Secretary of State;

(b) the agreement must be in writing;

(c) the agreement 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 any such description as may be prescribed by the Secretary of State;

(d) the agreement must comply with such requirements (if any) as may be so prescribed;

(e) the sum to be paid by the litigant must consist of any costs payable to him in respect of the proceedings to which the agreement relates together with an amount calculated by

reference to the funder's anticipated expenditure in funding the provision of the services; and

(f) that amount must not exceed such percentage of that anticipated expenditure as may be prescribed by the Secretary of State in relation to proceedings of the description to which the agreement relates.

(4) Regulations under subsection (3)(a) may require a person to be approved by the Secretary of State or by a prescribed person.

(5) The requirements which the Secretary of State may prescribe under subsection (3)(d)—

(a) include requirements for the funder to have provided prescribed information to the litigant before the agreement is made; and

(b) may be different for different descriptions of litigation funding agreements.

(6) In this section (and in the definitions of 'advocacy services' and 'litigation services' as they apply for its purposes) 'proceedings' includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated. …"

27. A new section 58AA was inserted into the CLSA 1990 by section 154 of the Coroners and Justice Act 2009 ("the CJA 2009") to introduce DBAs and make them enforceable subject to the satisfaction of certain conditions. As originally introduced section 58AA was limited to employment claims. However, that limitation was removed by section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") with effect from 19 January 2013. For discussion of these changes, see *Lexlaw Ltd v Zuberi* [2021] EWCA Civ 16; [2021] 1 WLR 2729. As so amended, and so far as is material, section 58AA provides 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 and may make different provision in relation to different descriptions of agreements.

…

(7) In this section—

…

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

28. The latter cross-reference to the 2006 Act has now been replaced by amendment in 2018 (by article 90 of the Financial Services and Markets Act 2000 (Claims Management Activity) Order 2018 (SI 2018/1253)) to say that "'claims management services' has the same meaning as in the Financial Services and Markets Act 2000 (see section 419A of that Act)".

29. Shortly after section 58AA was given general effect in January 2013, on 1 April 2013 the Damages-Based Agreements Regulations 2013 (SI 2013/609) ("the DBA Regulations 2013") came into force. These Regulations set out additional detailed requirements which must be satisfied if a DBA is to be enforceable pursuant to section 58AA. It is common ground that the LFAs at issue in this case do not satisfy the requirements in the Regulations. Therefore, if the agreements are DBAs, by virtue of section 58AA(2) they are unenforceable.

30. Regulation 1(2) of the DBA Regulations 2013, as amended to reflect the change in the cross-reference in section 58AA(7), defines "client" to mean "the person who has instructed the representative to provide advocacy services, litigation services … or claims management services (within the meaning of section 419A of the Financial

Services and Markets Act 2000) and is liable to make a payment for those services" and defines "representative" to mean "the person providing the advocacy services, litigation services or claims management services to which the damages-based agreement relates". Regulation 3 requires that the terms of a DBA must specify, among other things, the circumstances in which the representative's payment is payable.

**3. The issues in the appeal**

31. The appellants submit that under the LFAs with UKTC and the RHA, respectively, (hereafter, "the LFAs") Yarcombe and Therium provide "claims management services" within the meaning of section 4 of the 2006 Act and section 419A of FSMA by virtue of providing "other services in relation to the making of a claim" in the form of "the provision of financial services or assistance".

32. The respondents dispute this. They submit that the provision of "financial services or assistance" (section 4(3)(a) of the 2006 Act; section 419A(2)(a) of FSMA) "in relation to the making of a claim" (section 4(2)(b) of the 2006 Act; section 419A(1) of FSMA) is to be interpreted as applying in the context of the management of a claim, and under the LFAs Yarcombe and Therium have no role in the management of the claims against the appellants. The LFAs are therefore not DBAs within the statutory meaning and section 58AA(2) does not render them unenforceable. This was the submission accepted by the Tribunal and the Divisional Court.

33. The Divisional Court noted that none of the parties submitted that anything turns on the differences in wording between section 4 of the 2006 Act and section 419A of FSMA, so the critical issue before it was the meaning of the phrase "claims management services" as defined in the 2006 Act, when that definition was first incorporated into section 58AA by the CJA 2009. That remains the principal issue on this appeal.

34. The LFA between the RHA and Therium was entered into prior to the change in the reference in section 58AA(7) from section 4 of the 2006 Act to section 419A of FSMA. The LFAs between UKTC and Yarcombe were entered into after that change to section 58AA(7). In this court, again, there was no suggestion that this change had any significance and counsel for all parties focused their submissions on the meaning of "claims management services" as defined in the 2006 Act.

35. However, the respondents argued that it is relevant to have regard to later legislation, particularly the DBA Regulations 2013, as an aid to the interpretation of

section 4 of the 2006 Act and section 58AA. This is on the basis that, according to the argument, "claims management services" is an ambiguous expression, even having regard to the statutory definition, so that it is legitimate to have regard to later legislation to resolve that ambiguity; also, the DBA Regulations 2013 form part of an integrated legislative scheme with section 58AA and may be used as an aid to the interpretation of the parent Act, the CLSA 1990. They emphasised that the DBA Regulations 2013 use the term "representative" to denote the party who contracts with a client by way of the DBA.

36. As a subsidiary issue, UKTC submitted that even if its opt-out LFA with Yarcombe provides for a claims management service as defined, it still does not fall within the definition of a DBA in section 58AA(3). UKTC raised this argument by way of a Respondent's Notice in the Divisional Court and the appellants responded to it in their skeleton argument before that court. It was not addressed in the Divisional Court's judgment. UKTC pursued this alternative argument before this court. Both sides dealt with it primarily by way of written submissions.

**4. The judgment of the Divisional Court**

37. Henderson LJ summarised (paras 65-68) the principles of statutory construction to be applied, referring in particular to the speech of Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349 ("*Spath Holme*"), 396-397, and *Pollen Estate Trustee Co Ltd v Revenue and Customs Comrs* [2013] 1 WLR 3785, para 24 (Lewison LJ). Henderson LJ emphasised (para 68) that the presumption against absurdity is an important tool in determining the meaning which Parliament intended a statutory provision to have.

38. At paras 69-79 Henderson LJ reviewed the legal, social and historical context of section 4 of the 2006 Act. In order to identify the particular mischief which that provision was intended to remedy, that is, its purpose, he referred to the Explanatory Notes which accompanied the 2006 Act and the Explanatory Memorandum for the Scope Order. He also reviewed the case-law which indicated that certain forms of litigation funding by third parties had by 2006 become established and were recognised by the courts as not being champertous as contrary to public policy: *Factortame (No 8)* and *Arkin v Borchard Lines Ltd (Nos 2 and 3)* [2005] 1 WLR 3055 ("*Arkin*"). He concluded (para 78) that the purpose of introducing statutory regulation of claims management services in section 4 of the 2006 Act and the Scope Order "was to enhance consumer protection in areas where the activities of 'claims intermediaries' had been causing widespread public concern", and that conversely (para 79) there was no suggestion "that regulation of non-champertous funding of litigation by professional third-party funders in return for a reasonable share of the client's

recoveries", of the kind exemplified in *Factortame (No 8)* and *Arkin*, formed any part of the mischief which section 4 of the 2006 Act sought to remedy. In that regard, he referred to section 58B and drew the inference from the fact that it had not been brought into force that immediate regulation of the third-party funding sector was not considered necessary.

39. Having regard to the context in which section 4 of the 2006 Act had been passed, the Divisional Court concluded that the Tribunal had been right to construe the relevant words in section 4(2) of the 2006 Act as applying "in the context of the management of a claim" (para 87). Henderson LJ gave two main reasons for this. First, Parliament had already enacted a comprehensive scheme for the regulation of litigation funding agreements by way of section 58B, even though it had not been brought into force, and it was most improbable that Parliament would have intended to bring such agreements within the ambit of the regulation of claims management services by a side-wind: paras 88-90. Secondly, the structure of the definition of "claims management services" in section 4(2) and (3) of the 2006 Act, with a primary limb in section 4(2)(b) ("advice or other services in relation to the making of a claim", broadly defined) which was extended by subsection (3)(a) in various ways, meant that it was appropriate to have regard to "the potency of the term defined", meaning that the definition should itself be coloured by the reference to "claims management" in the phrase being defined: paras 91-95. Henderson LJ also relied (para 96) on the presumption against absurdity, saying:

> "The result of the construction for which DAF contends is in my judgment both anomalous and unreasonable, because it would bring any form of the provision of financial assistance for the making of a claim within the ambit of the 2006 Act, without regard to the fact that pure litigation funding was not then perceived to be a problem which required fresh legislative intervention, and if its regulation were to be considered necessary in the future, the provisions of section 58B of CLSA 1990 could be brought into force for that very purpose. I also respectfully agree with the Tribunal that the example of a bank lending money to a customer to fund litigation is telling in this context, because there is nothing to indicate that Parliament intended to bring such activities within the purview of the 2006 legislation, but a literal reading of section 4(3)(a)(i) would admittedly have that effect. A degree of legislative 'overkill' is sometimes the price to be paid for countering abuse, but if that were the position in the present case, it is inconceivable that the Explanatory Notes would have said nothing on the subject. If, however,

> the phrase 'claims management services' is interpreted with due regard to the central concept of the management (as opposed to the pure funding) of claims, the problem disappears."

## 5. The interpretation of Part 2 of the 2006 Act: its language and scheme and the context in which it was passed

### (a) The relevant interpretative principles

40. The basic task for the court in interpreting a statutory provision is clear. As Lord Nicholls put it in *Spath Holme*, at p 396, "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."

41. As was pointed out by this court in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16; [2022] AC 690, para 10 (Lord Briggs and Lord Leggatt), there are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. The examples given there are *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 and *Bloomsbury International Ltd v Department for the Environment, Food and Rural Affairs* [2011] UKSC 25, [2011] 1 WLR 1546. In the first, Lord Bingham of Cornhill said (para 8):

> "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

In the second, Lord Mance said (para 10):

> "In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance … In this area as in the area of

> contractual construction, 'the notion of words having a natural meaning' is not always very helpful (*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 391C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme."

The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it.

42. It is legitimate to refer to explanatory notes which accompanied a Bill in its passage through Parliament and which, under current practice, are reproduced for ease of reference when the Act is promulgated; but external aids to interpretation such as these play a secondary role, as it is the words of the provision itself read in the context of the section as a whole and in the wider context of a group of sections of which it forms part and of the statute as a whole which are the primary means by which Parliament's meaning is to be ascertained: *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, paras 29-30 (Lord Hodge). Reference to the explanatory notes may inform the assessment of the overall purpose of the legislation and may also provide assistance to resolve any specific ambiguity in the words used in a provision in that legislation. Whether and to what extent they do so very much depends on the circumstances and the nature of the issue of interpretation which has arisen.

43. The courts will not interpret a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used: see *R v McCool* [2018] UKSC 23, [2018] 1 WLR 2431, paras 23-25 (Lord Kerr of Tonaghmore), citing a passage in *Bennion on Statutory Interpretation*, 6th ed (2013), p 1753. See now *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), section 13.1(1): "The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature". As the authors of *Bennion, Bailey and Norbury* say, the courts give a wide meaning to absurdity in this context, "using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief". The width of the concept is acceptable, since the presumption against absurdity does not apply mechanistically but rather, as they point out in section 13.1(2), "[t]he strength of the presumption … depends on the degree to which a particular construction produces an unreasonable result". I would add that the courts have to be careful to ensure that they do not rely on the presumption against absurdity in order to substitute their view of what is reasonable for the policy chosen by the legislature, which may be reasonable in its own estimation. The constitutional position that legislative choice is for Parliament cannot be undermined under the guise

of the presumption against absurdity. There is an issue between the parties whether the presumption against absurdity provides relevant guidance in the circumstances of this case.

44. In certain circumstances, subordinate legislation made pursuant to powers in a statute can be an aid to interpretation of the statute. There is an issue as to how far this principle extends. The parties are agreed that the Scope Order is an admissible aid to interpretation of the 2006 Act. It was promulgated at a time roughly contemporaneous with the 2006 Act itself, and in *Deposit Protection Board v Dalia* [1994] 2 AC 367 the House of Lords held that it is permissible to refer to such contemporaneous subordinate legislation as an aid to interpretation: p 397 per Lord Browne-Wilkinson. In my view, on this basis and in line with the position for explanatory notes, the Scope Order is admissible as an aid to interpretation both for such light as it might throw on an assessment of the purpose of the primary legislation and to assist in resolving any identified ambiguity in a provision in that legislation.

45. Further, Part 2 of the 2006 Act specifically contemplated that, for its operation, the Secretary of State would define its scope by an order. Given the broadly contemporaneous nature of the Scope Order, it can fairly be regarded as being, in combination with the 2006 Act, part of a single scheme to introduce the new statutory regime in Part 2 in a way that justifies reference to the Scope Order "to take account of indications of consistency between them" on the basis explained in *R v McCool* [2018] UKSC 23, [2018] 1 WLR 2431, para 105 (Lord Hughes, for the majority); cited as authoritative in *Bennion, Bailey and Norbury*, 8th ed, above, section 24.18. To similar effect, in *R (A) v Director of Establishments of the Security Service* [2009] UKSC 12; [2010] 2 AC 1, Lord Hope of Craighead said that where a statute which received Royal Assent on 28 July 2000 and subordinate legislation was made under it on 28 September 2000 and laid before Parliament the next day, "[t]he interval was so short that, taken together, they can be regarded as all part of the same legislative exercise" (para 42), albeit in that case it was not in the event necessary to refer to the subordinate legislation because the scheme of the primary legislation was clear. Where the primary legislation and the subordinate legislation are drafted by or on the instructions of the same government department at about the same time, as would be normal in this type of case, it is reasonable to suppose that they are inspired by the same underlying objective and are intended to reflect a coherent position as understood at the time the primary legislation is presented to Parliament. In that situation, it has been observed that the subordinate legislation made under a power in the primary legislation can be regarded as a form of parliamentary or administrative contemporanea expositio (exposition of contemporary understanding) in relation to the primary legislation which may provide some evidence of how Parliament understood the words it used in the primary legislation, even though this does not decide or control their meaning: *Hanlon v The Law Society* [1981] AC 124, 193-194

(Lord Lowry, with whom Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Scarman agreed). This point is strengthened where, as here, the subordinate legislation is broadly contemporaneous with the Act and is subject to review by the same elected Parliament which passed the Act according to the positive or the negative resolution procedure. This can provide grounds to infer that the Parliament which passed the Act regarded the subordinate legislation as in accordance with it and a fair reflection of it.

46. Since the Scope Order is a permissible aid to interpretation of the statute, for similar reasons the Explanatory Memorandum which accompanied it to explain its effect to Parliament is also a permissible aid to interpretation of the statute.

47. The respondents contend that some assistance in interpreting the 2006 Act is also to be derived from the DBA Regulations 2013. In my opinion this contention is not sustainable. In the *Dalia* case regulations made four years after the Act in question were held not to be a permissible aid to interpretation. The DBA Regulations 2013 were not introduced broadly contemporaneously in combination with the 2006 Act as part of a single coherent scheme. They were not subject to review by the same Parliament which had enacted the 2006 Act. The reasoning which justifies treating subordinate legislation as a permissible aid to interpretation of primary legislation in limited circumstances is not applicable.

48. In an appropriate case "the potency of the term defined" may provide some guidance as to the meaning for that term as set out in a statutory definition. As it is put in *Bennion, Bailey and Norbury*, op. cit., section 18.6: "In the case of a statutory definition the defined term may itself colour the meaning of the definition". Lord Hoffmann explained in *MacDonald v Dextra Accessories Ltd* [2005] 4 All ER 107, para 18, "a definition may give the words a meaning different from their ordinary meaning. But that does not mean that the choice of words adopted by Parliament must be wholly ignored. If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean". I agree with Henderson LJ, paras 92-93 (citing *Birmingham City Council v Walker* [2007] 2 AC 262, para 11, per Lord Hoffmann, and *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674, para 38, per Lord Hoffmann, and para 82, per Lord Scott of Foscote), that this principle is not confined to cases where there is an ambiguity in the terms of the definition, but means that when the definition is read as a whole the ordinary meaning of the word or phrase being defined forms part of the material which might potentially be used to throw light on the meaning of the definition. Whether and to what extent it does so depends on the circumstances and in particular on the terms of the legislation and the nature of the concept referred to by the word or phrase being defined.

49. The difficulty in trying to use this sensible principle of interpretation in the present case is that it was agreed, and the Divisional Court accepted, that the phrase "claims management services" defined in section 4(2) of the 2006 Act did not have any established legal meaning. Nor, as explained below, did it have any clear or generally accepted meaning in ordinary parlance which was capable of exerting any significant "potency" in terms of qualifying the ordinary words used by Parliament in section 4(2) and (3) of the 2006 Act to define that term. Where an express definition of a term is given in statute then even if there is consensus as to its core content, in the absence of general consensus as to the limits of the term no significant potency can be attached to the term so as to colour or qualify the meaning of the definition: *Phillips v News Group Newspapers Ltd* [2013] 1 AC 1, para 20 (Lord Walker of Gestingthorpe, with whom the other members of the court agreed). Still less will the term defined have potency to colour the meaning of the definition if there is no general consensus as to the core meaning of the term, which is the case here. Rather, Parliament deliberately used wide words of definition in the 2006 Act precisely because of the nebulousness of the notion of "claims management services" at the time and in order to ensure that the general policy objective of Part 2 of the 2006 Act would not be undermined. That objective was to confer a general power on the Secretary of State appropriate for the regulation in the public interest of this developing area of activity, involving the creation of new commercial models to facilitate litigation and access to justice. The fact that Parliament provides a statutory definition of a term means that it is not satisfied that the term itself is sufficiently clear on its own. Where Parliament has taken the trouble to provide a definition, it is the words of the definition which are the primary guide to the meaning of the term defined. The weaker the inherent or established meaning of the term defined, the weaker must be its ability to throw light on Parliament's meaning when setting out the express words of the definition which falls to be construed.

**(b) The wording of section 4 of the 2006 Act**

50. The words used in section 4(2) and (3) to define "claims management services", read according to their natural meaning, are apt to cover the LFAs in this case, as the respondents and the Divisional Court accepted. Subsection (2)(b) defines "claims management services" to mean advice "or other services in relation to the making of a claim". Subsection (3)(a)(i) states in terms that for the purposes of section 4 "a reference to the provision of services includes … [a reference to] the provision of financial services or assistance." Under the LFAs Therium and Yarcombe are to provide financial services or assistance to their respective counterparties, the RHA and UKTC, in relation to the making of the claims they wish to bring. Of course, that would also be true of an ordinary bank which lent money to its customer for the purpose of assisting the customer to bring a claim. I return to this point when considering the presumption against absurdity, below.

51. The words used to define “claims management services” also provide an important indication of Parliament’s purpose in legislating as it did in Part 2 of the 2006 Act, to which I now turn.

