

Time for Parliament to act? The PACCAR decision of the UK Supreme Court

R (on the application of PACCAR Inc and Others) (Appellants) v Competition Appeal Tribunal and Others (Respondents) [2023] UKSC 28

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Introduction

Litigation funding has become an essential ingredient in collective actions for breaches of competition law brought in the Competition Appeal Tribunal (CAT). In the recent *PACCAR* proceedings, the Supreme Court was asked to rule on the nature and enforceability of litigation funding agreements (LFAs) between third-party litigation funders and group representatives where the success fee is determined as a percentage of the damages award.¹ The Court held with a 4:1 majority (Lady Rose dissenting)² that the LFAs in question are damages-based fee agreements (DBAs) and, as such, unenforceable. This judgment has wide-ranging consequences, as the CAT is unlikely to allow collective actions to proceed if the funding agreements cannot be relied on. The decision has caused uncertainty and upheaval in the funding market as a considerable number of funding agreements in collective proceedings contain DBAs. It also triggered legal challenges in collective proceedings where funders are seeking to amend the funding agreements to deal with the Supreme Court ruling.³ The fall-out from the decision suggests that funding rules for collective actions may need more legislative attention – litigation funding was given some thought during the drafting of the opt-out action regime, but the legal framework for litigation funding remains fragmented and open to interpretation.⁴

1. Background

The challenge as to the validity of funding agreements arose in collective action proceedings brought against members of the Truck cartel.⁵ Two competing applications for a collective proceedings order

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²Lady Rose is a former chairman of the CAT.

³*Alex Neill v Sony Interactive Entertainment* [2024] CAT 1; *Dr Rachael Kent v Apple* [2024] CAT 5.

⁴S Peyer and A Render ‘Access to justice in the UK’s opt-out collective action system: is it effective?’ (2023) 42(2) Civil Justice Quarterly 128.

⁵European Commission decision of 19 July 2016, Case AT.39824 – Trucks.

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(CPO) were filed: the Road Haulage Association (RHA) sought an opt-in CPO and UK Truck Claims Ltd (UKTC) applied for an opt-out CPO and, alternatively, for an opt-in CPO. RHA and UKTC represent purchasers of lorries which were allegedly overcharged by members of the Truck cartel. The CAT granted a CPO to the RHA and rejected UKTC's application.⁶ Challenged on the enforceability of the funding agreement between representative and external funder, the CAT and the Divisional Court held that the funding agreements in question were not DBAs.⁷ This classification rendered the funding agreements enforceable and, in turn, justified the making of a CPO if all other requirements for a CPO were met.⁸

The Consumer Rights Act 2015 introduced collective proceedings for breaches of competition law in the CAT.⁹ Collective proceedings can be brought as either opt-in actions, with all group members explicitly joining the claim, or as opt-out actions, where group membership is defined by certain characteristics and individual group members have the right to opt out of the action.¹⁰ To proceed with any collective proceedings the group representative requires a CPO from the CAT before moving on to disclosure and trial.¹¹ As part of its assessment of a CPO application, the CAT reviews the class representative's plan regarding costs and fee arrangements and whether the representative will be able to pay the defendants' recoverable costs if ordered to do so.¹² This scrutiny has created a situation where litigation funding, although not a legal requirement, is a de facto requisite for a successful CPO application. Opt-out actions are expensive and litigation budgets are usually in seven- or eight-digit figures.¹³ This creates a situation where considerable funds are required to satisfy these cost-related conditions for a CPO but none of the parties directly involved is likely to provide those resources. The specific demand for funding is met by external litigation funders, usually combined with no-win, no-fee agreements and after-the-event insurance.

The underpinning economics are simple: funders agree to support litigation in exchange for a success fee. This arrangement is sometimes referred to as a non-recourse loan, as the funder lends resources to the litigant but bears the risk that the claim is lost and neither interests nor loan can be recouped. If successful, however, the funder is due some interest on the loan, also referred to as a success fee. In principle, there are two ways to charge a success fee. The first option is to calculate it as a percentage of the award. This is often referred to as a DBA. The alternative is a conditional fee agreement (CFA), where the success fee is set as a multiple of the usual fee that would be charged for the services provided.¹⁴

Characterising a funding agreement as DBA has an impact on its enforceability and, therefore, determines whether the collective action is considered properly funded which, in turn, is a crucial requirement for a CPO. Under section 58AA(2) of the Courts and Legal Services Act 1990 (CLSA 1990), a DBA must comply with the conditions set out in section 58AA(4). The parties in *PACCAR* conceded that those conditions, which are further specified in the Damages Based Agreement Regulations 2013, were not met.¹⁵ Additionally, in opt-out actions, such as UKTC's claim, a DBA is unenforceable under section 47C(8) of the Competition Act 1998. Consequently, if the LFAs in *PACCAR* were characterised as DBAs, they would not be enforceable, which meant

⁶[2022] CAT 25.

