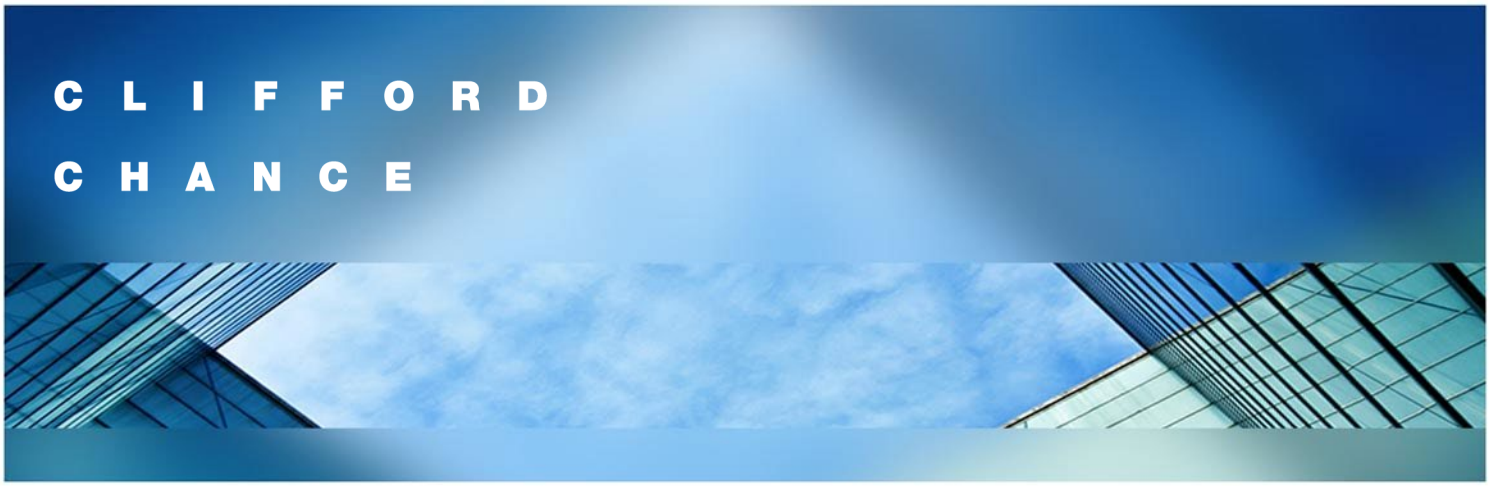

THE CHANGING LANDSCAPE OF LITIGATION FUNDING

The Supreme Court has handed down an important judgment relating to litigation funding in the context of antitrust collective actions, but which has much wider implications for funding of claims in the English Courts.

In *R (on the application of PACCAR Inc)* v *Compeition Appeal Tribunal* [2023] UKSC 28, the Supreme Court ruled that litigation funding agreements in which the funder's return is a share of the damages ultimately awarded to the Claimant are "damages-based agreements" and are therefore not enforceable if they do not meet the requirements set out in the applicable regulations. Most do not meet those requirements.

Background

The respondents in the appeal (UKTC and RHA) sought collective proceedings orders from the Competition Appeal Tribunal to bring collective proceedings on behalf of a class of purchasers of trucks against DAF and other truck manufacturers. The proceedings were follow-on actions, which relied on an infringement decision of the European Commission finding that there was an unlawful arrangement between DAF and other manufacturers, and alleged that the prices paid for trucks were inflated as a result. RHA's application was for 'opt-in' proceedings (whereby persons would have to opt in to be represented), while UKTC's application was for 'opt-out' proceedings (whereby UKTC would represent a specified class of persons, except those who opt out).

In order to obtain a CPO, the respondents had to demonstrate (among a number of other matters) that they had adequate funding arrangements in place to meet their own costs and any adverse costs order made against them. The respondents each relied on litigation funding agreements (LFAs), whereby a third-party finances all or part of the legal costs in return for a percentage of any damages recovered, to meet these requirements. The question in this appeal was whether LFAs constitute damages-based agreements (DBAs) and therefore were void and unenforceable because they did not comply with s. 58AA of the Courts and Legal Services Act 1990 (CLSA 1990).

At first instance, at a trial of a preliminary issue, the CAT held that LFAs did not involve the provision of "claims management services", and therefore were not void and unenforceable. The second instance decision proceeded as a judicial review before a Divisional Court, which dismissed the judicial review,

Key issues

- Following the Supreme Court judgment, all LFAs currently in place in which the funders would obtain a return that is a share of the damages ultimately awarded to the Claimant are likely to be unenforceable.
- Funders and funded claimants with this sort of agreement in place will need to consider very carefully how to proceed, and whether LFAs already in place can be restructured so as not to fall foul of the Damages-Based Agreements Regulations 2013.
- Those bringing opt-out claims in the CAT will need to consider whether they would still be authorised to bring those claims. They may need to obtain new funding and, in essence, go back to the drawing board for authorisation.
- Going forward, given the appetite from funders to fund cases, and from claimants for financing, the parties will need to devise alternative arrangements so that LFAs do not fall within the scope of this judgment (or, if they do, that they meet the requirements of the Damages-Based Agreements Regulations 2013).

and the Supreme Court then heard the appeal under the 'leap-frog' procedure from the decision of the Divisional Court with an intervention from the Association of Litigation Funders.