**(c) The context in which Part 2 of the 2006 Act was enacted and its legislative purpose**

52. The context in which Part 2 of the 2006 Act was enacted was one in which there had been a progressive expansion of the ways in which litigants could gain access to varieties of financial support to bring and defend claims. This was motivated in part by the need to promote new ways of assisting people to have access to justice in circumstances where public support for this in the form of legal aid was being reduced.

53. Section 58 of the CLSA 1990 allowed agreements for conditional fees (that is, fees paid to persons providing advocacy or litigation services conditional on success of the claim) to be used in cases to be specified by order made by the Lord Chancellor. Where such agreements provided for an additional success element above the basic fees, that element was not to be recoverable from the opposing party. The Conditional Fee Agreements Order 1995 (SI 1995/1674) allowed such conditional fee agreements for the first time, by specifying a limited range of proceedings in which such agreements would be permitted. The AJA 1999, as brought into force on 1 April 2000, replaced section 58 with a new section 58 and section 58A of the CLSA 1990 which expanded the range of cases in which conditional fee agreements could be used and provided that the success element could be recovered from the opposing party. Section 58B was also enacted, but was not brought into effect.

54. The decision of the Court of Appeal in *Factortame (No 8)* in 2002 considered the implications of these legislative changes as regards the public policy which underlies the law of champerty in the context of a contract whereby services were provided by accountants to assist in the bringing of a claim in return for a percentage of the final compensation awarded in respect of that claim. The claim was successful and the accountants were paid that percentage of the sum received as compensation. The claimants sought to recoup that amount as costs from the opposing party. The Court of Appeal held that they could. The original and the extant provisions of the CLSA 1990 provided guidance as to the limits of public policy taken to control the enforceability of such a contract. Section 58 of that Act did not apply to the form of contingent fee arrangement in issue and did not implicitly render it unenforceable. Assessing the effect of the contract in the light of the particular facts, and bearing in mind the importance which public policy now attached to access to justice, the contract did not conflict with public policy directed to protecting the due administration of justice. The

contract was therefore enforceable and the costs payable under it were recoverable from the opposing party.

55. In the *Arkin* decision in 2005 the Court of Appeal confirmed that an arrangement whereby a third party funder who financed a claim in the expectation of receiving a share of any recovery, under an arrangement which left the claimant in control of the litigation, was non-champertous and hence was enforceable. If the claim failed, the funder could be ordered to pay the costs of the successful party, but found that the funder in that case should be liable only up to the extent of the funding provided. The effect of *Factortame (No 8)* and *Arkin* was to encourage third party funders to provide financing for claims on the basis that they would assume a passive role in relation to the conduct of the litigation itself.

56. In May 2004 the Better Regulation Task Force ("the BRTF" - an independent group set up to advise the government) produced a report entitled "Better Routes to Redress" to consider what regulation would be appropriate in relation to various services to assist people to bring claims, focusing on personal injury claims. The report addressed the perception in the media that the United Kingdom was in the grip of a "compensation culture", but concluded that this was a myth. It considered how that damaging perception could be addressed and how people with genuine grievances could have better access to justice and made recommendations about how the process could be improved. It highlighted how the introduction of "no win, no fee" arrangements and the emergence of claims management companies had increased access to justice; but also how claims management companies, especially The Accident Group and Claims Direct which had dominated the market but had by then collapsed, had fed the perception that litigants were now being encouraged to bring unmeritorious claims in the hope of obtaining compensation. The report did not provide a definition of a claims management company nor analyse in detail what services might be provided by such a company, other than to say that they take advantage of the new "no win, no fee" arrangements "by gathering accident cases by advertising or direct marketing, administering the cases, and then farming them out to solicitors up and down the country", earning money "by non-transparent and complex systems of referral fees and charges". It noted that nearly everyone consulted for the purposes of the report called for the government to regulate the sector, "however few could suggest a model for the regulation of the sector"; instead, "self-regulation with a statutory underpinning" should be tried first, involving a new professional organisation, the Claims Standards Federation, which should apply to the Office of Fair Trading for approval of a code of practice to be developed by it. The BRTF advised that the government should keep the need for regulation under close review and a regulatory model should be developed "that could incorporate claims management companies should the need arise in future". If progress had not been made by December 2005, the government "should step in and regulate the sector" (para 4.1).

57. 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. Part 2 of the 2006 Act laid the legislative foundation for such regulation.

58. The government published Explanatory Notes which accompanied Part 2 of the 2006 Act. These referred to the BRFT's report and the government's response, by way of background. The Explanatory Notes stated (para 31):

> "The legislative framework [in the 2006 Act] is flexible and allows the Secretary of State to designate a body to regulate claims management services, to establish a body to regulate (where he thinks that no existing body is suitable for designation) or to regulate himself. The Act provides the outline regulatory framework to authorise providers who would be required to comply with rules and codes of practice. The Act also includes power for the Regulator to investigate unauthorised activities and to prosecute those who try to evade regulation."

The Explanatory Notes explained (para 34) that "[o]nly those claims management services that the Secretary of State prescribes by order under section 4(2)(e) will be subject to regulation. The Secretary of State can therefore target regulation in areas where he considers there to be a particularly high risk to consumers".

59. At para 35 the Explanatory Notes explained that section 4(3) "gives examples of activities which constitute the provision of services (where they are connected with a claim)" and continued:

> "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). The provision of advice does not extend to the preparation or giving of evidence. For example, if a person were asked to give evidence in a personal injury claim (whether or not

expert evidence) this would not amount to providing claims management services."

60. The 2006 Act does not prohibit or limit the provision of claims management services generally. Instead, section 4(1) provides that a person may not provide *regulated* claims management services unless certain conditions are fulfilled. Services are regulated only if they are of a kind, or are provided in cases or circumstances of a kind, prescribed by an order made by the Secretary of State: section 4(2)(e). To make such an order, the Secretary of State has to comply with the procedural requirements laid down in the Act, which stipulates for parliamentary oversight by the positive resolution procedure. Parliament thus reserved to itself close control of the making of an order to subject particular services to regulatory control pursuant to the Act.

61. In this way, in my view, the scheme of Part 2 of the 2006 Act bears out what was explained in the Explanatory Notes, that the purpose of Part 2 was to create a broadly framed power for the Secretary of State to regulate in this area, leaving it to him (subject to close supervision by Parliament itself) to target the regulation, and the statutory effects which regulation carries with it under section 4, according to his own assessment of where a need of regulation was shown to exist at any particular time on the evidence which had then become available.

62. The fact that the making of an order was to be subject to the positive resolution procedure indicates that Parliament intended the control on the Secretary of State's power to be primarily procedural, rather than by way of closely delimiting the ambit of the power by the statutory definition of the area in which it might be exercised. Further, Parliament clearly intended that the Secretary of State should be able to regulate effectively in future in a new and fast developing area in which, as at the time of enactment, the financing and business models being used were not fully understood. Effective regulation would be liable to be undermined if the powers conferred were narrow or unclear, so that an order which the Secretary of State might consider to be justified in the public interest to regulate some feature in the general area of providing funding and other assistance to potential litigants could be made subject to a vires attack. In the context of the power of regulation created by section 4, and the general purpose it is supposed to promote, there is no good reason to look for implied limitations which do not appear from the wide language used for the definition.

63. The language of the main part of the definition of "claims management services" in section 4(2)(b) is wide and is not tied to any concept of active management of a claim. The provision says that such services mean "advice or other services in relation to the making of a claim". Advice in relation to a claim does not carry any

connotation of management of the claim. In the area of litigation the connotation of "advice" in relation to a claim is advice (typically legal, though it might take other forms) given to a client who then makes their own decision about how to manage their claim. In the definition, the words "other services" are juxtaposed with and take their colour from "advice", so it is not plausible to say that they should be read as qualified to mean services in the management of a claim. Further, according to the definition the "other services" have to be "in relation to the making of a claim". That is wide express language and in my view it is not possible to read it to mean in relation to the management of the making of a claim; yet this is what the respondents' proposed interpretation amounts to.

64. These basic points are strongly reinforced by the wide language of section 4(3)(a), which stipulates that "the provision of services" includes a non-exhaustive list of four items stated in very broad terms, none of which has the connotation of or involves a power of management of a claim. Provision of services "by way of or in relation to legal representation" (sub-paragraph (ii)) is, according to the normal understanding of the role of a legal representative, to assist a client in presenting a claim, not to manage or have the power of management of a claim. "[R]eferring or introducing one person to another" (sub-paragraph (iii)) clearly does not involve management of a claim as a matter of the ordinary use of language. The same is true of making inquiries (sub-paragraph (iv)): in the context of litigation, inquiries are made to find evidence to support a claim being brought by others. The same point applies in relation to the provision of financial services or assistance (sub-paragraph (i)): in the context of litigation, as a matter of ordinary language, such services or assistance are provided to help someone to bring a claim, not to secure a power of management over it.

65. Consideration of section 4(3)(b) leads to the same conclusion. It is obvious, and does not require to be stated, that a witness giving or preparing to give evidence is not managing the claim to which that evidence relates, nor providing a service in order to manage that claim. The only point of section 4(3)(b) is to carve out from the wide definition of "claims management services" a category of case to which the Secretary of State's power of regulation does not extend. This provision therefore constitutes a further specific indication that the definition of "claims management services" in section 4(2)(b) is indeed intended to be very wide, in line with its own express language and that of section 4(3)(a), and that it is not limited to services involving the management of a claim.

66. It is also significant that the manner in which section 4 operates is by focusing on a particular type of activity rather than by focusing on a particular actor (say, a claims intermediary as opposed to a reputable or regulated bank). If it is possible that

one of the activities referred to could be conducted in a way which is prejudicial to consumer protection in this area, it is plausible to infer that Parliament intended the activity to be covered by the wide regulatory power created by section 4 even if some actors in the field may not behave in a prejudicial way. The reverse logic, according to which if there are some reputable actors it should be inferred that the intention was not to provide a power to regulate the activity at all, is not at all persuasive.

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

68. With respect to Henderson LJ, his assessment of the context and purpose of Part 2 of the 2006 Act is not sustainable. He infers there was an intention to regulate "claims intermediaries" and no one else, but that was not a concept used in the Act itself, nor is it a clear concept, nor was it used or defined in any precise way in the BRTF report or the Explanatory Notes. The scheme of Part 2 of the 2006 Act is to regulate activities, not persons of a particular description. The language used in section 4 and in the Scope Order to describe the services which may be or are regulated is not appropriate to describe what a claims intermediary (whatever that may be) does.

69. Henderson LJ said that he saw no reason why Parliament would have wished to regulate non-champertous third party funding in return for a reasonable share of the sum recovered. But the scheme of the legislation was that the Secretary of State was given a discretion as to what services would be made subject to regulation, and Parliament was to exercise close supervision of that choice, and there was no reason to think that the Secretary of State would seek to regulate services which did not jeopardise consumers' interests. However, evidence might emerge of third party funders extracting more than a reasonable share of the recovery, in which case regulation would plainly be fairly and squarely within the purpose of the power in section 4 of the 2006 Act, to protect consumers of such services. Moreover, there might be an element of bundling financial services together with other services as part of an overall package offered to a potential litigant, or the funding provided might be used to pay the fees of other service providers, or the person providing the financial assistance might pay a referral fee to a person promoting the litigation, any of which might require the regulatory power under section 4 to be exercised.

70. I do not consider that the existence of section 58B on the statute book has the significance which Henderson LJ accorded it. Section 58B is a comparatively blunt

instrument which is focused on regulating particular persons identified as funders, whereas the power to regulate under section 4 of the 2006 Act is focused on regulation of service activities and is intended to be wide and highly flexible, allowing the Secretary of State to target regulation more precisely as and when particular needs are identified. Section 4 allows for regulation of the provision of financial services or assistance to be integrated, if appropriate, into a coherent package of regulation covering also other forms of service provision with which they may be associated. If brought into effect, section 58B would impose a limitation which is not applicable where the Secretary of State regulates pursuant to section 4: see section 58B(3)(c). Section 58B was put on the statute book in 1999 (albeit not brought into effect) as a means of permitting litigation funding by exempting it from the common law rules against champerty on a very limited basis, where damages-based remuneration would not be permitted, but only remuneration calculated with reference to the funder's costs: section 58B(3)(e). That limitation was bypassed by development of the common law in *Factortame (No 8)* and *Arkin*, which confirmed that third party funding arrangements of the kind at issue in these proceedings were not champertous and hence were enforceable. Section 58B was not designed to regulate third party funding arrangements based on taking a share of the sum recovered of the kind which have been developed in the wake of those decisions, nor is it appropriate for that purpose. By the time of the enactment of the 2006 Act it was clear that, contrary to the view of the Divisional Court, section 58B did not provide a comprehensive scheme of regulation for litigation funders.

71. Accordingly, it can be seen that section 4 of the 2006 Act and section 58B do not operate in the same way. Section 4 was designed to address a world of third party funding which had developed in significant ways beyond that for which section 58B had been devised. Section 4 has a different purpose and function. Furthermore, even to the extent that the provisions overlap in terms of their coverage, there is nothing inherently untoward in this. The statute book is not neat and tidy and there is no particular reason why statutory powers contained in different enactments should be regarded as mutually exclusive. Parliament included the reference to "financial services or assistance" in section 4 simply as one type of services within the purview of the general regulatory power conferred by that provision, where it might be found to make sense in future to regulate them from the perspective of section 4 (potentially alongside other services) without reference to section 58B.

72. To sum up, therefore, I conclude that the statutory purpose of Part 2 of the 2006 Act was to provide a broad power to allow the Secretary of State to decide what targeted regulatory response might be required from time to time as information emerged about what was then a new and developing field of service provision to encourage or facilitate litigation, where the business structures were opaque and poorly understood at the time of enactment. The wide language used in section 4, and

the degree of parliamentary control for the future exercise of the section 4 power, which is a feature of the scheme of Part 2, are strong indications of this. The Explanatory Notes also indicate that this was the purpose of the provision. Viewed in this light, there is good reason to think that Parliament used wide language in section 4 deliberately and with the intention that the words of the definition of "claims management services" should be given their natural meaning.

**(d) The Scope Order**

73. Reference to the Scope Order and the Explanatory Memorandum provide further support for the appellants' case on the interpretation of this provision in the Act.

74. The Explanatory Memorandum for the Scope Order explained the policy background at para 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."

75. At para 7.6 the Explanatory Memorandum explained what the Scope Order was intended to achieve:

> "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 the 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. In particular, services provided to a defendant are outside the intended scope, and are not regarded as being within the definition of "claims management services" in the Act—see section 4(2)(b). The kinds of claim can generally be described as claims for injury, damage or loss that have resulted in consumer detriment. The consultation provided unanimous consensus that it was appropriate to include the sectors proposed in the draft Order."

76. Two points in particular emerge from the Explanatory Memorandum. It supports the interpretation of section 4 of the 2006 Act as conferring a wide power to regulate on the Secretary of State, which was to be targeted on particular areas of activity giving rise to concern as and when they might emerge. It also shows that it was appreciated that one area of concern might be the making of loans, ie the provision of financial assistance. It is again relevant that the statutory scheme is framed in terms of a power to regulate types of activity rather than particular actors.

77. The Scope Order provided for a range of kinds of services to be specified as regulated claims management services: para 22 above. These were services which the Secretary of State considered, on the basis of the information available to him at the time of making the Order, required to be regulated in the public interest pursuant to section 4 of the 2006 Act. Each of the services specified in the Scope Order is described in language which carries no connotation of management of, or of having the power to manage, a claim. They are far removed from any such concept. Advertising or seeking out persons who may have a cause of action (sub-para (a) of article 4(2)) can on no view be said to involve management of a claim. Nor can referring details of a claim or claimant, or a cause of action or potential claimant, to another person (sub-para (c)). Nor "investigating, or commissioning the investigation of, the circumstances, merits or foundation of a claim …" (sub-para (d)). The same point made above about "advice" in relation to a claim applies in respect of "advising a claimant or potential claimant in relation to his claim or cause of action" (sub-para (b)). Similarly, in ordinary language and in the context of litigation, "representation of a claimant" (sub-para (e)) means to act according to their instructions, without any power to manage how they seek to have their claim argued or litigated. In none of these cases is the management of a claim an apt concept to apply. For example, it cannot sensibly be said that a person

who advertises (it may be, unsuccessfully) to try to find a person who might have a claim is in any sense managing any claim at all. Accordingly, the Scope Order provides strong support for the appellant's submission as to the wide meaning of the definition in section 4 of the 2006 Act.

**(e) The potency of the term defined**

78. In my view there are three basic reasons why the notion of the potency of the term defined cannot be taken to have relevant application in this case to qualify or provide colour for the interpretation of the language used in section 4(2) and (3) of the 2006 Act to define "claims management services". First, as explained above, the terms explicitly used in the definition in the primary legislation and also in the Scope Order cannot be read as involving the management of claims nor as having claims management as a unifying core of meaning. It is therefore difficult to say that they should be read as the respondents suggest.

79. Secondly, "claims management services" had no established and generally accepted meaning which could lead a reader of the text of section 4 to suppose that the express language of the definition was to be treated as qualified or coloured by that meaning. Section 4 of the 2006 Act is thus to be contrasted with those statutory contexts where the term defined does have this effect.

80. *Delaney v Staples (trading as De Montfort Recruitment)* [1992] 1 AC 687 concerned the interpretation of a statutory provision which conferred exclusive jurisdiction on industrial tribunals in respect of the lawfulness of deductions from wages, where "wages" was defined in wide terms to mean "any sums payable to the worker by his employer in connection with his employment", with a series of items said to be included within this. The question was whether a tribunal had jurisdiction under this provision to adjudicate on the lawfulness of a failure to make a payment in lieu of notice to an employee who was summarily dismissed. The House of Lords held that since "wages" were payments in respect of the rendering of services during employment, the term did not cover payments in respect of the termination of a contract of employment. The main reasons for this conclusion were that the procedural provisions of the statute were not compatible with such an interpretation and it would have an unjustified effect on the employer's rights of set-off under the general law. However, a failure to pay some sums after termination of the employment would be covered according to the definition, and in order to draw the necessary dividing line Lord Browne-Wilkinson, who gave the sole substantive speech, said (p 697) that "one is thrown back to the basic concept of wages as being payments in respect of the rendering of services during the employment, so as to exclude all payments in respect of the termination of the contract save to the extent that such …

payments are expressly included" in the relevant statutory definition. This reasoning depended upon the concept of "wages" having a well understood basic meaning.

81. The same point can be made in relation to the terms defined in the other cases referred to in para 48 above (in the *Oxfordshire County Council* case Lord Hoffmann, with whom the majority agreed, after acknowledging the potential relevance of the term being defined - "town or village green" - set out reasons why in the particular statutory context it would not be appropriate to colour the statutory definition by introducing elements of the traditional village green into it: paras 38-39). Such a clear accepted meaning is absent in respect of "case management services". The result, as the appellants contend, is that the interpretation urged by the respondents and adopted by the Divisional Court suffers from being vague and circular.