⁷[2019] CAT 26; *Paccar Inc & Others v Road Haulage Association Ltd & Others* [2021] EWCA Civ 299.

⁸[2021] EWCA Civ 299.

⁹Consumer Rights Act 2015, Sch 8 introduced the current collective action regime in the Competition Act 1998, ss 47A–47D.

¹⁰Competition Appeal Tribunals Rules 2015 (CAT Rules 2015), SI 2015/1648, r 75 ff.

¹¹Competition Act 1998, s 47B(4).

¹²*Ibid*, s 47B(7)(a) and CAT Rules 2015, r 78(2)(d) and (3)(c)(i).

¹³*eg Dr Rachael Kent v Apple* [2022] CAT 28 at para [35]; *Justin Gutmann v First MTR South Western Trains Ltd* [2021] CAT 31 at para [48]; *Road Haulage Association Ltd v Man SE* [2022] CAT 25 at para [31].

¹⁴In a no-win, no-fee agreement, fees are normally conditional upon success.

¹⁵SI 2013/609.

that the collective actions were not properly funded. In this case, the CAT would have to reject the CPO applications even if all other CPO requirements were met.¹⁶

2. The issue

Whether an LFA is considered a DBA hinges on the construction of section 58AA(3)(a) of the CLSA 1990 as referred to by section 47C(9)(c) of the Competition Act 1998. Section 58AA(3)(a) defines a damages-based agreement as ‘an agreement ... providing advocacy services, litigation services or *claims management services*’¹⁷ where the amount of payment for services provided is determined by reference to the amount of the financial benefit obtained. Funders do not normally provide advocacy or litigation services, but the appellants argued that litigation funding falls under the definition of ‘claims management services’. The term ‘claims management services’ is not defined in the CLSA 1990; instead section 58AA(7) states that claims management services has the same meaning as in section 419A of the Financial Services and Markets Act 2000. Section 419A(1)(2) defines claims management services as ‘advice or *other services* in relation to the making of a claim’.¹⁸ ‘Other services’ are meant to include ‘*financial services* or assistance’, according to section 419(2)(a).¹⁹ The parties agreed that the term was copied from section 4(3) of the Compensation Act 2006, which first introduced the term claims management services and was later replaced by section 419A; in other words, the discussion as to the construction of statute and Parliament’s intent concerning section 4(3) of the Compensation Act 2006 would be relevant in this context.

3. The UKSC decision

Lord Sales, with the majority of the Court, held that the funding agreements in question constituted a financial service which, in turn, was encompassed in claims management services in section 58AA(2). Consequently, the funding arrangements were considered DBAs and, in their current form, unenforceable either because they did not comply with the Damages-Based Agreement Regulations 2013²⁰ or, in the case of opt-out actions, fell under section 47C(8) of the Competition Act 1998. Lady Rose dissented and argued for a wider, more purposive and context-based interpretation to solve the ambiguity in sections 4/419A. She stressed the importance of funding for access to justice.

The Court reiterated the principles applicable in the construction of ambiguous statutory provisions the main purpose of which is to give the statute the effect Parliament intended it to have, considering, for instance, contemporaneous explanatory notes to explore that purpose.²¹ Statutory interpretation meets its limitation where the construction by the courts would lead to an absurd result.²² As far the wording itself was concerned, Lord Sales opted for a literal reading of the relevant statutes. The provision of financial services or assistance was considered a fitting description of the services provided by the litigation funders in this case.²³ Lord Sales acknowledged that by using this approach any bank providing a loan that is used to pursue a claim could fall under the definition of claims management services rendering the loan agreement a DBA. However, in his view, the absurdity limit of statutory construction would prevent such an outcome.

¹⁶Alternatively, parties may be given the opportunity to amend their funding agreements.

¹⁷Emphasis added.

¹⁸Emphasis added.

¹⁹Emphasis added.

²⁰SI 2013/609.

²¹PACCAR, above n 1, para [41]; *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16; *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; *Bloomsbury International Ltd v Department for the Environment, Food and Rural Affairs* [2011] UKSC 25.

²²PACCAR, above n 1, para [43].

