THIRD-PARTY LITIGATION FUNDING IN ENGLAND AND WALES POST-PACCAR: WHERE ARE WE NOW?

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Litigation and Dispute Resolution Alert

In our earlier alert on third-party funding (TPF) and the UK Supreme Court's decision in *PACCAR*, we discussed the initial industry reaction, subsequent litigation, and legislative reform proposals (at the time, through the remit of the Digital Markets, Competition and Consumers Bill (DMCC Bill) - introduced by the former, Conservative UK government under then Prime Minister, Rishi Sunak).

This alert provides an update on where we are now, following the publication of the Civil Justice Council (CJC) interim report and consultation on litigation funding, which confirmed that the current UK government will not be re-introducing the Litigation Funding Agreements (Enforceability) Bill (LFA Bill) any time soon—instead, looking at legislative reform in the round after the CJC's final report is published in summer.

We therefore discuss the early indications around the CJC's direction of travel and recent industry reaction as we await these all-important clarifications.

RECAP

In July 2023 in *PACCAR*, the UK Supreme Court held that litigation funding agreements (LFAs) that entitle funders to payments based on the amount of damages recovered would be classified as damages-based agreements (DBAs). In turn, they would have to comply with the Damages-Based Agreements Regulations 2013 (DBA regime) or risk being deemed unenforceable. The decision brought the enforceability of many pre-existing LFAs into question and created large scale uncertainty within the TPF market. This was a particular problem for opt-out collective proceedings in the Competition and Appeals Tribunal (CAT), where DBAs are strictly prohibited (s.47C(8), Competition Act 1998).

Originally, there were proposals to restore the pre-*PACCAR* position through a last minute amendment to the DMCC Bill. By March 2024, this was a bill of its own—the LFA Bill. The LFA Bill was to be an integral part of the last government's commitment to restoring the pre-*PACCAR* status quo, passing second reading in the House of Lords on 15 April 2024. However, it did not survive the pre-election wash up ahead of the dissolution of parliament on 30 May 2024, remaining indefinitely postponed under the new administration.

CJC REVIEW OF THE TPF MARKET IN ENGLAND AND WALES

In spring 2024, prompted by the *PACCAR* decision, the then Lord Chancellor called upon the CJC to conduct a wider review of the TPF market. At this time, the *PACCAR* decision was to be reversed via the LFA Bill, which, as above, later fell through on change of governments.

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On 31 October 2024, the CJC published its much-anticipated interim report and consultation on litigation funding, as the first phase of the CJC review process. Being interim in nature, it seeks to identify the concerns within the current system of TPF in England and Wales and set up the key issues that the CJC is consulting on. Whilst only interim in nature, it does give an indication of the CJC's (and, subsequently, the government's) direction of travel.

Broadly, the interim report covers the development of TPF in England and Wales and the current self-regulatory model, approaches to the regulation of TPF across different jurisdictions, the relationship between costs and funding, and existing funding options.

There are 39 consultation questions that the CJC seeks input on, located at Appendix A.

In sum, these questions cover:

- The benefits of TPF (namely, access to justice and equality of arms between parties to litigation).
- The extent to which the current model of self-regulation works and whether there should be one homogenous regulatory framework applied to (i) all types of litigation and (ii) English-seated arbitration.
- Whether and, if so, to what extent, a funder's return on any third-party funding agreement should be subject to a cap.
- How TPF should best be deployed relative to other sources of funding (including legal expenses insurance and crowd funding).
- The role of the court in controlling the conduct of litigation support by TPF or similar funding arrangements.
- What provision (including provision for professional legal services regulation), if any, needs to be made for the protection of claimants whose litigation is funded by TPF.
- The extent to which the availability of TPF encourages specific forms of litigation.

Responses to the consultation are sought by 11:59 pm on Friday 31 January. The CJC will then issue a final report in summer with outcomes and recommendations.

DIRECTION OF TRAVEL

Whilst the CJC report is only interim in nature, it does give us an indication of the CJC's early thinking and the potential direction of travel. Some of these key themes are discussed below.

Self-Regulation

A large section of the CJC interim report focuses on the self-regulation of TPF in England and Wales through voluntary subscription to the 'Code of Conduct for Litigation Funders' published by the Association of Litigation Funders (ALF Code) and how this compares with other jurisdictions. The report notes that the current model of self-regulation was introduced in 2011, at a time when the TPF market was still beginning to develop, and notes that the TPF market has since expanded very significantly, especially in respect of funding collective proceedings and group litigation. On take up of the ALF Code, the report suggests that whilst an estimated 44 funders operate in England and Wales, only 16 are members of the ALF and thereby party to the ALF Code. Of these 16

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members, eight are also members of the International Litigation Funders Association. Many commentators suggest that the interim report's discussion of the current model of self-regulation may be indicative of the introduction of new legislation to regulate the TPF industry in the future.

PACCAR

The interim report doesn't address the resolution of *PACCAR* specifically, which has sparked some criticism. Some commentators have referred to the fact that when the CJC's original Terms of Reference were set in spring 2024, *PACCAR* was to be resolved via legislation which has since fallen away. The interim report offers no indication of whether *PACCAR* would be addressed in light of this.

The co-chair of the CJC review, Dr John Sorabji, has since suggested that whilst consideration of a litigation funding bill falls outside of the Terms of Reference, the CJC's wider review of TPF industry includes consideration of the DBA regime, for which *PACCAR* will inevitably be considered.

Several challenges to LFAs are currently stayed in the Court of Appeal as the TPF market awaits a legislative solution to *PACCAR*. Many funders have since adopted some combination of the 'multiples' approach linked to sums invested, internal rates of return and compound interest rates, and creatively drafted clauses that seek to pre-empt a legislative resolution to *PACCAR*. For now, the TPF market will have to eagerly await the final report and any legislative solution that follows.

Funder Involvement in the Settlement of Disputes

The interim report notes that the nature of TPF means, on the one hand, that the 'risk exists that funders will control the litigation' and that 'TPF discourages and undermines just settlement'. On the other hand, the report explains how the ALF Code makes provision for a dispute resolution procedure in these instances. Here, under the ALF Code the funder and funded are required to instruct a Kings Counsel (either jointly instructed, or as nominated by the Chairman of the Bar Council) to provide a binding opinion on the settlement proposal.

The debate around funder involvement in settlement has also been accelerated by recent headlines around the long running collective action in *Merricks v Mastercard*, in which the class representative, Walter Merricks, is said to have accepted a £200m settlement offer, much below the original claim value. The funder, Innsworth, has since publicly criticised the decision and written to the CAT ahead of the tribunal reviewing the terms of the settlement early this year.

There is currently no clarity as to whether—and if so to what extent—a funder's interests will be considered a relevant factor in deciding whether a settlement is just and reasonable. Indeed, this may be the first case to decide the point.

CONCLUSION

The interim report has therefore provided much food for thought around the future direction of travel. Whilst only indicative at this stage, it looks as though we may be moving away from the model of self-regulation that has existed since 2011, that *PACCAR* is likely to be addressed in the context of a wider discussion of the existing DBA regime, and that Courts will soon be tasked with considering funder submissions around settlement terms.

Responses to the CJC consultation are open until 31 January. Consultees do not need to answer all questions if only some are of interest or relevance. The full list of consultation questions is available here.

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K&L Gates regularly assists clients in obtaining litigation funding and is presently representing clients pursuing claims before courts and arbitral tribunals with the support of litigation funding.

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