82. I also agree with the appellants that the construction proposed by the respondents in substance involves the illegitimate addition or substitution of words in the definition in section 4 of the 2006 Act, either by interpreting section 4(2) to say "other services in relation to the management [rather than 'making'] of a claim" or by interpreting section 4(3)(a)(i) to say "the provision of financial services or assistance in relation to the management of a claim". Interpretation of section 4 in this way would also tend to undermine the object of having a definition of the term "claims management services", since the words used to define the term would then be treated as essentially illustrative and so would be redundant as a definition, since a service provided in the context of claims management will necessarily be a claims management service.

83. Thirdly, to read the definition in section 4 in this way would be counter to the scheme and purpose of Part 2 of the 2006 Act as analysed above.

**(f) Section 58B and the presumption against absurdity**

84. I do not consider that it can be said that the interpretation of section 4 of the 2006 Act for which the appellants contend produces any absurdity so far as the juxtaposition of that provision and section 58B is concerned: see paras 70-71 above. Looking at matters from the perspective of Parliament when legislating in 2006, there were understandable reasons why it would wish to include within the scope of the regime in Part 2 of the 2006 Act the possibility of regulation of funding to encourage or facilitate litigation.

85. Indeed, one might think that this was bound to be a matter of concern, because on any view the provision of some form of credit in relation to the provision of services against the possibility of recovery in the litigation would be central to any arrangements whereby litigation was to be promoted in the absence of legal aid provided by the state and where a litigant did not have sufficient financial resources of their own to be able to go to law. Since provision of legal advice and representation on credit is at the heart of conditional fee CFAs and other similar arrangements, it is not surprising that Parliament would wish to include other forms of provision of credit within the scope of the regulatory regime in Part 2. Also, there is clearly scope for a connection between legal services being provided and provision of third party funding in terms of distribution of the underlying risk. If a third party funder lends money to allow some or all of the legal fees to be paid in advance of recovery in the litigation, it takes on that element of the credit risk in place of the lawyers and there seems little reason to differentiate between the two as regards the coverage of the regulatory powers provided for in Part 2. It could reasonably be inferred that this is why the provision of financial services or assistance is the first item in the list in section 4(3) of the 2006 Act. The regime in Part 2 had to allow for the possibility that the person providing financial services or assistance might be willing to behave in exploitative ways or that they might be helping to fund others who are.

86. Nor do I think that it can be said to be absurd that the power to regulate conferred by section 4 happens to cover normal lending by reputable banks if provided in relation to the making of a claim. Another example given was that of the services provided by a barrister's clerk. Parliament recognised that the power conferred was likely to be wider than the set of situations in which it might need to be used. That is why, instead of simply enacting regulatory rules in primary legislation, it provided for the Secretary of State to have a wide discretion as to what services should be made subject to regulation by including them in any order he would make and why the exercise of that discretion was to be made subject to the positive resolution procedure as a further safeguard. It is also the reason why Parliament did not seek to subject the Secretary of State's regulatory power to tight control by stipulating narrow and precisely formulated parameters in the primary legislation. Parliament's purpose in enacting the power in the wide terms it chose was to allow the Secretary of State to tailor its use according to need as more information became available and problems were identified. In my view, it is not for the court to limit the ambit of the power or to qualify the wide language used in the definition of "claims management services" by imagining situations in which use of the power might be unreasonable, but where it is very unlikely to be used and where there are controls in place to police and prevent such use.

**(g) Events after 2006**

87. Focusing on the meaning of the definition of “claims management services” in the context of Part 2 of the 2006 Act, as the parties are agreed is the appropriate approach, leads me to conclude that the appellants’ submission as to its proper interpretation is correct. The problem in this case has arisen not from the effect of the definition in that context, but because the same definition was used in section 58AA with effect from 2009/2010 to define DBAs in relation to employment matters and then more generally from 19 January 2013 pursuant to the amendments to that provision introduced by LASPO. Section 58AA(2) directly declares that a DBA which does not satisfy the conditions in subsection (4) is unenforceable. Unlike in Part 2 of the 2006 Act, the effect of section 58AA is general and immediate and is not predicated on any further exercise of discretion by the Secretary of State or further supervision by Parliament. The use of the same definition in section 419A of FSMA means that this problem continues and that provision has the same effect as section 58AA.

88. The respondents emphasised that Sir Rupert Jackson, in his preliminary report on Review of Civil Litigation Costs (May 2009) and in his final report (January 2010), identified improving access to justice as a regulatory objective and endorsed the use of third party funding based on receipt of a percentage of the sums recovered in the action. In chapter 15 of his preliminary report Sir Rupert noted that there had been a sea change in the common law of champerty to allow such arrangements to be enforceable, at least so long as the funders did not have control over the conduct or settlement of the litigation, and asked for views on whether regulation should be extended to cover them. In chapter 11 of his final report Sir Rupert recommended that a satisfactory voluntary code, to which all litigation funders should subscribe, should be drawn up and the question whether there should be statutory regulation of third party funders by the Financial Services Authority ought to be re-visited if and when the third party funding market expanded.

89. In 2011 the Association of Litigation Funders of England and Wales issued a Code of Conduct in line with the recommendations in Sir Rupert Jackson’s final report. The latest form of that code came into effect in 2018. The respondents emphasise that the LFAs comply with the requirements in the Code of Conduct.

90. However, in my view neither of Sir Rupert Jackson’s reports nor the Code of Conduct assist in answering the question of statutory interpretation which arises in this case. They post-date the enactment of the statutory definition in section 4 of the 2006 Act by several years and do not provide guidance regarding the policy context in which it was enacted or its purpose. Even if it might be said that it is desirable in public policy terms that third party funding arrangements of the kind in issue in this case should be available to support claimants to have access to justice (as to which I express

no view), this is not a reason why there should be any departure from the conventional approach to statutory interpretation. It may also be noted that section 58AA in its original form (cross-referring to the 2006 Act) and in its amended form (cross-referring now to section 419A of FSMA) provides that, even if the LFAs are to be classified as DBAs, such third party funding arrangements will be enforceable provided that the various stipulated requirements in respect of them are satisfied.

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

92. Mr Rhodri Thompson KC, for the respondents, submitted that later legislation, in particular section 58AA, may be referred to as an aid to interpretation of the 2006 Act in order to resolve an ambiguity in that earlier legislation. He contended that the interpretation of section 4 of the 2006 Act proposed by the appellants produces absurd effects in relation to the application of the later legislation and that this supports the interpretation preferred by the Divisional Court. I am not persuaded by this. It is not clear to me that section 58AA would provide helpful guidance even if the statutory definition of "claims management services" in section 4 of the 2006 Act or section 419A of FSMA were ambiguous. However, it is not necessary to examine this submission in detail, because I do not consider that there is any ambiguity in that definition.

93. Mr Thompson also submitted that it is legitimate to refer to the DBA Regulations 2013 as an aid to interpretation of the 2006 Act. I do not agree. There is authority to the effect that if a statute is ambiguous a later Act of Parliament might be relied on as persuasive authority as to its meaning: *Kirkness (Inspector of Taxes) v John Hudson & Co Ltd* [1955] AC 696; *Finch v Inland Revenue Comrs* [1985] Ch 1, 15, per Oliver LJ; and see the discussion in *Bennion, Bailey and Norbury*, op. cit., in section 24.19, pp 769-770. However, the inference to be drawn from a later Act as to the meaning earlier legislation was intended to have is comparatively weak and the principle comes into play only where there are two potential interpretations of the earlier legislation which are "both equally tenable" (in the words of Oliver LJ in the *Finch* case at p 15). The principle functions as a tie-breaker in that limited class of case, being justified by a background concern to maintain the overall coherence of the law as expressed in primary legislation. There is no ambiguity of this kind in the present case.

94. In any event, in my judgment this principle does not apply where the later legislation sought to be relied on is subordinate legislation made by the executive rather than an Act of Parliament. Therefore it does not authorise use of the DBA Regulations 2013 as an aid to interpretation of the 2006 Act. If the position were otherwise, it would undermine the emphasis given in the authorities to the importance of subordinate legislation being broadly contemporaneous with the primary legislation which falls to be interpreted: paras 44-47 above. It would also confer an unjustified power on the executive to take action later on which might modify the meaning which is given to words used in earlier primary legislation. See also the discussion in *Bennion, Bailey and Norbury*, op. cit., pp 770-771.

**6. UKTC's separate argument regarding its opt-out funding agreement**

95. Section 47C(8) of the Competition Act 1998, as added by amendment in 2015, provides that "[a] damages-based agreement is unenforceable if it relates to opt-out collective proceedings". Subsection (9)(c) states that "damages-based agreement" has the meaning given in section 58AA(3). Accordingly section 47C(8) creates an additional reason why UKTC's opt-out LFA with Yarcombe is not enforceable. Unlike a DBA in relation to opt-in collective proceedings, there is no scope for a DBA in relation to opt-out collective proceedings to be made enforceable by compliance with the conditions stipulated in section 58AA.

96. UKTC seeks to meet this problem in relation to its opt-out LFA by submitting that even if Yarcombe is to be classified as a provider of "claims management services" (as I consider they should be), the LFA is not a DBA caught by the terms of subsection 58AA(3) as a matter of substance because (1) unlike a standard opt-in DBA, Yarcombe's recovery is subject to (a) prior payment to members of the opt-out class of their full share of damages and (b) the discretion of the Tribunal pursuant to section 47C(6) of the Competition Act 1998 (which provides that the Tribunal "may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings"); and (2) there is no reason to stretch the concept of a DBA under section 47C(8) to render unenforceable a commercial agreement between UKTC and Yarcombe that (a) involves a very significant sharing of risk by the funder; (b) is subject to judicial control by the Tribunal; and (c) provides for full recovery by individual claimants in the event that their claim for an aggregate award of damages is successful.

97. I do not accept UKTC's submissions on this point. The appellants provide a convincing answer.

98. Under the opt-out LFA Yarcombe's funder's fee is expressed to include a percentage of the proceeds of the litigation. As the appellants point out, according to the procedural rules in the Tribunal and by virtue of the Competition Act 1998 the funder of opt-out proceedings always takes the risk that all of the damages recovered will be distributed to members of the class with the result that there will be nothing left to pay its fee and also takes the risk that the Tribunal might decline to exercise its discretion to order a payment in favour of the funder. UKTC is the proposed representative in the opt-out proceedings and, if those proceedings succeed, will obtain an award of damages on behalf of the class represented. Distribution of the damages is governed by rule 93 of the Tribunal Rules. Members of the class who claim their share of the damages in time are to be paid; but it is in the nature of opt-out proceedings brought on behalf of a wide class of people, many of whom may be unaware of or uninterested in the proceedings, that there may be a substantial amount which is not collected. Rule 93(4) enables the Tribunal to order payments out of undistributed damages in respect of the representative's costs, fees and disbursements and it has been established that this also permits payment of a funder's fee: *Merricks v Mastercard Inc* [2017] CAT 16; [2017] 5 CMLR 16, paras 117 and 127. The terms of the opt-out LFA between UKTC and Yarcombe are structured to take this mechanism into account. Clause 10.1 imposes an obligation on UKTC to pay the funder's fee (including the stipulated percentage share of the damages) save to the extent that the aggregate amount ordered by the Tribunal to be paid to UKTC in respect of that obligation falls below the funder's fee, and by clause 3.1.4 UKTC warrants that it will use its best endeavours to obtain such an award.

99. None of this affects the application of section 58AA(3). The LFA provides that payment of the funder's fee is conditional on UKTC receiving a "specified financial benefit" in the litigation. The payment to be made is obviously a success fee. As the appellants submit, the fact that a claims management service provider enters into an agreement which adds a further condition which must be met before a payment is due does not deprive the remuneration being of the character of a specified financial benefit within the meaning of section 58AA(3)(a)(i). This is a general point which has particular force when, as here, the additional condition simply reflects the mechanism in the Tribunal Rules which allows such a payment to be made. It also remains the case that the amount of the payment due to Yarcombe "is to be determined by reference to the amount of the financial benefit obtained", so as to satisfy the condition in section 58AA(3)(a)(ii) as well, even though the structure of the opt-out regime according to the Competition Act 1998 and the Tribunal Rules means that this is treated as capable of being departed from in certain circumstances. Yarcombe's primary contractual entitlement is to payment of an amount determined as stated in that subparagraph, even if there may be a departure from that in certain identified circumstances. As a matter of substance, the LFA retains the character of a DBA as defined. It is inherent in any DBA that risk is shared by the funder, so the fact that under the opt-out LFA

Yarcombe as funder shares the financial risks associated with the litigation provides no basis to say that this LFA falls outside the statutory definition of a DBA.

**7. Conclusion**

100. For the reasons given above, I would allow the appeal.

**LADY ROSE (dissenting):**

**(1) Introduction**

101. The issue before the court on this appeal is whether section 58AA of the Courts and Legal Services Act 1990, as inserted by the Coroners and Justice Act 2009, together with the regulations made under section 58AA(4), render unenforceable agreements between claimants and litigation funders in which the funder agrees to loan money to pay for the litigation in return for receiving a share of any damages recovered for the claimant in the proceedings. The appeal arises in the context of claims brought in the Competition Appeal Tribunal ("the CAT") pursuant to the statutory procedure for bringing collective actions. This is set out in sections 47B onwards of the Competition Act 1998. The issue arises acutely in this context because this kind of litigation funding agreement underpins many if not all of the proceedings brought under that statutory procedure. However, these funding agreements are by no means limited to collective actions in the CAT, as the cases I consider in this judgment show.

102. Section 58AA of the Courts and Legal Services Act 1990 ("CLSA" or "CLSA 1990") as amended currently provides 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 (subject to subsection (9)) 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 and may make different provision in relation to different descriptions of agreements.

(6) Before making regulations under subsection (4) the Lord Chancellor must consult—

(a) the designated judges,

(b) the General Council of the Bar,

(c) the Law Society, and

(d) such other bodies as the Lord Chancellor considers appropriate.

(6A) Rules of court may make provision with respect to the assessment of costs in proceedings where a party in whose favour a costs order is made has entered into a damages-based agreement in connection with the proceedings.

(7) In this section—

‘payment’ includes a transfer of assets and any other transfer of money's worth (and the reference in subsection (4)(b) to a payment above a prescribed amount, or above an amount calculated in a prescribed manner, is to be construed accordingly);

‘claims management services’ has the same meaning as in the Financial Services and Markets Act 2000 (see section 419A of that Act).

(7A) In this section (and in the definitions of ‘advocacy services’ and ‘litigation services’ as they apply for the purposes of this section) ‘proceedings’ includes any sort of

proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.

(8) Nothing in this section applies to an agreement entered into before the coming into force of the first regulations made under subsection (4).

(9) Where section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies to a damages-based agreement other than one relating to an employment matter, subsections (1) and (2) of this section do not make it unenforceable.

(10) For the purposes of subsection (9) a damages-based agreement relates to an employment matter if the matter in relation to which the services are provided is a matter that is, or could become, the subject of proceedings before an employment tribunal.

(11) Subsection (1) is subject to section 47C(8) of the Competition Act 1998."

103. The appeal turns on whether litigation funding agreements of the kind at issue in this appeal fall within the definition of "damages-based agreements" for the purposes of section 58AA. That in turn depends on whether the funders of these claims are providing "claims management services" within the meaning of the section. The reference in section 58AA(7) to the meaning given to "claims management services" in section 419A of the Financial Services and Markets Act 2000 ("FSMA 2000") is a reference to the following provision:

"**419A Claims management services**

(1) In this Act 'claims management services' means advice or other services in relation to the making of a claim.

(2) In subsection (1) 'other services' includes—

(a) financial services or assistance,

(b) legal representation,

(c) referring or introducing one person to another, and

(d) making inquiries,

but giving, or preparing to give, evidence (whether or not expert evidence) is not, by itself, a claims management service.

(3) In this section 'claim' means a claim for compensation, restitution, repayment or any other remedy or relief in respect of loss or damage or in respect of an obligation, whether the claim is made or could be made—

(a) by way of legal proceedings,

(b) in accordance with a scheme of regulation (whether voluntary or compulsory), or

(c) in pursuance of a voluntary undertaking.

(4) The Treasury may by order provide that a claim for a specified benefit is to be treated as a claim for the purposes of this section.

(5) The Treasury may specify a benefit under subsection (4) only if it appears to the Treasury to be a social security benefit, payable under the law of any part of the United Kingdom, designed to provide compensation for industrial injury."

104. Before tackling the difficult question of the proper construction of these two provisions that is posed by this case, I describe the role that the litigation funders play and how their role in litigation has been addressed in the case law and in the legislation with which we are concerned.

## (2) Litigation funding

*(a) What is litigation funding?*

105. Attitudes to litigation funding by commercial third parties have turned round completely over the last few decades, particularly as a result of the substantial reduction in the availability of legal aid in most civil court proceedings. Funding agreements that used to give rise to criminal liability are now regarded as making an important contribution to providing access to justice. The background to litigation funding and current practice was described in the evidence before the court from Ms Susan Dunn who is the Chair of the Association of Litigation Funders of England & Wales ("the ALF"). She says that the basic model for litigation funding is a simple one. For many claimants the financial risks of commercial litigation can be prohibitive. Claimants may neither be able to afford to pay for their legal costs, nor to face the risks of an adverse costs order if their case fails. Even if they can afford it, they may prefer not to risk their assets and instead seek to manage these risks by obtaining litigation funding.

106. One particularly important characteristic of litigation funding is that it is invariably a non-recourse investment. That means that the funder commits at an early stage in the proceedings to fund the costs and expenses of the client pursuing the claim. If the case is lost, then it is the funder who loses its money, the claimant does not have to pay back the money that the funder has provided. Because of the risk of losing the money lent, the funder has to investigate and assess the merits of the claim. After that, Ms Dunn says, the funder is essentially passive in the litigation process. The funder does not run the case or provide instructions as a client would. It merely monitors its investment in the case. Most notably, the funder does not control settlement of the case; this decision remains the decision of the client. The litigation remains the claimant's claim with the funder simply providing the means by which that claimant is able to use the civil justice process.

107. Ms Dunn states that the vast majority of litigation funding in England & Wales is carried out by members of the ALF. They are obliged to adhere to the terms of a Code of Conduct promulgated by the Association and generally contract with the funded party on relatively standard terms. The current version of the Code of Conduct adopted in 2018 provides, for example, that the funder must take reasonable steps to ensure that the funded party has received independent advice on the terms of the agreement prior to its execution (para 9.1); it must not seek to influence the funded party's solicitor or barrister to cede control or conduct of the dispute (para 9.3) and must maintain adequate financial resources to meet its funding obligations (para 9.4). It also provides (para 18) that nothing in the Code prevents the funder "from

conducting appropriate due diligence, both before offering funding and during the course of the litigation procedures that are being funded, including but not limited to analysis of the law, facts, witnesses and costs relating to a claim, and including regularly reviewing the progress of the litigation."

*(b) Litigation funding in the courts*

108. It is important to understand the changing approach to litigation funding in the courts in order properly to construe section 419A FSMA and section 58AA CLSA. As Lord Wilberforce said in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822:

> "In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs."

