The weakest link

Andrew Hogan examines how litigation funding has become a prime target for defendant attacks

The recent Civil Justice Council Final Report on Litigation Funding, like the Jackson Review of Civil Litigation Costs before it, regards litigation funding as a 'good thing', with the clear potential to enhance access to justice for those who are unable or unwilling to self-fund their litigation costs.

But although litigation funding ostensibly facilitates access to justice, there is now almost a decade of case law which supports the conclusion that the presence of litigation funding can provide a useful weapon for a defendant to a claim to seek to derail proceedings brought against them.

THE *MERRICKS* SAGA

Much of the new law of litigation funding is being cast in the crucible of the Competition Appeal Tribunal. The case of *Merricks v Mastercard* and the numerous judgments in the proceedings have been pored over in the legal and academic press. The latest, possibly last twist in the saga, is the battle over the proceeds of settlement waged between the class representative and the litigation funders, in circumstances where the claim settled for a fraction of its perceived value. But the first judgment repays careful study, as it set a template for what was to follow. That is the judgment reported as *Walter Hugh Merricks v Mastercard Incorporated and others* [2017] CAT 16.

For the benefit of anyone unfamiliar with the case, it started with an application for a collective proceedings order under section 47B of the Competition Act 1998, to enable the continuation of collective proceedings seeking damages against Mastercard for certain charges made in breach of European Union law. The case was said to be brought on an opt out basis for 46.2 million people and worth billions.

> Defendants are prepared to pursue arguments that might be thought to have a slender chance of success because the stakes are so high

Section 47B(4) provides that for such proceedings to continue, the tribunal must make a collective proceedings order. Section 47B(5) provides that there must be a representative whom the tribunal could authorise to act as the representative, and the claim must be eligible to be included in collective proceedings. Section 47B(6) provides claims are eligible for inclusion if they raise the same or similar or related issues of fact and law, and are suitable to be brought in collective proceedings.

These statutory provisions are supplemented in particular by rules 77, 78 and 79 of the Competition Appeal Tribunal Rules 2015 and the Tribunal's Guide to Proceedings 2015. They were also to prove a soft underbelly to the application. The appointment of Mr Merricks was attacked on the basis of the terms of the funding agreement into which he had entered. It was objected to on the basis that the funding agreement would not enable the applicant to continue to fund the litigation or pay Mastercard's costs, since it could be terminated by the funder. Even if it could not be so terminated, adverse costs provision was only £10m and inadequate, and the terms of the funding agreement gave rise to a conflict of interest on the part of the applicant.

These arguments were very carefully considered by the tribunal: it was critical of the 'impenetrable' wording of the funding agreement, and found some traction in the defendant's arguments; indeed indicating that on the terms of the agreement as drafted, it would not authorise the applicant to act as a class representative. What saved the day was that the tribunal was prepared to accept that the funding agreement could be subject to 'running repair' and redrafted; and provided that was done, it would not be a bar to authorisation of the class representative. In the event the order was refused for other more substantive reasons, though ultimately the Supreme Court [2021] UKSC 25 overturned this decision of the tribunal.

AN ACT OF OBLIVION AND INDEMNITY

A couple of years later the Supreme Court intervened again in this space. One of the more surprising decisions of the Supreme Court in recent years was the case of *R on the application of PACCAR Inc and others v Competition Appeal Tribunal and Others* [2023] UKSC 28. This case is the clearest instance yet of the litigation funding agreements proving the weak spot to a claim, as it was argued to devastating effect that the agreements were unenforceable.

The judgment erupted in the litigation funding industry with the force of a sleeping volcano come to life: since, in the judgment of the majority of the Supreme Court (Lord Sales with whom Lord Reed, Lord Leggatt and Lord Stephens agreed), it was found that - contrary to popular belief and the ruling of the Competition Appeal Tribunal [2019] CAT 26 and the Divisional Court [2021] EWCA Civ 299 - the litigation funding agreements in the case were properly to be construed as damages based agreements (DBAs). These DBAs were unenforceable for failing to comply in form with the statutory formality requirements imposed by section 58AA of the Courts and Legal Services Act 1990 and the Damages Based Agreements Regulations 2013.