²³*Ibid*, para [50].

The context of section 4 was crucial for the majority's decision. The relevant rules in the Compensation Act 2006 were designed at a time when financial support for litigation had been expanded, for example, by permitting conditional fee agreements and reducing the scope of champerty.²⁴ The majority's argument drew on the Explanatory Note to the Compensation Act 2006 and that it provided the statutory basis for the Secretary of State to regulate funding in the appropriate manner.²⁵ According to the Explanatory Note, the purpose of section 4 was to prohibit the provision of regulated claims management services unless they are authorised.²⁶ The Secretary of State was given the power to regulate claims management services and these powers were broadly framed. The list of activities that fall under the umbrella of claims management services is non-exhaustive and the concept of claims management services is 'wide and not tied to any concept of active management of a claim'.²⁷ The Explanatory Note mentions 'assisting with the purchase of insurance or loans' as falling under claims management services.²⁸ This was taken as a hint that litigation funding was to be categorised as other financial services and, consequently, encompassed in claims management services. Lord Sales interpreted the carve-out in section 4(3)(a) of the Compensation Act 2006, whereby witnesses do not provide claims management services, as an indication that those services which do not benefit from a carve-out – including litigation funding agreements – should fall under the definition of claims management services.²⁹ The fact that the list in section 4(3)(a) is not exhaustive was read as giving the Secretary of State the power to include litigation funding in regulated services. Interpreting claims management services more narrowly and excluding litigation funding from it would have undermined Parliament's intention of giving the Secretary of State extensive power to regulate litigation funding.

Lady Rose,³⁰ and Henderson LJ in the Divisional Court (with Singh LJ and Carr LJ agreeing), interpreted the context differently. Lady Rose stressed the changing approach to litigation funding,³¹ and she highlighted that purposive construction does not point clearly in favour of or against a particular interpretation.³² She disagreed with the majority on the presumption against absurdity point, reasoning that a bank loan to support litigation may be considered claims management services under the majority's construction.³³ The wording of the Damages-Based Agreement Regulations 2010³⁴ and 2013 were further evidence that litigation funding was not included in claims management services, as litigation funders cannot realistically comply with those Regulations, which were meant to address lawyers.³⁵

Henderson LJ alluded to the fact that 'claims intermediaries' were the supposed target of section 4:³⁶

... [T]he 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

²⁴Courts and Legal Services Act 1990, s 58; *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions* (No 8) [2003] QB 381; *Arkin v Borchard Lines Ltd* (Nos 2 and 3) [2005] 1 WLR 3055.

²⁵PACCAR, above n 1, para [60].

²⁶Explanatory Note to the Compensation Act 2006, para 33.

²⁷PACCAR, above n 1, para [63].

²⁸Explanatory Note, above n 26, para [35].

²⁹PACCAR, above n 1, para [64].

³⁰PACCAR, above n 1, para [101].

³¹*Ibid*, para [108] ff.

³²*Ibid*, para [201].

³³*Ibid*, para [202] ff.

³⁴SI 2010/1206.

³⁵PACCAR, above n 1, para [225] ff.

³⁶PACCAR, above n 7, para [78].

personal injuries, employment, housing, and financial products or services, in all of which consumer protection is likely to be much needed

Henderson LJ drew those conclusions based on the wording and context of the so-called Scope Order, specifying regulated claims management services.³⁷ According to the explanatory note accompanying the Scope Order, under the ostensive title ‘policy background’, the meaning of claims management services becomes more obvious: ‘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’.³⁸ In other words, sections 4 and 419A were supposed to include financial services that are provided in addition to other claims-related services, but not sole litigation funding as provided to UKTC and RHA. Their funders have no other involvement in the claims, eg as intermediaries or by acting directly for their clients.

Lord Sales rejected this reasoning by saying that section 4 was supposed to ‘regulate activities, not persons of a particular description’.³⁹ The concept of claims intermediaries was not used in the Act and not clearly defined, whereas ‘there was no reason to think that the Secretary of State would seek to regulate services which did not jeopardise consumers’ interests’.⁴⁰ Lord Sales speculated that there might be a scenario in which litigation funding may become unfair and harm consumer interests, justifying its inclusion in regulated services.⁴¹ While this is theoretically possible, he ignored the strong control exercised by the CAT in collective proceedings which includes the approval of fees.⁴² Lord Sales also argued that one area of concern requiring regulation might be the making of (litigation) loans – as it is mentioned in the memorandum.⁴³ However, it appears that this argument is taken out of context – the policy background made a clear reference to intermediaries but did not include the sole activity of providing a (litigation) loan.