109. Litigation funding was historically prohibited by the rules on maintenance and champerty. It was decriminalised by section 14 of the Criminal Law Act 1967. The history of this evolution leading to the enactment of section 58 CLSA 1990 has been recounted by Steyn LJ in *Giles v Thompson* [1993] WL 963259, [1993] 3 All ER 321, 328, and I need not repeat it here. That case upheld the ability of car hire companies to recover the charges for lending cars to claimants whose own cars had been seriously damaged in road accidents. The car hire agreement provided that the company should have a right to pursue the defendant responsible for the accident in the claimant's name to recover the car hire charges as special damage. The defendants' insurers asserted that such agreements were unenforceable because they were champertous and contrary to public policy.

110. When the case reached the House of Lords ([1994] 1 AC 142, 164A) Lord Mustill in his leading speech noted that the law on maintenance and champerty has not stood still, but has accommodated itself to changing times, "as indeed it must if it is to retain any useful purpose". The law, he said, "can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants."

111. Damages-based litigation funding agreements have come before the courts in a variety of contexts. First, where the claim has failed and the impecunious claimant is

unable to satisfy the adverse costs order made against him, the defendant may seek an order that the funder pay the costs. Cases in this category include *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655, [2005] 1 WLR 3055 discussed later and *Excalibur Ventures LLC v Texas Keystone Inc (No 2)* [2016] EWCA Civ 1144, [2017] 1 WLR 2221. Secondly, where the claim has succeeded and the claimant has received damages from which the lawyers seek to recover their share in accordance with the agreement, the client may refuse to share the damages, alleging that the agreement under which he or she agreed to do so was unenforceable. Cases in this category include *Lexlaw Ltd v Zuberi* [2021] EWCA Civ 16, [2021] 1 WLR 2729. Thirdly, the claim may succeed and the claimant may be happy to share the damages in accordance with the agreement. But the defendant against whom an adverse costs order is made then argues that it is not liable to pay the costs because of the indemnity principle: *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] EWCA Civ 932, [2003] QB 381 ("*Factortame (No 8)*") falls within this category.

112. Of these authorities, the case on which the Respondents rely to show "the state of affairs" before the relevant legislation was enacted is *Factortame (No 8)*. This judgment of the Court of Appeal marked one of many chapters in the long running challenge by Anglo-Spanish fishermen to the legislation which banned them from fishing in UK territorial waters. After many years of litigation, in much of which they were successful, the fishermen entered into an agreement with a firm of chartered accountants, Grant Thornton ("GT"), to whom they already owed substantial fees. GT's task was to obtain the expert evidence needed to establish the appropriate quantum of damages – something that would require a major forensic accountancy exercise. GT appointed and funded an independent fisheries expert and an independent expert accountant with whom they worked to create a computer model for calculating the losses claimed.

113. The parties settled the case with the Government paying the fishermen compensation. GT were paid 8% of the damages paid in accordance with their agreement with the fishermen, the money to cover both their own fees and the fees of the two expert witnesses. The issue arose whether the fishermen could recover that 8% from the Secretary of State under the costs order made against the Government or whether the agreement between the claimants and GT was champertous. If the agreement was champertous that would mean that the claimants had not been legally liable to pay GT that sum and, applying the indemnity principle whereby the receiving party can only claim costs to cover fees it is liable to pay, the Secretary of State would thereby avoid an adverse costs order in respect of GT's work.

114. Lord Phillips of Worth Matravers MR giving the judgment of the court (with Robert Walker and Clarke LJJ) rejected the argument that the damages-based litigation

funding agreement was contrary to public policy and upheld the enforceability of the agreement.

115. The Court of Appeal first considered the nature of the services provided by GT: paras 23 onwards. Solicitors had been instructed by the claimant fishermen and GT's services had at all times been ancillary to the conduct of litigation by those solicitors. Lord Phillips then considered the history of champerty and concluded that the test to be applied in any individual case was to see if the agreement tended to conflict with existing public policy directed at protecting the due administration of justice, with particular regard to the interests of the defendant: para 44. The Court held, first, that the agreement was not caught by section 58 CLSA 1990 which regulated conditional fee agreements (as I will describe later). Section 58 only covered agreements for litigation and advocacy services and GT was not providing those services.

116. The fact that the agreement was not rendered unenforceable by statute was not, however, the end of the inquiry. As Lord Phillips put it, at para 61, the scope of the legislation may reflect "Parliament's assessment of the present state of public policy in this area" even for agreements not expressly caught by the provision. The Court considered that the policy behind section 58 in fact militated against a finding that public policy would condemn GT's agreement as champertous. That section evidenced a "radical shift" in attitude towards conducting litigation on terms that the obligation to pay fees will be contingent upon success:

> "62 … Conditional fees are now permitted in order to give effect to another facet of public policy – the desirability of access to justice. Conditional fees are designed to ensure that those who do not have the resources to fund advocacy or litigation services should none the less be able to obtain these in support claims which appear to have merit."

117. Lord Phillips then applied a two-fold test to determine whether the agreement with GT put at risk the purity of justice first, because it gave GT an interest in the outcome of the litigation and secondly, because it entitled GT to a percentage of the compensation recovered. As to the first, the Court noted (para 79) that the parlous position of the claimants meant in reality that, regardless of the terms of any agreement with them, anyone who provided services to them was only going to be paid out of recovered damages. As to whether the damages-based nature of the agreement carried with it "any tendency to sully the purity of justice" (para 84), the Court held that it did not. GT were not likely to yield to the temptation to inflame the damages in order to increase their own payment. GT were reputable members of a respectable profession whose members are subject to regulation. No reasonable

onlooker would seriously have suspected that the fact that they were to receive 8% of the recoveries would tempt GT to deviate from performing their duties in an honest manner. The Court concluded at (para 91):

> "The claimants had been brought low by the initial wrong done to them and by the costs and stress of prolonged litigation in which no quarter was given. They were faced with an extraordinarily complicated task in proving the damage that they had suffered and there was a real risk that lack of funds might result in their losing the fruits of their litigation. The 1998 agreements ensured that they continued to enjoy access to justice. They did this without putting justice in jeopardy. The 1998 agreements were not champertous."

118. Litigation funding was again considered by the Court of Appeal and Lord Phillips MR in *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055 ("*Arkin*"). *Arkin* concerned a claim for damages brought by the claimant against four members of a shipping conference. He alleged that they had destroyed his shipping business through anti-competitive activities contrary to the competition provisions of the EC Treaty. He entered into a conditional fee agreement with his lawyers and a funding agreement with a professional funding company. The funders agreed to fund the cost of expert evidence for a contingent fee of 25% for the first £5 million of damages recovered and 23% thereafter. The cost to the funder was £1.3 million. The claim was ultimately dismissed and a costs order was made against the claimant. The issue was whether, the claimant being unable to pay those costs, the defendants could claim the costs from the funders.

119. The important point for our purposes is the emphasis that the Court of Appeal placed on the role of the funders in the litigation and the distinction they drew between champertous agreements and litigation funding agreements of the kind with which we are concerned. The judgment of the court (Lord Phillips of Worth Matravers MR, Brooke and Dyson LJJ) described the evolution of the rules against champerty during the 1990s in the context of costs orders being sought and made against those who had funded unsuccessful litigation. They referred to the important case of *Hamilton v Al Fayed (No 2)* [2003] QB 1175 where the successful defendant failed in his attempt to claim his costs from "pure funders", that is to say people who supported the litigation without any view to profit but simply from a more or less altruistic desire to assist the claimant. The Court of Appeal in *Arkin* recognised the need to balance the importance of ensuring access to justice with the principle that costs should normally follow the event. It was unjust that a funder who purchases a stake in an action for

commercial motives should be protected from all liability for the costs of the opposing party: para 38

> "Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed."

120. The Court of Appeal devised a solution which was practicable, just and which reflected the policy considerations that they had considered. The solution for the non-champertous funder was that they should be potentially liable for the costs but only to the extent of the funding provided. The Court then considered the likely effect of such a ruling on the operation of the litigation funding market. One likely consequence was that professional funders would cap the funds that they provided in order to limit their exposure under an adverse costs order to a reasonable amount: para 42. This, Lord Phillips said, should have a salutary effect in keeping costs proportionate. Professional funders would also have to consider with even greater care whether the prospects of the litigation were sufficiently good to justify the support that they were asked to give. This would also be in the public interest.

121. This case led to what has been referred to as the "*Arkin* cap", namely the principle that the liability of the claimant's funders to pay the costs of a successful defendant will normally be limited to the value of their funding: see for example the discussion in *Chapelgate Credit Opportunity Master Fund Ltd v Money* [2020] EWCA Civ 246, [2020] 1 WLR 1751 and the cases referred to in that judgment. In that case the judge at first instance had declined to apply the "*Arkin* cap" and the Court of Appeal upheld the exercise of his discretion, given the unusual nature of the funding arrangement in that case. As Newey LJ (with whom Moylan and Patten LJJ agreed) noted at para 36, litigation funding and after the event (ATE) insurance had moved on since *Arkin* and was now prevalent in litigation: (para 36)

> "It is also relevant that *Arkin* was decided when third party funding of litigation was still 'nascent' and conditional fee agreements and ATE insurance relatively new. Such matters will have highlighted the desirability of ensuring that commercial funders were 'not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed' (to quote from the judgment in

> *Arkin*). Nowadays, however, commercial funders, conditional fee agreements and ATE insurance are all much more established. The risk of someone with a claim which has good prospects of achieving success without disproportionate cost being unable to pursue it unless the extent to which a funder could be ordered to meet the other side's costs is curtailed will have diminished in consequence. Apart from anything else, a funder should now be able to protect its position by ensuring that either it or the claimant has ATE cover."

*(c) The collective proceedings in this appeal*

122. The Appellants in this case were parties to an unlawful agreement which operated in the truck manufacturing sector. On 19 July 2016 the European Commission issued a decision finding that they had engaged in anti-competitive collusion for 14 years between 1997 and 2011 throughout the European Economic Area: see the decision in Case AT.39824 *Trucks* adopted on 19 July 2016. The Respondents are customers who bought trucks from the manufacturers during the operation of that agreement. They claim compensation on the basis that the price they paid for those trucks was artificially inflated as a result of the covert agreement of the Appellants and the other parties to the agreement.

123. The Appellants have used the collective action procedure in the CAT to bring these claims pursuant to section 47B of the Competition Act 1998. The proceedings are governed by sections 47B to 49E of that Act, by the Competition Appeal Tribunal Rules (SI 2015/1648) and by Section 6 of the Competition Appeal Tribunal Guide to Proceedings issued in 2015 on the conduct of this kind of complex litigation. Broadly, collective proceedings can be brought either on an "opt-in" or an "opt-out" basis. In "opt-in" claims, the members of the class of claimants in the action are identified because they expressly choose to join in the action. In "opt-out" proceedings, the claimants are described as a class and everyone within the jurisdiction who falls within that class is joined as a party in the proceedings unless they opt out.

124. In either case, the bringing of collective proceedings must be approved by the CAT before they can proceed. This approval involves two aspects. First, the person who wishes to represent the class of claimants must be authorised and secondly the claims must be certified by the CAT as being eligible for inclusion in collective proceedings. If the CAT approves the claim, it will appoint the class representative and issue a collective proceedings order ("CPO"): see section 47B(4).

125. The collective proceedings which the Respondents wish to bring against the truck manufacturers were the subject of two applications before the CAT for CPOs. The first application has been brought by the Second Respondent, UK Trucks Claim Ltd, which is a special purpose vehicle set up to pursue these claims. That claim was filed on 18 May 2018. The second claim is brought by the Third Respondent, the Road Haulage Association Ltd, which is a trade association of road hauliers. The Road Haulage Association Ltd seeks to bring "opt-in" proceedings, whereas the UK Trucks Claim Ltd's application is primarily to bring "opt-out" proceedings with "opt-in" proceedings in the alternative.

126. The Appellants who are defendants to these claims objected to the grant of the CPOs on a variety of grounds. The issue of the enforceability of the litigation funding agreements that the claimants have entered into was raised as one of several reasons why the truck manufacturers argued the CAT should not certify the proceedings and should not therefore allow them to go forward. The Appellants were not all the addressees of the European Commission's infringement decision in 2016. Other truck manufacturers have been allowed to join in the objection to the grant of the CPOs on the basis that they are likely to be subject to claims from the named defendants for contribution or indemnity.

127. At the time the claims were commenced, the decision of the European Commission was binding on the CAT as to the existence of the unlawful agreement – the truck manufacturers cannot challenge in these proceedings the fact that they were parties to an unlawful agreement as found by the Commission in the decision. But the decision does not establish whether or how much loss had been caused to purchasers of trucks. The issues in the claims brought therefore include whether the infringing agreement in fact led to any overcharge for trucks bought by the members of the proposed class; if so, what was the level of the overcharge and what was the duration of any "run-off period" that is to say, the period after the termination of the agreement before prices returned to a competitive level. Establishing the existence and extent of any loss is likely to be an expensive and protracted process involving expert evidence, the processing of a great deal of data and the creation and refinement of computer modelling – an exercise similar to that described by Lord Phillips in *Factortame (No 8)*.

128. The collective proceedings regime in the CAT was described by this court in *Merricks v Mastercard Inc* [2020] UKSC 51, [2021] Bus LR 25 ("*Merricks*"). That appeal concerned the proposed opt-out claim lodged by Mr Merricks against Mastercard arising out of the anti-competitive conduct of Mastercard in setting the intra-EEA multilateral interchange fee. The CAT refused to certify the proceedings but that decision was overturned by the Court of Appeal. This court, by a majority (Lord Briggs

and Lord Kerr of Tonaghmore JJSC and Lord Thomas of Cwmgiedd), upheld the Court of Appeal's decision. Lord Briggs in his opening paragraph noted that in such claims:

> "Proof of breach, causation and loss is likely to involve very difficult and expensive forensic work, both in terms of the assembly of evidence and the analysis of its economic effect. Viewed from the perspective of an individual consumer, the likely disparity between the cost and effort involved in bringing such a claim and the monetary amount of the consumer's individual loss, coupled with the much greater litigation resources likely to be available to the alleged wrongdoer, means that it will rarely, if ever, be a wise or proportionate use of limited resources for the consumer to litigate alone."

129. Lord Sales and Lord Leggatt JJSC in their dissenting judgment (para 84) put the matter somewhat more forcefully, quoting Judge Posner in *Carnegie v Household International Inc* (2004) 376 F 3d 656 at 661, a decision of the US Seventh Circuit Court of Appeals:

> "The realistic alternative to a class action is not 17m individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."

130. It has long been recognised that the collective proceedings procedure has the potential to be misused by people bringing speculative actions claiming large amounts of damages where the size of the claims and the heavy costs of defending the action may be used as a threat to induce defendants to settle: see for example the concerns of Lord Sales and Lord Leggatt in *Merricks*: para 86. The CAT's judgment in the present case illustrates how the safeguards introduced have operated for the benefit of the Appellants in this appeal.

131. One of the requirements set by the CAT's Rule 78 is to show that the class representative will be able to pay the defendant's recoverable costs if ordered to do so (r. 78(2)(d)). In addition to addressing the enforceability of the litigation funding agreements (as I describe further below), the CAT dealt with a number of criticisms that the Appellants made about the adequacy of the funding agreements and the extent to which they, and the ATE insurance that would be in place, protected the Appellants in the event that they defeat the claims.

132. In paras 46 to 109 of its judgment in this case, the CAT summarised the arrangements. First, the CAT analysed the funding agreement between the Road Haulage Association and the Therium Group. The funding provided by Therium in this claim amounts to £27 million to be provided in various tranches. The judgment records that during the course of the hearing and prompted by questions raised by the CAT, the agreement was amended to meet the Appellants' concerns, for example by restricting the ability of Therium to terminate funding after the first tranche or to assign its rights under the agreement. As to the funding agreement between Yarcombe and UK Trucks Claim, that provides for funding of £24 million of which £4 million was reserved for insurance premiums. Again, during the course of the hearing before the CAT and in response to points raised by the CAT, some features of the agreement were changed, for example, that the balance of the £24 million not yet spent would be placed in an escrow account in certain circumstances: para 63.

133. The CAT also considered in detail the Appellants' concerns about the class representative's potential liability in costs. Issues raised by the truck manufacturers included the restrictions on the insurers' ability to avoid the policy for non-disclosure: see paras 80 – 83 of the CAT's judgment; whether the liability of the individual insurers who had joined together to underwrite the policies should be joint and several or only several: para 85; whether the insured should be the funder or the class representative: paras 87 – 89 and the level of cover, paras 103 - 109. At the conclusion of the judgment the CAT held that the funding arrangements proposed between the Road Haulage Association and Therium did not provide a ground for refusing to authorise the Association as a class representative pursuant to section 47B of the Competition Act and that the same applied to UK Trucks Claim and Yarcombe if certain conditions set out in the judgment were met.

**(3) The evolution of statutory controls on funding of legal proceedings**

*(a) Part 2 of the Courts and Legal Services Act 1990*

134. The provisions with which we are concerned are found in Part II of the CLSA 1990, which comprises sections 17 to 70. Section 17 sets out the statutory objective for this Part:

> "(1) The general objective of this Part is the development of legal services in England and Wales (and in particular the development of advocacy, litigation, conveyancing and probate services) by making provision for new or better ways of providing such services and a wider choice of persons

providing them, while maintaining the proper and efficient administration of justice."

135. Section 58 CLSA 1990 as originally enacted dealt with conditional fee agreements. These were defined as agreements for the provision of litigation or advocacy services (as defined) under which the provider's fees and expenses were to be payable only in certain circumstances. If such an agreement complied with the requirements imposed by or under that section, then it was not unenforceable "by reason only of its being a conditional fee agreement". Thus, the section did not provide that an agreement complying with the conditions set was enforceable, only that it was not unenforceable for that reason. Various requirements were set out in section 58 itself and the section empowered the Lord Chancellor to prescribe further requirements by order, following consultation with designated judges, the General Council of the Bar, the Law Society and other appropriate authorised bodies.

136. Section 58(10) listed the kinds of proceedings in which conditional fee agreements could not be made, primarily criminal and family proceedings. Section 58(2) dealt with a term in the agreement whereby additional fees could be charged in certain circumstances (in practice where the claimant was successful) over and above the amount that would ordinarily be payable. The percentage of the uplift over the normal fees had to be specified in the agreement and, further, the Lord Chancellor could prescribe the maximum percentage permitted in relation to different kinds of proceedings. According to section 58(8) as originally enacted, although clients could be required under the agreement to pay the success fee to their lawyers, they could not recover that success fee from the opposing party as part of the costs order against the unsuccessful defendant.

137. The Lord Chancellor exercised the power to prescribe the kinds of proceedings in which conditional fee agreements were to be allowed. The Conditional Fee Agreements Order 1995 (SI 1995/1674) specified a limited range of proceedings, primarily those relating to personal injuries, insolvency and cases before the European Commission and the European Court of Human Rights.