Because the litigation funding agreements adopted a funding structure which was (or has been) common to most litigation funding agreements; namely that the funder would be paid a percentage of the recoveries in the litigation, the consequences were that many litigation funding agreements entered into in England and Wales over the last decade were also unenforceable.

The effect of *PACCAR* could be mitigated to a degree, because agreements can simply be amended, or contain severance clauses, which might apply anyway to sever offending clauses: such as the common provision that a funder will be paid 30% of the recoveries upon the successful conclusion of the case. There are interesting arguments as to what extent the common law doctrine of severance can apply in the context of a statutory regime of unenforceability. The litigation funding industry pressed for remedial statutory intervention almost immediately: and this bore fruit. The Conservative government leapt into action with the publication of the Litigation Funding Agreements (Enforceability) Bill, which promised to reverse *PACCAR* and with

retrospective effect: but that Bill fell with the Conservative government. The Civil Justice Council Final Report has supported legislation of this nature, to replace the lost Bill, along with a great many other things, but that has not yet, and may not, happen.

PACCAR II

At the time of writing, the Court of Appeal had just handed down judgment in the conjoined appeals reported as *Sony Interactive Entertainment Europe Limited and another v Alex Neill Class Representative Limited and other appeals* [2025] EWCA Civ 841. The appeals considered amended litigation funding agreements, where the funder's fee was to be calculated as a multiple or multiples of the funder's outlay in the proceedings. The revised litigation funding agreements also provided that, expressly or by implication, the amount of the funder's recovery was capped at the level of the proceeds recovered, or part of them.

The appellants (defendants) contended that these arrangements were equally as problematic as in the *PACCAR* case, as they created unenforceable damages-based agreements, in substance if not in form. The Court of Appeal began its discussion of the various arguments by noting that both the common law on the interpretation of contracts and the principles of statutory interpretation lean against absurd results. In context, the court concluded that to find the agreements unenforceable would be absurd. It was not necessary to do so: the primary contractual entitlement of the funder was to a multiple of its outlay, not a percentage of damages. Further, looking at the various *travaux preparatoire*, the interpretation of the statute pointed to the respondents' (claimants') construction that a DBA is an agreement under which the representative's fees are calculated or determined as a percentage of the damages recovered.

At the time of writing, it is not known whether the case will proceed to the Supreme Court.

Continued on page 6

Continued from page 5

ON THE ROCKS

The cases discussed above demonstrate how the form and content of a litigation funding agreement can create insuperable difficulties for a collective action; and also how defendants are prepared to pursue arguments that might be thought to have a slender chance of success, because the stakes are so high.

The cases also demonstrate how the tribunal is prepared to allow amendments to funding agreements even in the teeth of a hearing, and how a lot can turn on how an agreement is structured. But it should be remembered that challenges to litigation funding agreements are not challenges to the agreements per se, but rather the suitability of a class representative being appointed who has made the litigation funding agreement in question.

The most interesting case on this point is that of *Christine Riefa Class Representative Limited v Apple and others* [2025] CAT 5; a decision of the tribunal, chaired by Mrs Justice Bacon, who has been recently appointed president of the Competition Appeal Tribunal. The case concerned allegations that Amazon and Apple had entered into agreements which had the effect of restricting or distorting competition in the UK. In an interesting review of recent case law, at paragraph 31 of the judgment the tribunal directed itself to the following considerations:

(1) The tribunal may certify a claim only where it considers that it is just and reasonable for the PCR to act as the class representative.

(2) In making that determination, the tribunal must consider whether the PCR would fairly and adequately act in the interests of the class members.

(3) That includes consideration of the PCR's ability to pay the defendant's recoverable costs, as well as its ability to fund its own costs, such that the proceedings are conducted effectively.

(4) Class actions almost inevitably require third party funding. The interests of the funders are not the same as the interests of potential class members. This gives rise to inherent risks for the fulfilment of the policy objectives of the collective actions regime.

(5) An important protection for potential class members is that the PCR will properly act in the best interests of the class including when agreeing any funding arrangements, and in managing the proceedings going forward including ongoing interactions with funders. That requires the PCR to be sufficiently independent and robust.