For its decision to not categorise the funding agreement as DBA, the Divisional Court also drew on the existence of section 58B of the CLSA 1990. This provision is not in force but potentially provides a template for regulating litigation funding agreements. The existence of section 58B was read as Parliament’s decision to make litigation funding subject to a comprehensive regulatory scheme if the need arises.⁴⁴ In the Divisional Court’s construction, Parliament did not intend to regulate funding through the backdoor of claims management services but had an explicit regulatory scheme in mind. The Supreme Court disagreed with that interpretation. Section 58B does not operate in the same way as section 4, and section 4 was designed to address third-party litigation funding that had developed considerably since section 58B was drafted.⁴⁵

The Supreme Court also rejected the Divisional Court’s decision that the ‘definition should itself be coloured by the reference to “claims management” in the phrase being defined’.⁴⁶ Whereas the Divisional Court used the ordinary meaning of claims management to colour its definition and, thus, exclude litigation funding from its meaning, Lord Sales, relying on the wording in section 4 (2) and 4(3), adopted a literal reading of the statute to include litigation funding.⁴⁷ In her dissent, Lady Rose held that the ordinary meaning of claims management services advocates in favour of excluding litigation funding when only funding, but no other service, is provided.

³⁷ Compensation (Regulated Claims Management Services) Order 2006, SI 2006/3319.

³⁸ Explanatory Memorandum to Compensation (Regulated Claims Management Services) Order 2006, SI 2006/3319, para 4.1.

³⁹ PACCAR, above n 1, para [68].

⁴⁰ Ibid, para [69].

⁴¹ Ibid, para [76].

⁴² eg CAT Rules 2015, rr 93(4)(5) and 94(9)(a).

⁴³ PACCAR, above n 1, para [75].

⁴⁴ PACCAR, above n 7, para [88].

⁴⁵ PACCAR, above n 1, para [71].

⁴⁶ Ibid, para [39].

⁴⁷ Ibid, para [70].

4. Observations

The immediate consequences of the *PACCAR* decision have already begun to materialise. Funders are seeking to amend funding agreements to make them enforceable in collective proceedings but also in litigation more generally. While most parties have been practical in their attempts to place litigation on a sound financial footing, some defendants in the CAT have opposed changes to the respective funding agreements, likely leading to wasteful satellite litigation.⁴⁸ Litigation funders will align themselves with the current situation by amending funding agreements and continuing to innovate; however, this comes at an unnecessary cost and not without further delays.

The Court's conclusion that litigation funding is considered claims management services is based on an overly narrow interpretation of section 4 and does bring it into conflict with the natural use of language. More importantly, it does not seem to give effect to Parliament's intended purpose. In response to the *PACCAR* decision, Parliament proposed to remove funding agreements from the definition of DBAs.⁴⁹ If this proposed change is implemented, funders would be able to charge success fees that are based on a percentage of the damages award. One cannot fail to notice the irony that by trying to give weight to a narrow interpretation of Parliament's supposed intentions, the Court seems to have achieved the opposite and prompted Parliament to legislate and reverse the Court's decision.

The UKSC has temporarily resolved one dispute that arose from unclear rules relating to litigation funding, but more disputes will likely arise unless Parliament creates a clearer legal framework. What the *PACCAR* decision has made clear is that funding is regulated by a patchwork of primary and secondary legislation with cross-referencing and definitions that are open to interpretation. This approach no longer works as it causes legal uncertainty and is likely to lead to costly litigation in the CAT and elsewhere. Regulating funding in piecemeal fashion and around existing constraints, such as the poorly justified prohibition of DBAs in opt-out collective actions, is no longer a suitable approach given the size of the industry, its importance for access to justice and the financial implications of judicial decision-making on ongoing disputes. Section 58B of the CLSA 1990 provides a template and meaningful starting point for a discussion about a legal framework for litigation funding.⁵⁰ The rising number of collective proceedings in the UK shows that financial support for litigation is key to ensuring access to justice.

⁴⁸ *Alex Neill v Sony Interactive Entertainment* [2024] CAT 1; *Dr Rachael Kent v Apple* [2024] CAT 5.

⁴⁹ Clause 126 of the Digital Markets, Competition and Consumers Bill removes the reference to 'claims management services' from the definition in the Competition Act 1998, s 47C(9).

⁵⁰ The information in this comment was correct at the time of writing but legislative proposals are currently under consideration.