138. Although the change in the law brought about by section 58 CLSA 1990 was modest, it set the structure which still pertains in respect of the control of conditional fee agreements namely:

(i) it was limited to agreements between a person providing advocacy or litigation services and his or her client;

(ii) it provided for such agreements to be permitted in respect of some kinds of proceedings but not others;

(iii) it provided for requirements to be prescribed by the Lord Chancellor after consultation with the Bar Council, the Law Society and other authorised bodies; and

(iv) it dealt with the extent to which the costs payable by the client under the agreement could be recovered from the opposing party under a costs order made in the proceedings.

139. This change to the law was expanded by amendments made to the CLSA 1990 by the Access to Justice Act 1999 ("AJA 1999"). Section 27 of the AJA 1999 replaced the original section 58 with two new sections, section 58 and section 58A. Section 58 in this version was still limited to conditional fee agreements under which (a) fees were only payable in specified circumstances; and (b) a success fee was charged above the amount of the fees for the time spent working on the case.

140. Section 58A dealt with the kinds of proceedings which could not be the subject of an enforceable conditional fee agreement (namely criminal proceedings and family proceedings as defined). It also dealt in more detail with some of the elements that had been covered by the original section 58, such as the kinds of conditions the Lord Chancellor could prescribe. Section 58A(6) reversed the effect of the original section 58(8) by providing that a costs order against the opposing party could now include the success fee that the client had to pay to his lawyer.

141. As well as amending the statutory provision in relation to conditional fee agreements, the AJA 1999 inserted a new section 58B into the CLSA headed "Litigation funding agreements": see section 28 of the AJA 1999. This provided that a litigation funding agreement would not be unenforceable by reason only of being such an agreement, provided that it met certain prescribed conditions, including such requirements as the Lord Chancellor may set out in regulations. Section 58B defined a litigation funding agreement as an agreement under which the funder agreed "to fund (in whole or in part) the provision of advocacy or litigation services (by someone other than the funder) to another person ('the litigant')" and "the litigant agrees to pay a sum to the funder in specified circumstances": section 58B(2). It was thus clearly aimed at catching someone who was involved in the litigation in a different capacity from the person contemplated by sections 58 and 58A. The section did not itself define the "funder" who could enter into a litigation funding agreement; rather, section 58B(3)(a)

provided that the funder "must be a person, or a person of a description, prescribed by the Secretary of State".

142. Section 58B mirrored the preceding sections in some ways. For example, a litigation funding agreement could not relate to proceedings of a kind to which a conditional fee agreement could not relate (section 58B(3)(c)); there was to be similar consultation with the professional regulators before the Lord Chancellor made regulations prescribing conditions (section 58B(7)); and an adverse costs order could order the opposing party to reimburse the payment due from the litigant to the funder under the agreement (section 58B(8)).

143. I note here that neither section 58 and 58A nor section 58B as inserted by the AJA 1999 covered damages-based agreements. The scheme was only concerned with agreements under which the liability of the client to pay arose only in specified circumstances but, if it did arise, then the payment to be made could include an additional amount. In conditional fee agreements, the additional payment, described in section 58(2)(b) as a "success fee", was defined as an increase above the amount that would be payable if the fees were not conditional upon success. In litigation funding agreements in section 58B(3)(e), the additional payment was described as "an amount calculated by reference to the funder's anticipated expenditure in funding the provision of the services", in other words the uplift was a percentage of the amount expended in funding rather than an amount of fees charged.

144. Section 27 of the AJA 1999 (and hence the new sections 58 and 58A inserted into CLSA 1990) was brought into force on 1 April 2000 by the Access to Justice Act 1999 (Commencement No 3, Transitional Provisions and Savings) Order 2000 (SI 2000/774). But section 28 AJA 1999 and hence the new section 58B CLSA 1990 has never been brought into force though it has not been repealed.

145. There were further amendments to the CLSA 1990 provisions by the Coroners and Justice Act 2009, section 154. Section 154 falls within Part 6 of that Act dealing with legal aid and other payments for legal services. This introduced section 58AA into the CLSA 1990 dealing with damages-based agreements. The original section 58AA came into force on 12 November 2009. Again, the initial scope of the change introduced by this original version of section 58AA CLSA 1990 was modest. It applied only to a damages-based agreement relating to an employment matter, that is to say a matter which could be the subject of proceedings before an employment tribunal. In this original version of section 58AA:

(i) Subsections (1) and (2) provided that a damages-based agreement which related to an employment matter and which satisfied the conditions set out in the section or prescribed by the Lord Chancellor was "not unenforceable by reason only of its being a damages-based agreement" but that if it related to an employment matter and did not satisfy those conditions then it was unenforceable;

(ii) A damages-based agreement was defined as an agreement with a person providing advocacy services, litigation services or claims management services, under which the recipient of the services pays the service provider if the recipient obtains a financial benefit from the matter and the amount of the payment is determined by reference to the amount of that benefit;

(iii) Subsection (4) provided for the Lord Chancellor to prescribe conditions additional to those set out in the section itself;

(iv) Subsection (8) provided that it did not apply to any agreement that predated the making of the first regulations made by the Lord Chancellor under subsection (4).

146. The Lord Chancellor made the Damages-Based Agreements Regulations 2010 (SI 2010/1206) pursuant to section 58AA(4) CLSA ("the 2010 DBA Regulations"). These came into force on 8 April 2010. At this stage, the 2010 DBA Regulations, like section 58AA itself, only applied to damages-based agreements in employment matters.

147. Section 58AA CLSA as inserted by the Coroners and Justice Act 2009 was further extensively revised by section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO 2012"). Section 45 amended section 58AA by removing the limitation of the provision to employment matters and applying instead the restriction on the kinds of proceedings that already applied to conditional fee agreements under section 58A. Section 58AA in its current form, following the amendments made by LASPO 2012, has already been set out in para 102 above. LASPO 2012 also inserted section 58C into CLSA 1990. This dealt with the conditions that must be met before a costs order made in favour of a party to proceedings could include the premium for a costs insurance policy insuring against the risk of a party incurring a liability in those proceedings.

148. The amendments to section 58AA by LASPO 2012 were wholly brought into force by 1 April 2013. On the same date the Damages-Based Agreements Regulations

2013 (SI 2013/609) ("the 2013 DBA Regulations") came into force replacing the 2010 DBA Regulations.

***(b) Case law on section 58AA CLSA 1990***

149. The parties drew our attention to two recent cases considering the application of section 58AA. They illustrate, in my view, the courts' awareness that provisions enacted to enable "new or better ways" for legal services to be provided should not be used either by the client to avoid paying their own lawyers for successful work done pursuant to the retainer or by the opponent to disrupt the proceedings and avoid the adverse costs consequences that normally follow from having fought and lost.

150. In *Lexlaw Ltd v Zuberi* [2021] EWCA Civ 16, [2021] 1 WLR 2729 Ms Zuberi brought a claim against a bank alleging that she had been mis-sold certain financial products. Her solicitors agreed to work on her claims in exchange for 12% of the damages recovered, payable if the litigation was successful. She accepted an offer of settlement from the bank but then refused to pay her lawyers, contending that the agreement was unenforceable pursuant to section 58AA CLSA. She asserted that the agreement did not comply with the 2013 DBA Regulations because it provided that if the client terminated the retainer prematurely, (which she had not) she would be liable to pay the solicitor's time costs up to the date of termination. Ms Zuberi said that this was contrary to a regulation which prohibited any term which required an amount to be paid by the client other than the percentage share.

151. Lewison LJ and Newey LJ followed different routes to uphold the entitlement of Ms Zuberi's solicitors to the share of her compensation they had earned. Lewison LJ held that the term of the agreement dealing with what would happen on early termination was not part of the damages-based agreement at all and so was not subject to the 2013 DBA Regulations. Newey LJ held that the 2013 DBA Regulations did not regulate and were not intended to regulate fees payable to legal representatives in the event of early termination of the agreement. Coulson LJ agreed with the reasoning of both Lewison and Newey LJJ.

152. Lewison LJ quoted at para 41 of his judgment from the Explanatory Memorandum accompanying the 2013 DBA Regulations. This addressed how much regulation of damages-based agreements was appropriate where the agreement was entered into by qualified legal representatives. The Government had concluded that the conduct of such representatives was subject to regulation by their professional bodies so no further regulation of termination fees was required. In this regard, the

Memorandum noted the draconian consequences of a failure to comply with the 2013 DBA Regulations:

> "7.5 … Moreover, the consequence of failing to comply with these Regulations is that the DBA will not be enforceable and, in those circumstances, the representative will receive no payment. There is a concern that this could lead to attempts to avoid payment, by suggesting that the legal representative had failed to comply with one or more of the additional regulations (as happened when CFAs were subject to greater regulation), leading to satellite litigation."

153. An example of satellite litigation instigated by the opposing party is *Akhmedova v Akhmedov* [2020] Costs LR 901. In that case a litigation funding agreement was entered into by a wife to fund her attempts to enforce an award of over £450 million made in her favour in financial relief proceedings on her divorce. Her son was a defendant to her claim as it was alleged that he held assets transferred to him by his father to put them beyond her reach. The son challenged the funding agreement as unlawful and champertous. He applied for an injunction to prevent the wife from instructing solicitors funded by the litigation funders and sought disclosure of the terms of the funding arrangements.

154. Knowles J referred to the funding being provided to the wife by a well-known and London listed professional third party funder: para 18. The funder was a founding member of the ALF and committed to the Code of Conduct which had been endorsed by the Civil Justice Council. The precise terms of the arrangement were not known. The son argued that family proceedings were among the kinds of proceedings in which conditional fee agreements were not permitted by section 58 CLSA 1990. By analogy, he argued, litigation funding should not be permitted because many of the same concerns which prompted the exclusion of family proceedings from section 58 also applied to LFAs. Knowles J rejected the analogy between conditional fee agreements and litigation funders (para 70). She stressed the importance of litigation funding in enabling claimants in family proceedings to enforce their rights:

> "71. Absent any evidence for the improper conduct of the Wife and her legal advisors in these proceedings or any statutory barrier to her funding arrangements, Mr Owen QC's [the son's counsel's] contentions came perilously close to a submission that there was an issue of principle as to whether third-party funding was per se permissible in family proceedings. Those submissions are misplaced, in my view, in

> circumstances where third-party funding has been accepted in this jurisdiction to be desirable to facilitate access to justice and where first-instance decisions in the Family Division have concluded that (a) it is "a necessary and invaluable service in the right case" (per Francis J at para 53 in *Weisz v Weisz* [2019] EWHC 3101 (Fam)) and (b) that nothing should be said "that makes it even more difficult for litigants to obtain litigation funding in the future, particularly given that there is no legal aid available in this area anymore" (per Moor J at para 9 of *Young v Young* [2013] EWHC 3637 (Fam))."

155. She declined to investigate the terms of the Wife's arrangements with the funder:

> "73. … Litigation funding practised by a funder adhering to the Code of Conduct has been endorsed by the senior courts in robust terms. Funding is being provided post-judgment to enable the Wife to secure the recovery of sums already awarded to her in the face of the Husband's contumelious conduct (assisted by others) in evading and frustrating the enforcement of the judgment debt. Without such funding, the Wife would lose access to justice and the chance of recovering the monies awarded to her in December 2016."

**(4) Claims management services**

156. Section 58AA(7) provides that "claims management services" has the same meaning as in section 419A of FSMA 2000 which I set out at the start of this judgment. That definition, the Appellants say, gives a very broad meaning to claims management services which covers the funding that Therium and Yarcombe provide here. That means, they submit,

(i) that the Respondent funders are persons "providing … claims management services" within section 58AA(3)(a); which in turn means that

(ii) the agreement is a damages-based agreement within section 58AA(1); which in turn means that

(iii) because the agreement does not satisfy the requirement in section 58AA(4)(c) that it comply with the prescribed terms and conditions it is unenforceable because of section 58AA(1).

157. In order to decide if there is any merit in this submission it is necessary to back track a little to consider what "claims management services" as defined in section 419A FSMA are.

158. Section 419A of FSMA is part of a regime which is not concerned with the enforceability or unenforceability of agreements but with the authorisation and regulation of people who, broadly speaking, act for clients who wish to pursue a legal dispute. Section 419A was inserted into FSMA 2000 by section 27 of the Financial Guidance and Claims Act 2018 ("FGCA 2018") in order to enable the provision of claims management services to be made a regulated activity within the meaning of FSMA. The FGCA 2018 was not the first occasion on which people who provide claims management services were required to be authorised. Section 419A of FSMA derived from section 4(2) of the Compensation Act 2006.

159. Part 2 of the Compensation Act 2006 provided for the regulation of claims management services in the following terms:

> "**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,

(c) ‘claim’ means a claim for compensation, restitution, repayment or any other remedy or relief in respect of loss or damage or in respect of an obligation, whether the claim is made or could be made—

(i) by way of legal proceedings,

(ii) in accordance with a scheme of regulation (whether voluntary or compulsory), or

(iii) in pursuance of a voluntary undertaking,

(d) ‘exempt person’ has the meaning given by section 6(5), and

(e) services are regulated if they are—

(i) of a kind prescribed by 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)."

160. Other sections in Part 2 of the Compensation Act 2006 provided:

(i) for the Secretary of State to designate by order who was going to be the Regulator for the purposes of section 4 (section 5);

(ii) for the Secretary of State by order to provide for exemptions from the authorisation requirement for people who were regulated by specified bodies or in specified circumstances (section 6);

(iii) that it was a criminal offence for a person to provide regulated claims management services unless he is authorised or exempt (section 7); and

(iv) that an order under section 4(2)(e), that is to say, an order specifying which claims management services are to be regulated, could not be made until the Secretary of State had consulted the Office of Fair Trading and other appropriate persons and unless a draft had been laid before and approved by both Houses of Parliament (section 15).

161. To implement section 4 of the Compensation Act 2006, an order was made under section 4(2)(a) and section 15: the Compensation (Regulated Claims Management Services) Order 2006 (SI 2006/3319) ("the Scope Order"). That order specified the kinds of claims management services which were brought into regulation if they were rendered in relation to the making of a claim of a kind described in that order. The kinds of services to be regulated were listed in article 4(2) of the Scope

Order. They included advertising for persons who may have a cause of action, referring clients to solicitors, investigating the merits of the claim or representing a claimant. The kinds of claims covered included personal injury claims, housing disrepair claims and claims relating to financial services or products. The Order did not refer to providing financial services or assistance or to claims relating to loss suffered from unlawful anti-competitive agreements.

162. The role of the Regulator appointed under section 4 of the 2006 Act to authorise and set standards for people carrying on regulated claims management services was undertaken by the Claims Management Regulator Unit in the Ministry of Justice. The Regulator issued rules governing the conduct of regulated claims management services and the Compensation (Claims Management Services) Regulations 2006 (SI 2006/3322) set up the regime whereby providers could apply for authorisation.

163. Subsequently it was decided to transfer regulation of providers of regulated claims management services from the Ministry of Justice to the Financial Conduct Authority ("the FCA") by incorporating the separate regulatory regime under the Compensation Act 2006 into the existing FSMA 2000 regime. Part 2 of the FGCA 2018 achieved that transfer of function making the substantial amendment to FSMA that was needed in order to effect this change.

164. The fundamental provision in FSMA, section 22, describes the kinds of activity which can be specified by the Treasury as a regulated activity and thereby brought within the regulatory regime established by the Act. Section 22 was amended by the insertion of subsection (1B) by the FGCA 2018. That new subsection provided that an activity could be specified as a regulated activity if it was carried on by way of business in Great Britain and "is, or relates to, claims management services". So the potential for claims management services to be made regulated activities under FSMA was thereby created. The phrase was inserted into many other sections of FSMA by the FGCA 2018. The Financial Services and Markets Act 2000 (Claims Management Activity) Order 2018 (SI 2018/1253) ("the FSMA Claims Management Activity Order") made substantial amendments to the secondary legislation under FSMA in order to effect this change.

165. Article 4 of the FSMA Claims Management Activity Order amended the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) so that the potential for regulation created by the insertion of subsection (1B) into section 22 of FSMA was realised. The FSMA Claims Management Activity Order then inserted a new Part 3B (headed "Claims Management Activities in Great Britain") into the FSMA Regulated Activities Order. Part 3B comprised articles 89F – 89W. It specified the kinds

of claim in respect of which claims management activity was to be regulated as personal injuries claims, housing disrepair claims, some social security benefits claims, employment related claims and claims made under section 75 of the Consumer Credit Act 1974 or under the Criminal Injuries Compensation Scheme. Part 3B then specified which activities were regulated in relation to each of those kinds of claims. The provision of financial services or assistance are not mentioned.

166. When it was originally inserted into the CLSA 1990 by the Coroners and Justice Act 2009 section 154, section 58AA defined "claims management services" as having the same meaning as in section 4(2) of the Compensation Act 2006. The reference to section 419A of FSMA was substituted by article 90 of the FSMA (Claims Management Activity) Order 2018.

167. It is common ground that the two definitions cover the same services although the wording of section 4(2) and of section 419A are rather different. I shall refer to the two sections as "sections 4/419A".

168. No one has suggested that the funding services provided by Therium and Yarcombe in these proceedings were specified as regulated activity either under the Compensation Act 2006 or under FSMA 2000 or that they need to be authorised under either of those regimes in order lawfully to operate the business that they are operating. I note here that Mr Leslie Perrin, Chairman of Calunius Capital LLP, states in his evidence that Calunius (the funding group of which Yarcombe is part) has in fact been authorised by the FCA since 2007 because it offers investment advice to its funds. The regulatory regime under the Compensation Act 2006 was not therefore the only means by which some control on the content of the agreements between funders and their customers could be exercised.

169. There is limited case law on the meaning of the term "claims management services". The Divisional Court at paras 27 and 103 of the judgment now under appeal referred to the decision in *Meadowside Building Developments Ltd v 12-18 Hill Street Management Co Ltd* [2020] Bus LR 917 ("*Meadowside*"). The Divisional Court agreed with the conclusion of the CAT that the funding agreement in *Meadowside* was very different from the kind of third party litigation funding agreement that we are concerned with here. That case involved a damages-based agreement in adjudication proceedings on behalf of the liquidator of an insolvent company which had undertaken building work for which it had not been paid. The firm, Pythagoras, was appointed to "take all steps to ascertain and recover amounts due" to the insolvent company. The adjudication found that a balance was due to the insolvent company from the owners of the building. As part of the arrangement between the liquidator and Pythagoras, Pythagoras guaranteed payment of, amongst other things, any costs award made in

favour of the building owner. The Deputy High Court Judge considered the application of the 2013 DBA Regulations to the arrangement at paras 91 onwards. At para 97 he held that Pythagoras may have been providing all of the "other services" within the definition of claims management services. It could not sensibly be disputed that it was providing financial assistance since that was "at the very heart" of its services. In reality it was also providing advice and other services to ascertain and recover the debt. He, rightly in my view, rejected a submission that section 58AA should be read as limited to *regulated* claims management services. Having concluded that the arrangement was a damages-based agreement falling within section 58AA the judge held that it did not comply with the 2013 DBA Regulations, because the percentage of damages to which Pythagoras was entitled exceeded the maximum of 50%. The agreement was therefore unenforceable.

