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Apple Ruling Provides Clarity For UK Litigation Funders

Lucy Glyn · Monday, May 12th, 2025

The recent Court of Appeal decision in Gutmann v. Apple Inc. has brought much-needed clarity for funders of collective actions in the Competition Appeal Tribunal

In a unanimous April 16 judgment, the Court of Appeal confirmed that the Competition Appeal Tribunal has jurisdiction to order that a litigation funder's fee be paid out of damages before any distribution is made to class members. This decision will reassure funders that the risk of there being insufficient damages left over to cover their return in the event of a high distribution to the class can be appropriately managed.

Subject to any appeal to the U.K. Supreme Court, certainty regarding this fundamental issue will be welcomed by funders with an interest in this space during what has been a volatile period in the market, following the Supreme Court's controversial 2023 decision in R (on the application of PACCAR Inc. and others) v. Competition Appeal Tribunal, and the subsequent commencement of a wide-ranging review of the sector by the Civil Justice Council.

Background

The decision relates to collective proceedings brought in the Competition Appeal Tribunal by Justin Gutmann as class representative on behalf of U.K. claimants alleging abusive conduct by Apple in relation to battery issues affecting certain iPhone models.

Having certified the claim in November 2023, subject to the resolution of certain issues relating to the class representative's litigation funding agreement, the Competition Appeal Tribunal delivered a judgment on March 12, 2024, which

upheld the class representative's litigation funding agreement.

The judgment also found that, on a proper interpretation of the applicable statute, there was no reason to conclude that funders should not be paid in priority to the class — as the litigation funding agreement envisaged — in appropriate circumstances.

Apple appealed, arguing that the Competition Appeal Tribunal had no jurisdiction under Section 47C of the Competition Act to certify proceedings where the litigation funding agreement permitted a funder to be paid in priority. The class representative's litigation funding agreement, in Apple's submission, was contrary to statute and unenforceable. In addition, Apple argued that the relevant provisions of the class representative's litigation funding agreement created perverse incentives requiring him to argue against the interests of the class and rendering him unsuitable as a class representative.

The Court of Appeal Decision

The Court of Appeal held that payment of the funder's return, and lawyer fees, in priority to the class, was clearly permitted under Section 47C(3)(a) and (b) of the Competition Act, which conferred wide, unrestricted powers on the Competition Appeal Tribunal.

Apple's argument that any priority payment to the funder or lawyers could not properly be made on behalf of the class was held to be misconceived because the class representative represents the class and acts on their behalf, including when entering into agreements with the funder and the lawyers.

The Court of Appeal identified the scenario where there is likely to be a high take up of damages by class members, for example, where distribution is proposed by way of account credit, as a situation where principles of justice might well dictate that a funder and the lawyers should be paid in priority, as otherwise they might be deprived of all or part of the return on their investment.

More broadly, the Court of Appeal acknowledged that any discussion of the order of distributing damages is predicated upon achieving a successful outcome in the proceedings, which in turn would not have been possible without the capital invested — and placed fully at risk — by the funder under the litigation funding agreement.

The funder is entitled to a return on its investment in those circumstances. Importantly, the amount of that return is always subject to the approval of the Competition Appeal Tribunal, whose supervisory jurisdiction would "ensure that what is recovered is not excessive," according to the Court of Appeal decision.

Once the Court of Appeal had found positively in respect of the Competition Appeal Tribunal's jurisdiction to order priority payments to funders and lawyers, it followed

naturally that “there can be absolutely nothing wrong with the class representative entering into a [litigation funding agreement,] which makes provision for that to happen.”

The suggestion by Apple of there being nobody to represent the class at the distribution stage because the class representative aligned himself with the funder was seen as “wholly misconceived,” given the class representative had an overriding duty to the class under the litigation funding agreement. If any conflicts were to arise during the proceedings, the Court of Appeal saw no reason to suppose that the class representative would not “address those appropriately with the assistance of his advisers and following the guidance from the Competition Appeal Tribunal in exercising its supervisory jurisdiction.”

Comment

Many involved in litigation finance will be breathing a collective sigh of relief at the Court of Appeal’s decision. A finding going the other way would have been a further blow to the U.K. funding market, which has been navigating an already turbulent period. The Paccar decision that, contrary to the general consensus in the industry, litigation funding agreements where the funder’s return is calculated by reference to the amount of the damages recovered must comply with the Damages-Based Agreements Regulations 2013 rendered many English law funding agreements unenforceable.

The DBA regulations were originally intended to regulate certain forms of no-win, no-fee agreements between the client and the lawyer and, even in that context, were widely regarded to be poorly drafted, giving rise to uncertainty and, ultimately, limited take up.

The challenge of making funding arrangements comply with these regulations was seen by many funders as insurmountable and, since Paccar, there has been a pivot away from percentage-based pricing — where the funder’s return is calculated as a percentage of the damages recovered and is therefore clearly captured by Paccar — toward multiple-based pricing, where the funder’s return is based on a multiple of the financing amount and is therefore generally considered to fall outside the scope of the decision. While multiple-based pricing has always played an important role in the pricing of litigation finance, it lacks the alignment of interests that is inherent in percentage-based pricing and exacerbates the potential for unhelpful conflicts.

As funders continue to await a legislative solution to the Paccar problem, the level of uncertainty regarding funding in this jurisdiction has been deepened by the commencement of the Civil Justice Council’s regulatory review of the sector, which remains ongoing.

As the Court of Appeal in Gutmann acknowledged, the possibility of being paid out in priority to class members is vital to funders in order to mitigate the risk of a high

distribution rate leaving nothing left for their return. Litigation funders are in the business of risk. However, the risk of funding complex and lengthy proceedings to a successful outcome only to see all of the proceeds paid out to claimants — who may have suffered the loss, but took none of the financial risk associated with the litigation — would be commercially unacceptable to any funder.

From a policy perspective, the collective action regime in the Competition Appeal Tribunal is intended first and foremost to benefit class members who have suffered harm. Cases likely to lead to a high take up of damages by class members are therefore exactly the sorts of cases the regime should encourage. It would have been a perverse outcome if funders were dis-incentivized from investing in those very cases.

Beyond the relief of those funders already exposed to this issue, the Court of Appeal's decision brings clarity that will be welcomed by all those involved in the funding of collective actions — including prospective class representatives and their lawyers — and should create a more certain investment environment for any litigation funder seeking to invest in future cases.

But this decision is not the end of the story. In June, the Court of Appeal is scheduled to hear a further appeal by Apple in the same Gutmann proceedings — alongside parallel appeals by defendants in other claims on similar grounds — relating to the consequences of Paccar. The question to be decided there is even more fundamental to the ongoing viability of litigation finance under English law — namely, whether multiple-based pricing is also captured by the DBA regulations.

If it is, absent any intervention from the legislature, funders would be left with no established pricing mechanism that would be enforceable absent compliance with the DBA regulations. The harm to the U.K. funding market would be significant.

So while the Court of Appeal's decision in Gutmann will certainly be perceived by funders as a step in the right direction, it is the handling of Paccar — in the upcoming appeals or, ultimately, by the legislature — and the outcome of the Civil Justice Council's review, due by this summer, that will have the greatest impact on shaping the direction of the industry moving forward.

Matt's article was published in full by Law 360 and can be viewed online here.

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