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Insight

Third-Party Funding in England & Wales: PACCAR to be reversed but in an uncertain direction

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On 4 March 2024, the UK government announced that it would introduce legislation to reverse the UK Supreme Court's *PACCAR* judgment of 26 July 2023. As we explained in a previous post, that judgment held that litigation funding agreements ("LFAs") could constitute "damages-based agreements", meaning that many existing agreements are unenforceable unless they comply with certain formal requirements.

Legislation is already making its way through Parliament to permit "damages-based agreements" for opt-out collective proceedings in the Competition Appeal Tribunal. However, the latest announcement signals the government's intention to extend this approach to all forms of legal proceedings in England and Wales, by removing LFAs from the "damages-based agreements" category entirely.

The government's announcement was quickly welcomed by the litigation funding industry. Gary Barnett, executive director for ILFA (the International Legal Finance Association), is quoted in the Law Society Gazette as follows:

"We're pleased to see the government grasp the importance and urgency of this issue with a commitment to introducing a dedicated bill.

We hope ministers continue to push the bill through at pace to resolve the uncertainty created by the *PACCAR* decision. We are fully aligned with the government on the importance of legal finance to the UK legal sector, business and citizens."

Unpacking the government's announcement: what exactly are the plans?

Although a reprieve from the consequences of the judgment in *PACCAR* would certainly offer litigation funders more freedom to structure LFAs as they wish, it remains to be seen whether the government's plans will indeed "resolve" uncertainty for funders and funded litigants.

A Ministry of Justice press release explained that the government's intention is to "restore the position that existed before the Supreme Court's ruling last year, which made many litigation funding agreements unenforceable."

This leaves some room for doubt as to what exactly the government plans to achieve. Technically, there is no position to "restore" as such. The Supreme Court did not "make" LFAs unenforceable, rather it interpreted *existing legislation* and explained that certain LFAs were, and had always been, unenforceable. Specifically, it found litigation funding fell within the definition of "claims management services" under section 419A of the Financial Services and Markets Act 2000 ("**FSMA**"), as that term is used in section 58AA of the Courts and Legal Services Act 1990 ("**CLSA**") governing "damages-based agreements". In other words, the Supreme Court judgment only confirmed what was already the case as a matter of law.

Nevertheless, it appears that the government's intention is to enact what most in the industry assumed (albeit incorrectly, in the Supreme Court's view) the legal position to be before *PACCAR*: that litigation funding does not fall within the scope of the CLSA at all. To achieve this aim, the current regulatory framework will need to be amended, and the government has indicated that it intends to enact new legislation to do so.

A straightforward legislative mechanism would be to add a caveat to section 58AA(7) of the CLSA to clarify that litigation funding services are not "claims management services" for the purposes of that Act. However, this solution alone would only change the legal position prospectively. It might not salvage the LFAs that were entered into under the CLSA as it currently stands, meaning significant uncertainty might remain over such agreements. For example, recipients of funding under pre-*PACCAR* LFAs might still seek to challenge the funder's entitlement to a share of their damages, on the grounds that the LFA was unenforceable when it was entered into and performed.

If the government intends to resolve all uncertainty over existing LFAs, it would need to make the new legislation retroactive. This would likely be a much more complicated legislative task, especially since disputes have already arisen between funded parties and litigation funders over the unenforceability of those LFAs.

Will the post-*PACCAR* world offer more certainty?

As far as future LFAs are concerned, many will assume that reversing *PACCAR* will return the litigation funding market in England and Wales to a state of certainty.

There is certainly some cause for optimism for funders. Without the potential trap of being deemed unenforceable "damages-based agreements", litigation funders will be liberated to structure LFAs in a way that best suits them and the funded party in the circumstances. LFAs could be structured so as to provide the funder a percentage of the amount recovered by the claimant, which, the Supreme Court held in *PACCAR*, would likely afoul of the CLSA unless the LFA meets certain requirements applicable to "damages-based agreements".

However, there is a caveat. Even after lifting statutory restrictions on the enforceability of LFAs, the English common law doctrine of "champerty" will remain. According to that doctrine, agreements that "sully the purity of justice" [1] can be void for public policy reasons (for example where the funder takes too much control over the conduct of the litigation; or where the funder's share of the proceeds is disproportionately high).[2] Although in recent decades the courts have significantly narrowed the scope of the champerty doctrine, its boundaries remain imprecise.

Arguably, if Parliament intends to reverse *PACCAR*, public policy should not subvert that intention by determining that those LFAs affected are nevertheless champertous and unlawful. Indeed, in *PACCAR* itself, the Supreme Court noted that previous legislation had affected the state of public policy in the area of litigation funding.[3] One option would be for the government to put the matter beyond any doubt by including in the new legislation a clear statement that LFAs are not champertous or contrary to public policy. That would follow the model of section 5B of the Singapore Civil Law Act, enacted in 2017 as part of Singapore's liberalisation of third-party funding.

Regulation on the horizon

The government's announcement also indicated that it is "considering options" for a broader review of the third-party funding sector, including whether increased regulation is required.

The Justice Secretary, Alex Chalk MP, writing in the Financial Times on 3 March 2024, stated a “need to strike the right balance between access to justice and fairness for claimants.” He referred to the LFA enabling sub-postmaster Alan Bates successfully to take on the Post Office over the recent Horizon scandal, but leaving the claimants themselves with “a fraction of the total award”.

This rhetoric suggests that the present government could decide to impose limits on third-party funders’ recovery under LFAs in a future regulatory regime. Although, with a general election due to take place at some point in 2024, it remains to be seen whether Mr Chalk’s government will remain in place long enough to do so. We are not aware of Labour’s position on this issue.

Regardless, the prospect of more regulation is unlikely to be welcome news among litigation funders. For all the talk of “restoring” the pre-*PACCAR* world, simply turning back the clock may not be an option.

References

[1] *R (Factortame Ltd) v Transport Secretary (No 8) (CA)* [2002] EWCA Civ 932; [2003] QB 381, 413.

[2] *R (Factortame Ltd) v Transport Secretary (No 8) (CA)* [2002] EWCA Civ 932; [2003] QB 381, 413-414.

[3] See *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 at [54] (Lord Sales), [116] (Lady Rose, dissenting).