170. I do not find *Meadowside* assists in resolving the present issue. Pythagoras was clearly managing the claim on behalf of the liquidator and providing a bundle of services that were properly described as claims management services. Those services included the services listed in section 419A(3). That does not help in deciding whether each such service amounts to providing claims management services if that is the only service which is provided.

**(5) The decisions in the CAT and the Divisional Court in this case**

171. As I have mentioned, the issue of the enforceability of the damages-based litigation funding agreements supporting the Respondents' proposed collective proceedings was considered by the CAT as one of a number of issues raised by the Appellants objecting to the certification of the proceedings under section 47B of the Competition Act 1998. The CAT ordered the hearing of a preliminary issue, namely the question whether there were any aspects of the funding arrangements which should result in the Respondents not being authorised to act as class representatives. Not all the defendants to the proceedings advanced the argument that the agreements were unenforceable. The argument was put forward primarily by DAF, supported by MAN and Iveco.

172. The CAT (Roth J, Dr William Bishop and Professor Stephen Wilks) handed down its ruling on that preliminary issue on 28 October 2019 ([2019] CAT 26). The CAT set out the legislative history of the statutory provisions and the orders made under them. They described the background to the enactment of section 58AA originally in the Coroners and Justice Act 2009. They referred to Sir Rupert Jackson's comprehensive review of litigation costs, the Preliminary Report dated in May 2009 and the Final Report dated in December 2009. The Reports discussed third party funding and addressed the question whether it should be regulated. Sir Rupert had recommended

that full regulation of litigation funding was not required and that a voluntary code to which all litigation funders subscribe should be drawn up: see para 31 of the CAT's judgment. That led to the founding of the ALF in November 2011 and the publication of the first Code of Conduct for Litigation Funders.

173. The CAT relied on a number of principles of statutory construction; the importance of context, the relevance of Explanatory Notes as an aid to construction, the presumption against absurdity and the relevance of secondary legislation as an aid to the construction of the primary legislation under which it is made: para 38.

174. The CAT held, in para 41, that the Respondents were correct that the reference in section 4(2) read with section 4(3)(a) of the Compensation Act 2006 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". I take that to mean, in the context of the management of a claim by the same person who is providing the financial assistance. Litigation funders, the CAT said, were engaged in the funding of a claim and not in the management of the making of the claim. On that basis they were not providing "claims management services" and so did not come within the definition of a damages-based agreement in section 58AA.

175. The CAT also considered that viewed in its context, section 58AA was never intended to apply to litigation funding agreements. Those were intended to be covered by section 58B CLSA. This view was supported by the wording of the 2013 DBA Regulations which were not apt to describe the relationship between a funder and the recipient of financial assistance. This was further supported by the Jackson Costs Review material: "it would have been flying in the face" of those conclusions if Parliament had, by amending section 58AA rendered unenforceable agreements which complied with the ALF's Code of Conduct (para 44). They then turned to consider the nature and adequacy of the funding arrangements as I have described.

176. The Appellants sought to challenge the CAT's decision on this point on appeal. There was a procedural issue to be resolved as to whether that challenge could be by way of appeal under section 49(1A)(a) of the Competition Act 1998 or whether it should be brought by way of judicial review. The Appellants brought an application for permission to appeal or alternatively for permission to bring proceedings for judicial review, (for which purpose the Court would sit as a Divisional Court of the Queen's Bench Division) with the substantive hearing to follow in either case if permission were granted. The Court (Henderson, Singh and Carr LJJ) held that the correct route was the judicial review route and that the Court of Appeal would have no jurisdiction to hear the substantive issue on appeal from the CAT: see para 60 of the judgment at [2021]

EWCA Civ 299, [2021] 1 WLR 3648. I shall therefore refer to that judgment as the judgment of the Divisional Court.

177. Henderson LJ's judgment proceeded on the basis that the relevant search must be for the meaning of the phrase "claims management services" on its first enactment in section 4(2) of the Compensation Act 2006: para 64. He referred to principles of statutory construction, in particular the presumption against absurdity. Having set out the legal, social and historical context of section 4, including *Factortame (No 8)*, *Arkin* and the enactment of section 58B CLSA, he asked what was the particular mischief that section 4 was intended to remedy. He concluded at para 78 that there was nothing to suggest that non-champertous funding of litigation by professional third-party funders in return for a reasonable share of the client's recoveries formed any part of the explicit mischief that section 4 sought to remedy. He concluded at para 87 that:

> "Although on a literal, acontextual, reading of the extended definition, the words 'the provision of financial services or assistance' 'in relation to the making of a claim' could be read as including the provision of litigation funding by a third party which plays no part in the management of the claim, I consider that the Tribunal was correct to accept the submission of Mr Kirby for the RHA that those words are 'to be interpreted as applying in the context of the management of a claim'…"

178. His conclusion was based in particular on the presence of section 58B CLSA even though it had not been brought into force. The second reason was the structure and wording of the definition itself (para 91). He referred to the principle of construction known as "the potency of the term defined" which I discuss below. He said that: (para 94).

> "it seems to me entirely natural to read the words of the definition as both coloured and conditioned by the reference to 'claims management' in the phrase which is being defined, so that the 'advice or other services in relation to the making of a claim' must be understood as referring to advice or other services of a claims management nature, or having to do with the management of a claim, and the reference in subsection (3)(a)(i) to the provision of financial services or assistance should likewise be read as referring to the provision of such services or assistance in the context of claims management."

179. He held, at para 95, that the fact that the concept of claims management services had no standard or accepted legal meaning in 2006 shows that Parliament was content to leave its precise meaning to be developed by the courts in the light of the purpose of the statutory scheme and the guidance which could be obtained from the relatively open-textured terms of the definition. One must not, however, "ignore the relevance of the concept of 'claims management' as a central factor in delimiting the general nature and extent of the activities which Parliament intended to be subject to the regulatory scheme of the 2006 Act." He therefore granted permission to the Appellants to apply for judicial review but dismissed the claim on the merits. Singh and Carr LJJ agreed with his judgment.

**(6) Construing section 4/419a**

180. If section 58AA CLSA had been enacted without subsection (7), I doubt it would have occurred to anyone that litigation funding agreements of the kind supporting the truck purchasers' claims were caught by the term "claims management services". Litigation funders are not offering to manage their clients' claims, they are not lawyers and they do not represent their customers in any kind of proceedings, however informal. There is always one or more other firms or individuals providing litigation services or advocacy services to the funded person. Those other firms work for months or years, charging an hourly rate for preparing the case, liaising with the court or tribunal, liaising with the opposing side or with other claimants. The litigation funders lend a large capital sum for which they would, normally, be paid by the repayment in due course of that capital together with interest, set at a rate which covers whatever administrative costs are incurred in the initial negotiation of the loan together with the cost of money.

181. The Appellants' submissions as to why nonetheless the Respondents are providing claims management services for the purpose of section 58AA can be summarised as follows. The definition of "claims management services" in section 4(2) of the Compensation Act 2006 and now in section 419A FSMA was cast very wide because it was simply delineating the pool of activities from which the activities to be regulated could be drawn. There were no consequences arising for a firm providing claims management services from the fact that its business now fell within that wide definition, unless or until the particular service it was providing was specified by an order made under those regimes. There was no reason therefore for Parliament not to include the activity of litigation funding in the definition of "claims management services" even if litigation funding could not be described as such by any normal meaning of those words. That, they say, is what Parliament meant in section 4(3)(a)/419A(3) by stipulating that the reference to the provision of services "includes, in particular," (in section 4(3)(a))or just "includes" (in section 419A(2)) a reference to

the provision of financial assistance. In other words, they submit that because a reference to claims management services "includes" a reference to the provision of financial assistance, that means that the provision of financial assistance becomes a claims management service, even if carried out separately. It does not have to be provided as part of an overall service that could properly be described as the service of managing a claim in order to be caught by the definition.

182. The Appellants then make the jump from section 4/section 419A FSMA to section 58AA CLSA by submitting that the effect of section 58AA, now read together with section 419A FSMA, is that any person who provides one of the "other services" listed in section 419A(2)(a) to (d) of FSMA must be "a person providing … claims management services" within the meaning of section 58AA(3)(a) so that the agreement between that person and the recipient of the services is a damages-based agreement within section 58AA(1).

*(a) The relevant principles of statutory construction*

183. Before construing section 4(3) and section 419A(2) I must first marshal the canons of statutory construction which will help determine whether what the Appellants contend is correct. First, I consider which interpretative criteria are relevant to the construction of section 4/section 419A. These are the general purposive approach to construction, the presumption against absurdity and the "potency of the term defined" or, as I find more relevant in the current dispute, what is meant by "including" something as part of the definition in this case. In construing section 58AA CLSA, additional tools can be deployed, namely the terms of the secondary legislation implementing the primary legislation, the relevance of a statutory provision which has not been brought into force, the effect of incorporating definitions from other enactments and reliance on the likely consequences of adopting either of the two rival constructions.

184. I address first the interpretative criteria relevant for interpreting section 4/419A.

185. **The purposive approach to construction** There are many passages in recent case law which set out how the courts should construe legislation. In *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 Lord Hodge DPSC referred to some of the earlier authorities when describing the task: (paras 29 to 31)

> "29 … Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained.
>
> "31 Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered."

186. The court is often faced with legislative wording which appears to run counter to the purpose at which the provisions were directed. There is plenty of guidance in the case law as to how to approach such a problem. *Littlewoods Ltd v Revenue and Customs Comrs* [2017] UKSC 70, [2018] AC 869, was a judgment delivered in the long-running dispute over whether the interest to be paid by HMRC to a taxpayer when refunding overpaid tax should be calculated on a compound or simple basis. One issue was whether the statutory provisions conferring a right to interest for taxpayers who had overpaid VAT was intended to exclude the possibility of a common law claim to such interest.

187. In their joint judgment, Lord Reed and Lord Hodge JJSC (with whom the other Justices agreed) accepted that read literally, the statutory provision did not exclude common law claims. On the contrary, the statutory entitlement to interest was expressly stated to arise if and to the extent that HMRC would not be liable to pay interest apart from that section. Further, there were other sections in the same enactment which did expressly exclude common law claims. They considered whether it was possible, nevertheless, to construe the critical words more narrowly than their literal sense so that they referred only to preserving the entitlement to interest under other statutory provisions but excluded a right under the common law. They noted that limitations had been placed by Parliament on claims to interest under the statute and these would be defeated if it were possible for the taxpayer to bring a common law claim instead. Parliament could not have intended the special regime to be capable of circumvention in that way. They therefore upheld that narrower construction, at para 39:

> "It is not a literal construction, but a departure from a literal construction is justified where it is necessary to enable the provision to have the effect which Parliament must have intended."

188. In *Littlewoods*, Lord Reed and Lord Hodge cited the well-known passage from the speech of Lord Bingham of Cornhill in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, para 8. Lord Bingham stated that the court's attention should not be confined to a literal interpretation of the particular provision giving rise to difficulty. A literal interpretation has its dangers in, for example, encouraging prolixity in drafting:

> "… It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

189. **The presumption against absurdity** In *Shahid v Scottish Ministers* [2015] UKSC 58, [2016] AC 429, para 20 Lord Reed observed that purposive construction can only go so far: "No amount of purposive interpretation can however entitle the court to disregard the plain and unambiguous terms of the legislation." But he went on to observe that there are more powerful tools available:

> "21 The only principle of statutory interpretation which might enable the plain meaning of legislation to be circumvented is that it can be given a strained interpretation where that is necessary to avoid absurd or perverse consequences: see, for example, *Inland Revenue Comrs v Hinchy* [1960] AC 748, 768 (Lord Reid), and *R (Edison First Power Ltd) v Central Valuation Officer* [2003] 4 All ER 209, paras 25 (Lord Hoffmann) and 116 (Lord Millett). Indeed, even greater violence can be done to statutory language where it is plain that there has been a

> drafting mistake: *R v Federal Steam Navigation Co Ltd* [1974] 1 WLR 505, 509 (Lord Reid), and *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, 592 (Lord Nicholls of Birkenhead)."

190. *Bennion, Bailey and Norbury on Statutory Interpretation,* 8th ed (2020) ("*Bennion*") states the presumption that an absurd result is not intended in the following terms, at section 13.1:

> "(1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature. Here, the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.
>
> (2) The strength of the presumption against absurdity depends on the degree to which a particular construction produces an unreasonable result.
>
> (3) The presumption may of course be displaced, as the ultimate objective is to ascertain the legislative intention."

191. Earlier formulations of that principle in *Bennion* have been approved by this court, see for example *R v McCool* [2018] 1 WLR 2431, paras 23 – 25 (Lord Kerr of Tonaghmore JSC) and the observations of Lord Millett in *R (Edison First Power Ltd) v Central Valuation Officer* [2003] 4 All ER 209, paras 116-117.

192. **The potency of the term defined** The Respondents rely on the principle sometimes referred to as "the potency of the term defined". They submit that the other services listed in section 4(3)(a)/419A(2) only fall within the scope of the term "claims management services" to the extent that they are part and parcel of services involving the managing of claims. The principle, if such it is, has been used in a number of cases involving difficult points of statutory construction. In *MacDonald (Inspector of Taxes) v Dextra Accessories* [2005] UKHL 47, [2005] 4 All ER 107, ("*Dextra*") the House of Lords was considering the meaning of the words "potential emoluments" in a tax

context. Lord Hoffmann, with whom the other members of the House agreed, said at para 18:

> "In the ordinary use of language, the whole of the funds were potential emoluments. They could be used to pay emoluments. It is true that, as Charles J pointed out, 'potential emoluments' is a defined expression and a definition may give the words a meaning different from their ordinary meaning. But that does not mean that the choice of words adopted by Parliament must be wholly ignored. If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean."

193. Lord Hoffmann made a similar point in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [2006] 2 AC 674 ("*Oxfordshire*"). That case concerned the definition of a village or town green and whether an area of scrub land much of which was described as "impenetrable by the hardiest walker" fell within the statutory definition of a village or town green. Under the heading "What is a village green?" Lord Hoffmann referred to a "visceral unease" some might feel at the lack of resemblance between the land sought to be registered in the case before the House and the "traditional" village green:

> "37 … Perhaps, one might feel, the concept could be narrowed by importing into the definition some of the qualities which are associated with the ordinary use of the term defined - what might be called an 'Auburn test', not expressly stated in the definition but implied from the choice of the words 'town or village green'.
>
> 38 My Lords, it is true that in construing a definition, one does not ignore the ordinary meaning of the word which Parliament has chosen to define. It is all part of the material available for use in the interpretative process. But there are several reasons why I think that it would be unwise for your Lordships, at any rate without full argument, to embark upon the process of introducing some elements of the traditional village green into the statutory definition."

194. The reference to the "Auburn test" was to the green at Auburn described in wistful terms in Goldsmith's poem *The Deserted Village* (1770) from which Lord

Hoffmann had quoted at para 3 of his speech. Lord Rodger of Earlsferry at para 115 agreed with Lord Hoffmann that it should not be so limited. Lord Walker of Gestingthorpe noted at para 128 that Parliament had deliberately chosen not to adopt a narrower definition that had been proposed by the Royal Commission on Common Land 1955–1958 (1958) (Cmnd 462). Lord Scott of Foscote at paras 81 – 83 placed greater reliance on the potency of the term defined. He held that the ordinary meaning of the term did affect its scope, though he agreed with the outcome of the appeal on other grounds. He said:

> 82 In Bennion, *Statutory Interpretation*, 4th ed (2002), p 480, under the side-heading 'Potency of the term defined', the author says:
>
> 'Whatever meaning may be expressly attached to a term, it is important to realise that its dictionary meaning is likely to exercise some influence over the way the definition will be understood by the court. It is impossible to cancel the ingrained emotion of a word merely by an announcement.'
>
> The author gives a number of examples from decided cases which illustrate, convincingly in my opinion, his point. …
>
> 83 My Lords, I would apply the same approach to construction of the definition of 'town or village green' in section 22(1) of the 1965 Act, or, for that matter, to construction of 'town or village green' in the Victorian statutes to which I have referred. I do not believe it can be correct to insist on a literal application of the section 22(1) definition so as to apply it to land that no one would recognise as a town or village green."

195. Lady Hale asked the question "Is there some essence of the very expression 'town or village green' which would preclude or at least militate strongly against the registration of such land as a green?": para 145. She said that she had considerable sympathy for the views expressed by Lord Foscote and noted that the powerful points expressed by Lord Hoffmann depended to a large extent on how the term had been construed since the 1965 Act was passed. She preferred to leave the issue for another day.

196. The Appellants in this appeal argue that a term defined only has "potency" for this purpose if it has a settled meaning. They rely for this proposition on *Phillips v News Group Newspapers Ltd and another* [2012] UKSC 28, [2013] 1 AC 1 ("*Phillips*"). The issue there was whether information left by people in voicemail messages recorded on their friends' phones was "technical or commercial information" falling within the definition of "intellectual property" in section 72(5) of the Senior Courts Act 1981. Section 72(2)(a) referred to "proceedings for infringement of rights pertaining to … intellectual property" for the purpose of removing the privilege against self-incrimination. "Intellectual property" was then defined as including technical or commercial information.

197. It was accepted by the parties in *Phillips* that there was no universal definition of "intellectual property" and that Parliament had adopted a variety of definitions for different situations. Lord Walker referred at para 19 to Lord Hoffmann's dictum in *Dextra* as to the potency of the defined term. But he concluded, at para 20, that there was no particular potency about the expression because although there was general consensus as to its core content, there was no general consensus as to its limits. For present purposes, he said, the essential point was that the definition contained the words "technical or commercial information" so that Parliament had made plain that information within that description was to be regarded as intellectual property for this purpose whether or not it would otherwise be so regarded.

198. Lord Walker, however, acknowledged that there was some "limited potency" in the expression and more generally in the legislative purpose of section 72 in enhancing protection against unlawful trade competition. Further, that might be of assistance in determining the meaning of the phrase "technical or commercial information".

*(b) Applying those principles to the construction of section 4(2) and (3)/419A(2)*

199. As regards a purposive construction of the provision, the CAT and the Divisional Court referred extensively to the history and context of the provisions in Part 2 of the CLSA 1990 and the regulation of claims management services in the Compensation Act 2006: see paras 22 to 35 of the CAT judgment and paras 69 to 79 of the Divisional Court judgment. The Divisional Court considered the mischief which section 4 was intended to remedy at paras 73 onwards. They referred to the Explanatory Notes to the Act which in turn referred to the Better Regulation Task Force report "Better Routes to Redress" (2004) and to the Government consultation paper, and the responses paper. They also quoted from the Explanatory Memorandum to the 2006 Scope Order. Henderson LJ concluded:

> “78 Taking stock at this point, it seems reasonably clear to me that the purpose of introducing statutory regulation of claims management services in section 4 of the 2006 Act and its associated Scope Order was to enhance consumer protection in areas where the activities of "claims intermediaries" had been causing widespread public concern. Typical activities of the kind causing such concern might be broadly described as proactive "claims farming" or the formation of books of potential claimants to pursue legal claims, followed by assistance in the formulation and bringing of those claims, in relation to matters such as personal injuries, employment, housing, and financial products or services, in all of which consumer protection is likely to be much needed: compare article 4(2) and (3) of the Scope Order, set out in the Tribunal's judgment at para 28.
>
> 79 Conversely, there is no suggestion in any of the material I have reviewed which indicates that regulation of non-champertous funding of litigation by professional third-party funders in return for a reasonable share of the client's recoveries, of the kind exemplified in *Factortame (No 8)* [2003] QB 381 and *Arkin* [2005] 1 WLR 3055, formed any part of the explicit mischief that section 4 of the 2006 Act sought to remedy.”