(6) In forming its view as to the ability of the PCR to act fairly and adequately in the interests of potential class members, the tribunal will consider all relevant circumstances, including the question of how the PCR has satisfied itself that the funding arrangements reasonably serve and protect those interests.

(7) A further protection is that the terms of any funding agreement should be open to scrutiny, not only by the court but also by the members of the class on whose behalf the claims are brought.

(8) The tribunal should nevertheless exercise caution in intervening in relation to the funder's return under the funding arrangements, at the certification stage, bearing in mind the tribunal's ability to control the return to the funder at the subsequent stage of judgment or settlement.

In extreme cases, however, the tribunal's concerns regarding the funding arrangements may lead to a refusal to certify.

The case proceeded to a hearing in the July, and then the September, by which time, the proposed class representative had given three witness statements and was subjected to cross-examination, in particular on the terms of the litigation funding agreement. The Tribunal's conclusions of the totality of her evidence were described in paragraph 106 of the judgment: 'However, in order to meet the authorisation condition, the PCR – whose representative is in this case its sole director, Prof Riefa – must demonstrate that it has a clear view of the interests of the class and can engage robustly and independently with advice received. In order to do so it must at the very least have a good understanding of (a) the effect of the terms being offered, and (b) the overall context in which it is being advised, including the position of its legal advisers, and the risks of any conflicts of interest arising from that position. In our view, the evidence of Prof Riefa falls well short of demonstrating a good understanding of either of those things.'

> There is a broader caution about regulation as a cure-all. History teaches that regulation often works better in theory than in practice

It is unusual for a proposed class representative to be cross-examined. It is unusual for a witness to be cross examined on the terms of a written agreement, and their understanding of those terms. The question that all litigation funders (and proposed class representatives) will be considering anxiously is to what extent this case is something of an outlier, or to what extent it represents the 'new normal'.

It also illustrates the potential Achilles heel in all these cases: many litigation funding agreements are far too lengthy and more complicated than they need to be. In particular, if they are incomprehensible to a lay person, even a highly educated and informed lay person, then they are not fit for purpose.

It can also be noted that if a litigation funding agreement and its terms needs to be resorted to at all during the course of litigation, then in a sense it is too late. Because all of these cases are built on a delicate framework of trust, and a shared determination to make things work. The terms of a litigation funding agreement only become relevant when the trust has evaporated.

THE FUTURE

The Civil Justice Council Final Report on Litigation Funding takes many of the practices of the Competition Appeal Tribunal and will develop and cast them on a wider stage, with a framework of what is engagingly called light touch regulation. Behind all this lies a larger question. What problem is this regulatory regime designed to solve? The Report does not cite any particular scandal, systemic failure, or pattern of abuse. There are well-known 'hard cases' such as the Post Office litigation, which suggests that funded parties have suffered substantial deductions from their compensation, but to what extent are these cases outliers, or examples of a larger problem? There is little empirical data on which to base the need for regulation. The most that can be said is that litigation funding is growing, and that *PACCAR* created legal uncertainty. Whether that justifies a regime as detailed as the one proposed is a matter of judgment.

One strand of the Report's reasoning is that parliament has already signalled its intent to regulate, by enacting section 58B of the 1990 Act. But that section was never brought into force. It has remained dormant for more than 25 years. If anything, its neglect suggests a legislative reluctance to regulate this field, not a commitment to do so.

There is, too, a broader caution about regulation as a cure-all. History teaches that regulation often works better in theory than in practice. The Conditional Fee Agreements Regulations 2000 led to a decade of litigation about technical compliance. The Damages Based Agreements Regulations 2013 regime has seen minimal uptake, in part because of regulatory inflexibility. And in the wider regulatory landscape, whether financial, professional, or institutional, failures of enforcement and oversight are not uncommon.

Light-touch regulation, once enacted, often becomes anything but. What the Report may well do is to create more weapons for defendants to claims, to try to point to regulatory failings or breaches in relation to litigation funding, and to seek to derail claims by probing for weak spots of the type in the cases noted above.

Andrew Hogan practises in costs and litigation funding from Kings Chambers. His blog can be found at www.costsbarrister.co.uk