The appeal focused on a question of statutory interpretation of the words "claims management services" in the CLSA 1990. The appellants submitted that under the LFAs the funders provide "claims management services" within the meaning of earlier legislation (s. 4 of the Compensation Act 2006 Act, the CA 2006) and section 419 of the Financial Services and Markets Act 2000, FSMA 2000) 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". The respondents submitted that the provision of "financial services or assistance" "in relation to the making of a claim" was to be interpreted as applying in the context of the management of a claim, and under the LFAs in this case the funders had no role in the management of the claims against the appellants. The LFAs were therefore, in the view of the respondents, not DBAs and were unenforceable.

The Judgment

The Supreme Court found that the words "claims management services" in s.4 of the CA 2006, read according to their natural meaning, were capable of covering the LFAs, and there was good reason to think Parliament used wide language deliberately. Part 2 of the Compensation (Regulated Claims Management Services) Order 2006 (which created a broadly framed power for the Secretary of State to regulate in this area) and its Explanatory Memorandum, were a legitimate aid to interpretation of s. 4 CA 2006 and supported a broad reading of the term "claims management services". The Order and Explanatory Memorandum were of assistance because they were introduced contemporaneously with the CA 2006 and part of the same legislative scheme. In contrast, the Supreme Court did not consider, as the respondents' contended, that the DBA Regulations 2013 were of assistance because they were not introduced contemporaneously with the CA 2006 nor subject to review by the same Parliament. The Supreme Court also found that its interpretation of s. 4 CA 2006 as covering LFAs did not produce an absurdity in relation to s. 58B CLSA 1990.

In support of the broad interpretation of "claims management services", the Supreme Court held that the CA 2006 only limited the provision of *regulated* claims management services, and Parliament had clearly intended that the Secretary of State should be able to regulate effectively in future, given the fast developing area of litigation finance. There was no requirement for "claims management services" to involve actual management of a claim.

There was a further important point considered in relation to opt-out collective actions. Section 47C(8) of the Competition Act 1998, amended in 2015, provides that a DBA is unenforceable if it relates to opt-out collective proceedings. UKTC argued that its LFA was not a DBA because its recovery was subject to (a) prior payment to a member of the opt-out class of their full share of damages, and (b) the tribunal had discretion to order that all or part of the costs or expenses incurred by the representative in the proceedings. However, the Supreme Court did not accept this submission. As a matter of law the LFA retains the character of a DBA, so the fact that under the opt-out LFA the funder shares the financial risks associated with the litigation provides no basis to say that it falls outside the statutory definition of a DBA. There is no scope for a DBA in relation to opt-out collective proceedings to be made enforceable by compliance with the conditions in section 58AA.

The Court recognised the public policy considerations surrounding funding generally, noting that it had been widely acknowledged that funding plays a valuable role in furthering access to justice and commenting that the

effectiveness of group litigation may depend on the use of third party funding. However, ultimately the Supreme Court held that even if it could be said that LFAs of the type under consideration at the hearing were desirable in public policy terms, this was not a reason to depart from the conventional approach to statutory interpretation.

WHAT NEXT FOR LITIGATION FUNDING?

In coming to its judgment, the Supreme Court noted that the implications of the appeal were significant, because the court was told by UKTC and RHA that if LFAs of this kind (where funders play no active part in the conduct of the litigation but are remunerated by receiving a share of any compensation recovered) are DBAs, the likely consequence would be that most third-party litigation funding arrangements would be rendered unenforceable.

This judgment strikes a powerful blow against the regime for opt-out antitrust collective actions. These include some of the most high-profile class actions in the UK, often seeking billions of pounds of damages on behalf of millions of consumers, for breaches of competition law. Even where CPOs have already been granted, the question of whether funding arrangements are in place to meet the claimants' own costs and any adverse costs order will have to be revisited – this will pose a real issue for ongoing claims based on an LFA that is no longer valid.

The impact on antitrust collective actions may push claimants that would have previously brought claims in the CAT to seek to expand the scope of representative actions in the English Courts (as the only alternative opt-out regime). However, litigation funding has also been a real driver behind the growth of group litigation in recent years – indeed, many if not all mass actions could not get off the ground without funding, and the economics of these LFAs will now have changed. This Supreme Court decision, together with the uncertainty surrounding representative actions in the English Courts (after cases such as *Lloyd v Google*), may slow the pace of group litigation more generally whilst funders and claimants alike take stock. That said, due to the territorial limit of the Regulations, many international proceedings and arbitrations without an English seat fall outside of the scope of this ruling.

Nevertheless, there is clearly a real appetite among funders to fund cases, both in the CAT and in the English Courts, and while the judgment will have immediate consequences, it is unlikely to stem that appetite in the long-term. Funders will, of course, have to stick to what is legally permissible and therefore now face the prospect of restructuring a number of funding agreements (both for legacy business and new funding opportunities). Due to the variety of funded cases and funding agreements, such amendments could take a number of forms, including seeking to implement assignment of claims, amending existing payment mechanics, seeking a clear delineation between a sum awarded in damages and the payment of the funders, or a mixture of these. In some cases, funders may well choose to embrace the DBA regime, meaning that the total sum a funder could recover at first instance is capped at 50% of damages awarded, and the funder has to pay the Claimant's costs and obtain their return from that amount.

The Supreme Court has, however, made clear that the 'head in the sand' assertion that "litigation funding is a commercial transaction between claimants and funders, not captured by the DBA regime" can no longer be relied upon. Funders and claimants alike will need to give careful consideration as to the appropriate arrangements for both current and future claims.

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