200. Neither party before this court sought to rely on anything that was said in Parliament during the debates on the Bill which became the Compensation Act 2006. The debates at Second Reading in the House of Commons appear to have focused on whether trade unions would be caught and should be exempted.

201. In my judgment, a purposive construction does not point clearly either in favour of or against a particular construction. The high point for the Appellants is a comment in the Explanatory Notes to the 2006 Act to the effect that the Act “provides the outline regulatory framework to authorise providers who would be required to comply with rules and codes of practice”: see the passage quoted by the Divisional Court at para 75. The Respondents on the other hand point to the undoubted fact that litigation funders were not and never have been brought within the regulatory regime created by the Act. Further, the Respondents argue that the 2006 Act was enacted shortly after the Court of Appeal had stated very clearly in *Factortame (No 8)* and *Arkin* that the courts at least did not regard litigation funding as problematic. On the contrary, as I have described earlier, the Court of Appeal stressed the importance of litigation

funding as providing access to justice. The "state of affairs", to adopt Lord Wilberforce's phrase (see para 108 above), did not suggest that the purpose of the legislation was to bring litigation funding with the scope of potentially regulated activity.

202. Turning to the presumption against absurdity, the Respondents rely on this presumption to submit that section 4(2) and (3)/419A(2) should not be read as meaning that everything listed amounts to a claims management service, subject only to the qualification that it is provided "in relation to the making of a claim". They give examples of absurdity that would result from treating every service listed, even if provided just by itself, as providing claims management services. The service of "making inquiries" in relation to the making of a claim in section 419A(2)(d) is, without more, entirely unbounded. There is no limit on the kind of inquiries that are covered. Similarly, if referring or introducing one person to another in relation to the making of a claim is a claims management service, a barrister's clerk would be caught by the definition since he or she clearly refers or introduces members of chambers to solicitors in relation to the making of claims. If the litigation funders in this case are caught, then so would an ordinary bank giving a loan, if they were aware that the loan was to fund the making of a claim.

203. The Appellants accept, as they must, that their interpretation stretches the term claims management services beyond anything that could properly be described by the ordinary sense of those words. Their answer to the absurdity point was that it does not matter that all these services are caught by the definition. Parliament assumed that the Lord Chancellor would use the power reasonably when deciding which claims management services to regulate. They point to the additional control exercised because the making of an order under section 4 was subject to the affirmative resolution procedure: see section 15 of the Compensation Act 2006 and section 26 of FSMA.

204. I do not accept that that is a sufficient answer to the undoubted absurdity problem thrown up by the Appellants' submission. The role of the legislature is to set the boundaries for the exercise of executive powers to make subordinate legislation. Those boundaries are defined by Parliament so that the later exercise of those powers can be examined by the courts to determine whether the resulting instrument made by the executive is within the vires of the power or not. The courts are frequently called upon to decide whether secondary legislation which the executive contends is authorised by the power conferred goes beyond the remit that Parliament delegated by the grant of that power. To argue, as the Appellants argue here, that it does not matter how broadly the power to regulate was drawn by the statute because one can

always trust the executive only to use the power reasonably upsets that balance between the legislature and the executive.

205. Furthermore, the decision of Parliament to include a degree of control over the making of subordinate legislation through the affirmative resolution procedure does not help to save or justify the broad interpretation for which the Appellants contend. The court's power to determine the legality of subordinate legislation is well established; even where a provision has been approved by Parliament, this does not prevent it from being challenged. In *Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 365, Lord Diplock stated:

> "even though [subordinate legislation] is contained in an order made by statutory instrument approved by resolutions of both Houses of Parliament … I entertain no doubt that the courts have jurisdiction to declare it to be invalid if they are satisfied that in making it the Minister who did so acted outwith the legislative powers conferred upon him by the … Act of Parliament under which the order [was] purported to be made …"

206. The Appellants' argument that the formal parliamentary approval procedure is the control that saves the enabling provision from being too wide also runs counter to the legitimacy of the court's jurisdiction to review subordinate legislation. The parliamentary approval process does not in this case shed any light on the correct construction of the provisions and is no answer to the absurdity problem.

207. If the Lord Chancellor had decided to prescribe ordinary lending by banks as a regulated claims management service or to require barristers' clerks to be authorised under the regime, I have no doubt that there would have been a powerful case mounted that the order was ultra vires the power conferred by section 4, or by section 419A. That would be on the basis that the service that a bank or a barristers' clerk provides is not a claims management service. The qualifying words "in relation to the making of a claim" do not narrow the scope sufficiently to mitigate the absurdity. The term "claim" is itself defined very broadly in section 419A(3). This presumption therefore points firmly in favour of a narrower construction of the term "claims management services" in section 4/419A.

208. How then should one construe section 4/419A to avoid the absurdity that arises from an argument that because the reference to the provision of services "includes" a reference to providing financial assistance, making inquiries, referring one person to

another, that means that all those activities, taken by themselves, are also claims management services? The choice is, in my judgment, between two alternative constructions:

> (i) The first construction is that because the term "claims management services" is said to "include" the provision of financial services, that means that any provision of financial services or assistance is to be treated as the provision of claims management services even if the provider is doing nothing else which would naturally fall within that term.
>
> (ii) The second is that because the term "claims management services" is said to "include" the provision of financial services, a person who provides claims management services within the normal meaning of that phrase can be regulated in relation to the financial services or assistance they offer to their clients – and in relation to all the other ancillary activities listed in subsection 4(3)(a)/419A(2) — even if one would not otherwise describe those elements of the package, looked at independently, as "managing claims".

209. The case law on the "potency of the term defined" is useful here. The *Phillips* case on which the Appellants rely is, in my view, of limited assistance on this point. The term "intellectual property" is clearly a term of art because it is not using the word "intellectual" in its normal sense, nor does it cover things that are "property" in any normal sense either in common parlance or as a legal concept. A non-lawyer coming across the term "intellectual property" for the first time would have no idea what it means. In those circumstances clearly there must be some settled meaning to the term, divorced from the actual words used, in order for the term to have some potency of the kind described by Lord Hoffmann. That is not the position with the term "claims management services". Each of those words has an ordinary meaning and the words bear that ordinary meaning here. The potency of that meaning is not destroyed by the fact that the precise boundary of the term is unclear. This point was made by Lewison LJ in *R (Sisangia) v Director of Legal Aid Casework* [2016] EWCA Civ 24, [2016] 1 WLR 1373 ("*Sisangia*"), referred to in *Bennion* section 18.3. That case concerned the meaning of the term "abuse of position or power" in a provision of LASPO 2012 which set out the kinds of claims for which legal aid could be granted. The judge at first instance had construed the term broadly on the basis that there was no generally recognised definition of "abuse of position or power" to be derived from the case law. Lewison LJ (with whom Elias and Christopher Clarke LJJ agreed) rejected that approach because it ignored the potency of the term defined: para 11. After referring to *Dextra*, he said:

> "14 In my judgment the fact that a definition of 'abuse of position or power' of universal application cannot be extracted from the authorities does not mean that the term defined can be ignored. It is equally possible, indeed probable, that Parliament's intention was that it should be left to the courts to develop what the phrase means.
>
> …
>
> 17 The fact that 'abuse of position or power' cannot be given a hard-edged definition does not mean that the concept itself is meaningless."

210. I respectfully agree. Almost all English words have imprecise boundaries. If one were to limit the principle of the "potency of the term defined" to ordinary words that have a single accepted core meaning and no fuzzy penumbra, almost no English word would have any potency at all. Case law is full of instances where the courts have had to grapple with the uncertain boundaries of an ordinary word.

211. The fact that litigation funding would not be regarded as "claims management services" in the normal meaning of those words is an important pointer in favour of a construction which treats the listed services as included in the term when they are provided as part of an overall claims management service but not when they are provided by themselves, not as part and parcel of managing a claim.

212. A similar point about the inclusion of a range of disparate items in a defined term arose in *Winfield v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1415, [2013] 1 WLR 948, a case cited in the passages from *Bennion,* section 12.2 to which the parties referred us. That appeal concerned the statutory definition of the word "advertisement" for the purposes of a provision in class 13 of the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 (SI 2007/783) which gave deemed planning consent to an advertisement displayed on a site continually for ten years. For that purpose, the word "advertisement" was defined by reference to the meaning given to it in section 336(1) of the Town and Country Planning Act 1990. That definition is very broad and expressly "includes" any hoarding or similar structure used or designed for the display of advertisements. The claimant had installed wooden posts and a wooden structure on the land for ten years and had sometimes displayed placards and notices on them. He argued that the unbroken presence on the land of the wooden posts and the wooden structure for more than ten years gave rise to deemed consent because, even during

the periods when nothing was attached to them, they were expressly included in the definition of "advertisement" and so continued to be advertisements for that purpose.

213. The Court of Appeal disagreed. Maurice Kay LJ (with whom Sir Stephen Sedley agreed) said:

> "14. This is difficult drafting, … In *Butler v Derby City Council* [2006] 1 WLR 1346, para 18 Sullivan J said:
>
> 'There is a degree of circularity in this definition … if one asks, what is an advertisement, the answer is, at least in part, something that is "in the nature of, and employed wholly or partly for the purposes of, advertisements". In this respect the definition of an advertisement is like the definition of the proverbial elephant. One knows an elephant (or advertisement) when one sees it because it is in the nature of an elephant (or advertisement).'
>
> 15. The submission on behalf of Mr Winfield is that the latter part of the definition, beginning with the word 'includes', brings within the meaning of 'advertisement' a 'hoarding or similar structure used or designed, or adapted for use, for the display of advertisements'. The structure need never have had upon it anything recognisable as an advertisement. It would be sufficient, if, for example, it had merely been designed or adapted for use for the display of advertisements."

214. The Court of Appeal noted that a purposive construction of the provision pointed in favour of a very broad meaning for the word "advertisement" as Mr Winfield contended. The provision was aimed at facilitating the control of advertising and was drawn broadly as an anti-avoidance measure to prevent loopholes. It was intended to enable the local authority to control not just a sign or placard but the structure to which it is attached. But, the Court of Appeal asked, did that necessarily mean that a bare unadorned structure remained an advertisement? It did not. Maurice Kay LJ said, at para 19:

> "I am satisfied that common sense can be accommodated within the cumbersome wording of the definition. During the

> period of cessation, the unadorned structure is no longer "in the nature of, and employed wholly or partly for the purposes of, advertisement" and it cannot feed the continuance required by class 13. I accept that this interpretation is at or near the limits of the permissible, but it seems to me to serve the purpose of the legislation and to chime with common sense. If it were not correct, it would mean that a landowner who erects a structure with the sole intention of eventual use for advertising, but who does not adorn it for ten years, would immediately obtain the benefit of class 13 if he were to commence active advertising at the commencement of the eleventh year. I do not believe that the legislation was intended to benefit advertisers (including advertising companies) in that way."

215. Just as the fact that an advertisement is expressly defined as including the hoarding on which it is fixed does not mean that the hoarding alone is an advertisement, in our case, the fact that claims management services include providing financial assistance, does not mean that all financial assistance is a claims management service whenever it relates to a claim. I recognise that "claims management services" are perhaps less readily identifiable than elephants or advertisements. But the Appellants fairly accepted that litigation funding of the kind with which we are concerned did not naturally fall within the scope of the term – the litigation funders here are not managing claims but are funding the litigation and advocacy services or claims management services provided to the claimants by others.

216. I am fortified in this conclusion by three further considerations. The first is that the drafting of the "services" which are said to become claims management services by the combination of section 4(2)(b) and (3)(a)(i) – (iv) is so broad as to be almost meaningless. How broad are the services "by way of or in relation to legal representation" or "making inquiries"? It cannot have been intended that everything falling within those terms is capable of being made a regulated activity even if the person does not also "manage claims" in any recognisable way. I agree, therefore with what Henderson LJ said at para 95 of the Divisional Court's judgment. The imprecision in the drafting of section 4:

> "shows that Parliament was content to leave its precise meaning to be developed by the courts in the light of the purpose of the statutory scheme and the guidance which could be obtained from the relatively open-textured terms of the definition."

217. This appears to be the first time that the courts have been called upon to develop that meaning, and I agree with the way in which the CAT and the Divisional Court carried out that task.

218. Secondly, it is important to consider the purpose for which claims management services are defined in section 4 of the Compensation Act 2006 and the subsequent section 419A FSMA. The prescription of some claims management services as regulated activities is not an end in itself but a means of empowering the Regulator to set standards for and control the conduct of persons carrying on regulated claims management services. The role of the Regulator designated by the Secretary of State under section 5 of the Compensation Act 2006 and now of the FCA is to regulate the conduct of authorised persons by for example investigating complaints. One can readily see that the inclusion of the ancillary services in section 4(3)/419A(2) within the scope of claims management services makes clear that standard setting and other regulation such as the capping of fees may extend to those aspects of the authorised person's business even if those aspects might not strictly speaking be described as claims management services themselves. It forestalls an argument by claims management service providers that the aspects of their business listed are not strictly speaking claims management services and so should not be the subject of regulation.

219. Thirdly, a similar argument to that put forward by the Appellants was considered and rejected by the Court of Appeal in *Factortame (No 8)*. The Secretary of State argued in that appeal that because the services that GT were providing were in large measure the type of services that solicitors customarily provide in the course of "the conduct of litigation", the principles that applied to solicitors should apply to them. Lord Phillips analysed the services that GT were providing. He noted that given that it was a criminal offence to conduct litigation without being a solicitor, the term must be given a narrow meaning: "It cannot embrace all the activities that are ancillary to litigation and which are sometimes carried on by a solicitor and sometimes by a person who has no right to conduct litigation": para 25. He cited Potter J in *Piper Double Glazing v DC Contracts* [1994] 1 WLR 777, 783 who said that "An unqualified person does not act as a solicitor … merely by doing acts of a kind commonly done by solicitors. To fall within that phrase, the act in question must be an act which it is lawful only for a qualified solicitor to do and/or any other act in relation to which the unqualified person purports to act as a solicitor". Lord Phillips said that GT's services had at all times been ancillary to the conduct of litigation by those solicitors.

220. The Appellants' argument in this appeal suffers from the same flaw as the Secretary of State's argument in *Factortame (No 8)*. It relies on a syllogism: claims management service providers often provide financial assistance - Therium provides financial assistance - Therium must therefore be a claims management service

provider. That ignores the point made in *Factortame (No 8)* that the people who provide advocacy services, litigation services and claims management services provide a bundle of services some of which are ancillary to the core service. A person who provides that ancillary service by itself is not within that class.

221. Mr Thanki relied on the express exclusion from claims management services in section 4(3)/419A(2) of the services of witnesses, whether or not expert witnesses. He submitted that the definition of claims management services must be casting the net very wide if Parliament considered it necessary to exclude expert evidence. There are two answers to that point. First, the exclusion of a specific item does not necessarily mean that it would have been included had it not been expressly excluded: see *Sisangia* para 30. Secondly, it is more likely, in my view, that the explanation for this exclusion lies in *Factortame (No 8)*, decided shortly before the Compensation Act 2006, and the nature of the services that GT provided to the fishermen. In his judgment, Lord Phillips addressed at some length the question whether expert witnesses could provide their services on a contingency fee basis. The Court of Appeal concluded at para 73 that it would be a very rare case indeed where the court would consider that appropriate. As I have said, the Court of Appeal, by contrast, saw nothing contrary to public policy in pure funding being offered under a damages-based contingent arrangement. So the Court of Appeal saw evidence and expert evidence falling on the wrong side of the champerty line but litigation funding falling on the right side. The legislature in section 4(3)(b)/419A(2) made clear that giving evidence and expert evidence falls on the right side of the line being drawn here. It would not make sense to suggest, from that provision, that the legislature was moving pure funding to the wrong side of the line, at least without making it clear that that was the intention.

222. I would therefore hold that section 4(3)/419A(2) properly construed means that claims management services include the ancillary services commonly provided by claims managers listed so that those ancillary services may also be regulated activities and subject to the supervision and standard setting role of the Regulator. It was not intended to elevate those ancillary services into claims management services in and of themselves, when they are undertaken outside the context of a claims management business. That is all that the section needed to achieve and that is, in my judgment, what it achieved both in its original version in section 4 of the 2006 Act and in its new version in section 419A of FSMA.

**(7) Construing section 58AA CLSA**

223. If I am wrong as to the scope of the definition in section 4/419A, there is still the question of how to define “a person providing advocacy services, litigation services or

claims management services" for the purpose of section 58AA(3)(a). For this task, four further interpretative criteria are relevant:

(i) The relevance of contemporaneous statutory instruments implementing the statutory provision in issue;

(ii) The relevance of a statutory provision which has not been brought into force;

(iii) The effect of incorporating definitions from other enactments; and

(iv) Reliance on the likely consequences of adopting each construction.

*(a) The relevance of the 2010 and 2013 DBA Regulations*

224. It is fairly accepted by the Appellants in this appeal that the terms on which the 2010 and 2013 DBA Regulations were drafted can be used as an aid to construe the provisions of section 58AA: see *Factortame (No 8),* para 57. It is apparent from the way the 2010 DBA Regulations are drafted that they were not directed at agreements with litigation funders. For example:

(i) The 2010 DBA Regulations use the term "client" to refer to the party who is described in section 58AA as the "recipient of the services" and define the word "client" to mean the person "who has instructed the representative" to provide advocacy services, litigation services or claims management services and who is liable to pay for those services.

(ii) They use the term "representative" to refer to the party who is described in section 58AA as the "person providing advocacy services, litigation services or claims management services".

(iii) They stipulate that the agreement must specify the circumstances in which the representative's payment, costs and expenses are payable. They then define "costs" as the total of the representative's time reasonably spent multiplied by a reasonable hourly rate, and define "expense" as disbursements including counsel's fees and the expenses of obtaining an expert's report.

225. The 2010 DBA Regulations therefore assumed that the person providing the services was a "representative" of the recipient of the services. A litigation funder of the kind described in *Factortame (No 8)* or *Arkin* does not "represent" the claimant in any normal sense of that word. Those Regulations, further, assumed that the representative was providing the kind of service which involves ongoing work typically charged for at an hourly rate. Again, that is entirely inapt to apply to a litigation funder who does not charge an hourly rate for work done but rather recovers sums advanced to finance the litigation plus an additional fee. That distinction is reflected in the different description of the uplift to which I have referred in section 58B (dealing with litigation funders) and sections 58 and 58A (dealing with legal representatives). Litigation funders do not charge a success fee expressed as an amount of fees charged because they do not charge fees like legal representatives do.

226. The 2013 DBA Regulations were similar to the earlier Regulations in that they referred to the recipient of the services as the client "who has instructed the representative" to provide advocacy services, litigation services or claims management services; they assume that the party providing the services is a "representative" who typically charges an hourly rate for time spent on the claim or proceedings. The use of these terms is not accidental. In fact, the Explanatory Memorandum laid before Parliament by the Ministry of Justice refers to the person providing the services as "the lawyer", apparently regarding that as interchangeable with "the representative". The DBA principles are described as "based on the lawyer not being able to recover any more than the DBA fee" (para 4.5).

227. Damages-based agreements entered into by litigation funders cannot realistically comply with either the 2010 or 2013 DBA Regulations because those Regulations are not drafted in a way which applies to their business. The issue in this case is whether Parliament and the Lord Chancellor by enacting section 58AA and prescribing conditions with which damages-based litigation funding agreements could not comply intended thereby to render unenforceable the damages-based litigation funding agreements currently underpinning claims in the CAT and in other courts and tribunals.

*(b) The presence of section 58B CLSA 1990*

228. I explained earlier that the AJA 1990 inserted section 58B about litigation funders into the CLSA 1990 as well as replacing the original section 58 with revised sections 58 and 58A. Section 58B has not been brought into force or amended since then. The Divisional Court placed considerable reliance on the existence of section 58B. Henderson LJ said at para 88 that one of the main reasons why he agreed with the

CAT's decision was the presence of section 58B. The fact that the section had never been brought into force was, he said, beside the point: (para 88)

> "… As I have explained, section 58B remained unrepealed on the statute book in 2006 (as it still does today), and the executive (in the form of the Lord Chancellor or the Secretary of State) is under a continuing duty to consider whether it should be brought into force: see para 81 above, and the decision of the House of Lords in the *Fire Brigades Union* case [1995] 2 AC 513. Furthermore, if section 58B were in force, there cannot be any doubt that the funding agreements in the present case would fall within its ambit. In terms of the definition in section 58B(2), set out at para 70 above, each such agreement is one under which the funder agrees to fund (in whole or in part) the provision of advocacy or litigation services by someone other than the funder to the litigant (i e the representative and/or the individual claimants), and the litigant agrees to pay a sum to the funder in specified circumstances."

229. Henderson LJ, at para 89, said that it was "most improbable" that Parliament would have intended, by a sidewind, to bring litigation funding agreements which were potentially liable to regulation under section 58B within the ambit of the scheme for regulation of claims management services under the 2006 Act.

230. The case to which Henderson LJ referred, *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513 concerned a statutory scheme set out in the Criminal Justice Act 1988 for compensating victims for criminal injuries. The quantum was to be calculated on the same basis as common law damages. The scheme was never brought into force by the Secretary of State. In 1994, a new non-statutory scheme was established that calculated compensation according to a tariff no longer based on common law principles and was substantially less generous. The House of Lords rejected the submission that the Minister was under a statutory duty to bring the provisions into force. That did not mean, however, that the Secretary of State had an absolute and unfettered discretion whether or not to do so. Lord Browne-Wilkinson said, at p 551:

> "So to hold would lead to the conclusion that both Houses of Parliament had passed the Bill through all its stages and the Act received the Royal Assent merely to confer an enabling power on the executive to decide at will whether or not to

> make the parliamentary provisions a part of the law. Such a conclusion, drawn from a section to which the sidenote is 'Commencement,' is not only constitutionally dangerous but flies in the face of common sense. … In the absence of express provisions to the contrary in the Act, the plain intention of Parliament in conferring on the Secretary of State the power to bring certain sections into force is that such power is to be exercised so as to bring those sections into force when it is appropriate and unless there is a subsequent change of circumstances which would render it inappropriate to do so."

231. The result of this was, the House of Lords held, that the Secretary of State came under a clear duty to keep under consideration from time to time the question whether or not to bring the sections into force. The introduction of the new tariff scheme was therefore unlawful because Parliament had expressed its will that there should be a scheme based on the tortious measure of damages. That expression of Parliament's will had not been repealed, nor had Parliament been invited to repeal it.

232. Lord Lloyd of Berwick also held that although the legislative provisions did not have statutory force that "does not mean that they are writ in water": p 570H. They contain a statement of parliamentary intention even though they create no enforceable rights. Lord Nicholls said that although the Secretary of State is not under a legal *duty to appoint* a commencement day, he or she "is under a legal *duty to consider* whether or not to exercise the power and appoint a day" (emphasis in original): p 575F. That obligation would cease only when the power was exercised or Parliament repealed the legislation. Until then the duty to keep under review continued.

233. The Appellants in this case say that that section 58B is not relevant because it does not empower the prescribing of a complete code for regulating litigation funding and in particular it could not be used to control damages-based litigation funding agreements. Henderson LJ was wrong to say that the funding agreements in the instant case would fall within section 58B if that section were brought into force. That is because litigation funding agreements within its scope are those where the uplift agreed is calculated by reference to the money spent by the funder and not by reference to the damages received: see section 58B(3)(e).

234. I accept that correction but I do not consider that that detracts from the force of the point made by Henderson LJ. The structure of this series of statutory provisions shows that agreements entered into by funders who agree to fund the provision of

advocacy and litigation services by someone else were dealt with separately from agreements entered into by those providing the advocacy and litigation services. The former were intended to be dealt with, if at all, by section 58B CLSA. That would be brought into force if needed and would, one assumes, be accompanied by a further set of regulations. Those regulations would need to define who is a "funder" for this purpose because section 58B(3)(a) does not enact a definition of funder but envisages that the definition will need to be contained in regulations. In enacting section 58B in the terms set out, Parliament no doubt intended that the requirements would be prescribed in a way which enable at least some litigation funding agreements to comply with them and so be enforceable.

235. If and when section 58B needs to be activated, Parliament may also have to consider whether that section itself needs amendment to reflect how matters have moved on since the AJA 1999 — whether, for example, it should apply to the funding of claims management services provided by someone else as well as to the funding of the advocacy or litigation services to which it is currently limited and whether it should apply to damages-based litigation funding agreements as well as agreements which provide for an uplift on the amount lent.

236. It seems to me, as it seemed to the Divisional Court, most improbable that Parliament intended that damages-based litigation funding agreements would all be rendered unenforceable by section 58AA without any mention of this fact. Given the Secretary of State's duty to consider whether to bring section 58B into force, one would expect the Appellants to be able to point to some explanation given by the Government as to why the 2010 and 2013 DBA Regulations were drafted so as to be the mechanism by which all damages-based litigation funding agreements were rendered unenforceable, rather than revising and implementing the mechanism for regulation of such agreements that Parliament had enacted in section 58B.

*(c) Incorporation of a definition from another statute*

237. The Appellants place weight on authorities that make clear that where a definition is incorporated into another statute it must bear the same meaning in both places. The leading case on this point is *Williams v Central Bank of Nigeria* [2014] AC 1189 ("*Williams*"). That case concerned the word "trustee" in section 21(1)(a) of the Limitation Act 1980. Section 38(1) of that Act defined the terms "trust" and "trustee" as having the same meanings as in section 68(17) of the Trustee Act 1925. That earlier definition extended the expressions to implied and constructive trusts and to the duties incident to the office of a personal representative. The issue before the court was whether the term "trustee" in the 1980 Act included as well a stranger to a trust who was liable to account (as the defendant bank was alleged to be) on the footing of

dishonest assistance or knowing receipt of trust assets. If such a stranger was not a "trustee" then the claim would be time barred.

238. Lord Sumption (with whom Lord Hughes JSC agreed) dealt at para 27 with the submission that Parliament must have intended to abolish for limitation purposes the distinction between true trustees and those on whom equity imposed a liability to account as if they were trustees. This was because the legislation was designed to adopt the recommendations of the Wright Committee (see Law Revision Committee, Fifth Interim Report, *Statutes of Limitation*, (1936) (Cmd 5334)) and that is what they recommended. Lord Sumption rejected that submission for a number of reasons. First, he rejected the submission that the Wright Committee had made such a proposal. Further, if Parliament had understood the Wright Committee to have made that recommendation, they would not have implemented it by adopting the definition in the Trustee Act 1925 since that Act was also not concerned with ancillary liability. Lord Sumption then went on: para 27

> "The latter point raises an altogether more fundamental objection to using the Committee's report to elucidate not the rules of limitation as such but the categories of 'trustee' to which they were intended to apply. By adopting not just the language but the meaning of the ready-made definition in the Trustee Act 1925, Parliament directed the courts to discover its meaning in the latter Act. On that question, the intentions of a Committee reporting 11 years later cannot be of the slightest assistance."

239. Lord Neuberger (with whom Lord Hughes also agreed) made the same point in *Williams*:

> "50 Where a term in a later statute is defined by reference to a definition in an earlier statute, it seems to me self-evident that the meaning of the definition in the later statute must be the same as the meaning of the definition in the earlier statute. Hence, the meaning of the term in the later statute is determined by the definition in the earlier statute. Further, the adoption of the definition in the later statute cannot somehow alter the meaning of the definition in the earlier statute. It accordingly follows that one has to determine the meaning of the term in the later statute simply by construing the definition in the earlier statute. … In the light of Lord Mance JSC's judgment, it is, I think, important to emphasise

> that the way in which the definition of 'trustee' in section 68(1)(17) is incorporated into the 1980 Act appears to leave no scope for contending that the meaning of the expression in the 1980 Act can somehow be different from that which it bears in the 1925 Act."

240. He rejected any suggestion that the words in the Limitation Act 1980 could bear any different meaning, because of the mischief being addressed by the later Act. When performing its interpretative role, the court cannot take "a free-wheeling view of the intention of Parliament" treating the words used as merely one item of admissible material: para 72.

241. That principle of construction, expressed in such uncompromising terms by Lord Neuberger, is in tension here with another principle referred to by *Bennion* at section 11.6. That section is headed "Regard to be had to consequences" and states the principle in the following terms:

> "When considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, the court should assess the likely consequences of adopting each construction, both to the parties in the case and (where similar facts arise in future cases) for the law generally. If on balance the consequences of a particular construction are more likely to be adverse than beneficent this is a factor telling against that construction."

242. The Appellants did not demur from the Respondents' description of the very adverse consequences of the choice between the two constructions I have set out at para 208, above. As I have already explained, the Appellants' primary argument in support of the breadth of the term "claims management services" for the purposes of section 4/419A is that Parliament included all sorts of ancillary services in the definition because the breadth of the term had no immediate effect on anyone unless or until the services were prescribed in an order of the Lord Chancellor. Transplanted into its new context in section 58AA, however, the Appellants contend that the breadth of the definition certainly does have adverse consequences for a person providing unregulated claims management services and for their customer. Those consequences are that the funders cannot enforce their agreement for the repayment of the millions of pounds they have spent.

243. Ms Dunn, the current Chair of the Association of Litigation Funders, described the consequences beyond the present proceedings in her witness statement:

> "These consequences will extend to all or most litigation funding agreements that have been agreed since litigation funding began in England and Wales. This would be massively damaging both for the administration of justice in relation to the existing cases which involve funding by litigation funders, and the future access to justice of parties who would otherwise have employed litigation funding agreements to fund their cases. It would bring to an abrupt end hundreds of funded claims with potentially catastrophic financial consequences for all involved in the case. It would have a major impact on the development of group litigations before the English Courts (including but not limited to Collective Proceedings Orders before the Competition Appeals Tribunal), given the inter-relationship between that group litigation and the litigation funding industry. This would have enormous financial consequences: there is estimated to be over £500 million of costs incurred annually by litigation funders in the UK alone. It would also have huge policy implications for the litigation funding industry, which ALF is best-placed to address."

244. Mr Leslie Perrin, Chairman of Calunius, also describes the importance of the issue:

> "… if the proposed LFAs with [UK Trucks Claim] were found to be DBAs, that finding would invalidate most if not all LFAs that have been agreed since litigation funding began. For example, it would invalidate the *Merricks* LFA (so far as I understand its terms from the judgments of the CAT) and would be likely to mean that no [collective proceedings order] could ever be pursued, given the reliance that has been placed on litigation funding in the development of this aspect of the work of the CAT. At the least, 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."

245. As regards the consequences of the Appellants' submission, there is the additional point arising from section 58AA(11) which cross refers to section 47C(8) of the Competition Act 1998 (inserted by the Consumer Rights Act 2015). That provides that a damages-based agreement is unenforceable if it relates to opt-out collective proceedings even if it complies with the requirements set in section 58AA.

246. Given that I have decided that the importation of the term "claims management services" from section 4(2)(b)/419A(1) into section 58AA does not lead to the outcome for which the Appellants contend, I do not have to address what would be the position if the term might be broad enough to do that. The Appellants were not able to point to anything that has happened in terms of orders made by the Lord Chancellor or standards set by the Regulator or FCA which would be disrupted by adopting the narrower of the two possible constructions set out in para 208, above. Litigation funding as an independent activity has never been treated as "claims management services" for any purpose either under section 4/419A or under section 58AA CLSA.

247. In my judgment, therefore, the highest that the Appellants can fairly put their case is that section 4/419A is ambiguous as to whether it is intended to catch "financial assistance", "making inquiries" or "introducing one person to another" in relation to a making of a claim even where that activity is unconnected with what one might naturally describe as managing claims. If there is that ambiguity, one must then address whether the incorporation of the term in the later legislation casts any light on whether it was really ever intended to be that wide. This principle is included in *Bennion* section 24.19. It is important not to overstate this principle because as Lord Radcliffe said in *Inland Revenue Comrs v Dowdall, O'Mahoney & Co Ltd* [1952] AC 401, 426 cited in *Bennion* "The beliefs or assumptions of those who frame Acts of Parliament cannot make the law". But where the provision in the earlier statute is ambiguous and capable of two meanings, a later statute can assist in resolving that ambiguity if it is clear that it assumes that the earlier provision bore one of two possible meanings.

248. This problem was considered in *R (ZYN) v Walsall Metropolitan Borough Council* [2014] EWHC 1918 (Admin), [2014] PTSR 1356, a case that was raised during the hearing before the court. In that case the difficulty was construing a reference in regulations made in 1987 to the "Court of Protection". The Court of Protection that had existed at the time those regulations were made had been abolished under legislation enacted in 2005 and replaced as from October 2007 with a new Court of Protection. Although transitional provision was made in the 2005 legislation dealing with various matters, there was nothing which stated that references in subsisting legislation to the old Court of Protection were to be treated as referring to the new Court. The question was whether the reference in the 1987 regulations was now

redundant or whether it should be read as referring to the new Court. Leggatt J compared the historical approach to interpreting legislation with the updating, or "always speaking" approach. He preferred the updating approach so that the term should be interpreted as referring to the body in existence at the time when the regulations are being applied: para 51. Leggatt J then went on to consider whether there are circumstances in which later legislation can change the meaning of earlier legislation. This can, of course, be done expressly but:

> "55 Even without explicitly requiring the courts to give a term in existing legislation a particular meaning, or to apply a specified rule when interpreting the term, Parliament may act in a way which treats the term as having a particular meaning and signals its approval of that meaning. A line of cases illustrates that this is a matter to which a court may properly have regard to resolve an ambiguity in the statutory language."

249. Having considered a number of authorities on the point, Leggatt J concluded:

> "59 This approach seems to me to respect the constitutional principle of parliamentary sovereignty. Bennion, at p 801, quotes a statement of Thomas Hobbes in *Leviathan* (1651), ch 26 that 'the legislator is not he, by whose authority the laws were first made, but by whose authority they now continue to be laws'. If Parliament has proceeded on the basis that an existing law has a particular meaning at a time when, if Parliament had understood the law to have a different meaning, it is reasonable to infer that it would have acted differently, that may properly be treated as an implied directive as to how a previously ambiguous law should be interpreted."

250. The term "Court of Protection" was capable of bearing either of two meanings. It was inconceivable that Parliament would have failed to update the 1987 regulations if they had thought that they referred solely to the body which had ceased to exist.

251. Leggatt J also addressed a point that underlies much of the debate in the present appeal, namely that Parliament simply overlooked or misunderstood the effect of the combination of the earlier provision and the abolition of the Court of Protection. That was not a permissible conclusion:

> "65 That suggestion might have force if ascertaining the intention of Parliament involved a sociological inquiry into what was actually in the minds of individual legislators. However, that would be to mistake the nature of the interpreter's task. When courts identify the intention of Parliament, they do so assuming Parliament to be a rational and informed body pursuing the identifiable purposes of the legislation it enacts in a coherent and principled manner. That assumption shows appropriate respect for Parliament, enables Parliament most effectively to achieve its purposes and promotes the integrity of the law. In essence, the courts interpret the language of a statute or statutory instrument as having the meaning which best explains why a rational and informed legislature would have acted as Parliament has. Attributing to Parliament an error or oversight is therefore an interpretation to be adopted only as a last resort."

252. I respectfully agree with that analysis. One of the cases to which Leggatt J referred was *Cape Brandy Syndicate v Inland Revenue Comrs* [1921] 2 KB 403. That concerned legislation taxing excess profits introduced by the Finance Act (No 2) 1915 during the First World War and raised the issue whether a business that was started after the War could be caught. The problem was that the Finance Act (No 2) 1915, when specifying the comparison to be made in order to decide whether profits were "excessive", appeared to contemplate that the comparison needed to be with profits earned in pre-war accounting periods. The Finance Act 1916 extended the operation of the taxing provision in the 1915 Act to later accounting periods but did not itself impose a new taxing provision. Lord Sterndale MR concluded that the framers of the Finance Act 1916 "were of the opinion" that the 1915 Act did catch businesses which started after the War commenced. He said: (p 414)

> "I think it is clearly established in *Attorney General v Clarkson* [1900] 1 QB 156 that subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier. … I think those are two possible constructions. It is perfectly obvious that the Act of 1916 and the Act of 1920 both assume that the Act of 1915

> was so framed as to include post-war businesses, and therefore it seems to me to assume and really to direct that the second construction, which does not exclude post-war businesses, is the right construction of Part II of the fourth schedule to the Act of 1915."

253. The ambiguity, if it exists, in section 4/419A can in my judgment be resolved in this way. Everything in the scheme of Part II of CLSA 1990 as amended over the years, in the pre-legislative materials, the 2010 and 2013 DBA Regulations and in the case law which Parliament is assumed to know shows that Parliament did not intend by enacting section 58AA suddenly to render unenforceable damages-based litigation funding agreements. Parliament must have read section 4/419A as having the second meaning I have suggested and so as not covering the litigation funding agreements at issue in these proceedings. There is no need, therefore, to frustrate the will of Parliament in that regard, under the banner (to adopt Lord Bingham's phrase) of loyalty to the will of Parliament.

254. I therefore conclude that the Divisional Court was right to agree with the reasoning of the CAT that the giving of financial assistance is only included in the term claims management services if it is given by someone who is providing claims management services within the ordinary meaning of that term.

255. I would therefore dismiss the appeal.