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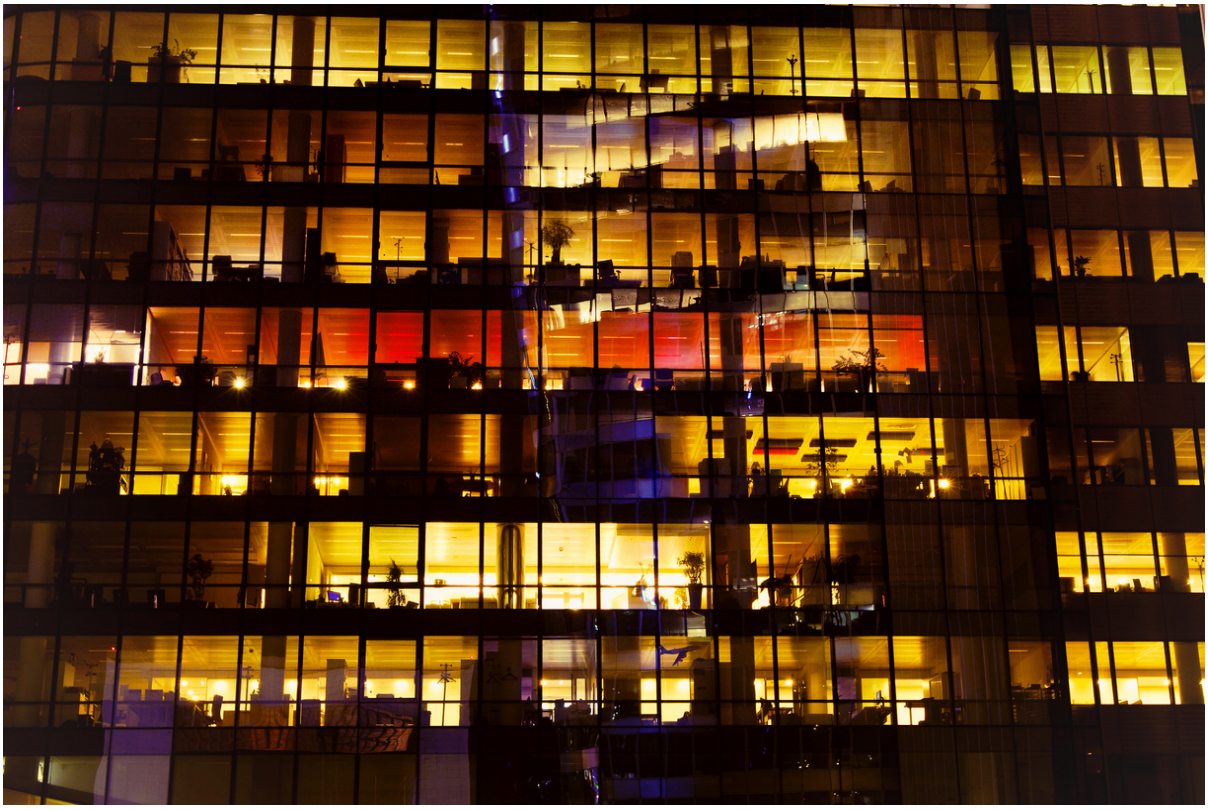

Court of Appeal Hearing on Litigation Funding Agreements and Damages Based Agreements in Collective Proceedings

Lucy Glyn · Friday, June 13th, 2025

Over a two-day hearing from 10th June 2025 the Court of Appeal considered the legality and interpretation of litigation funding agreements (LFAs) in the context of collective proceedings.

The central issue before the Court was whether the current versions of Litigation Funding Agreements ("LFA") used by class representatives in collective proceedings – in which the funder's success fee is calculated by reference to a multiple of the amount of funding advanced, but is also capped by reference to the amount of the proceeds, or some part thereof qualify as Damages Based Agreements ("DBA") under the statutory regime.

Further grounds of appeal related to the enforceability of a clause which contained the phrase "only to the extent enforceable and permitted by applicable law" in relation to a percentage entitlement to the funder, and the Competition Appeal

Tribunal's approach to severance.

Whilst we wait to hear whether the government intends to act on the CJC's recommendation to introduce legislation to reverse the effect of PACCAR, the outcome of this appeal will have far-reaching and potentially catastrophic implications for the funding market, especially in relation to collective proceedings.

Background

The joint appeal from Sony, Visa, Mastercard and Apple consolidated several claims in which there were challenges to funding agreements that been amended following the Supreme Court's decision in PACCAR, and follows a Competition Appeal Tribunal decisions in, inter alia, *Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd* [2023] CAT 73 and *Commercial and Interregional Card Claims I Ltd v Mastercard Incorporated* [2024] CAT 3.

In these claims, the Tribunal considered challenges to the terms of LFAs which had been amended following PACCAR to remove the funder's entitlement to a percentage of the proceeds and provide for the funder's fee to be the greater of:

1. a multiple of the amount of funding; or
2. "only to the extent enforceable and permitted by applicable law", a percentage of the proceeds obtained.

These arrangements were challenged on the basis that the terms, combined with the presence of a cap (express of implied) by reference to the amount of the proceeds recovered in the litigation (or a subset of those proceeds), meant the LFA still amounted to a DBA and was therefore unenforceable.

In both of these cases, the Tribunal ruled that wasn't the case and that the amended LFAs did not constitute DBAs but granted permission to appeal on the "other compelling reason" ground, noting that challenges to amended funding arrangements are "creating uncertainty and consuming the resources of the Tribunal and the parties, and that is unlikely to cease until there has been a conclusive decision on these points by the Court of Appeal". Specifically, the grounds of appeal were that:

1. The Tribunal erred in finding that there was no cap which operated so that the funder's return was determined by reference to the damages recovered, so finding that PACCAR could be distinguished.
2. The Tribunal erred in treating as enforceable a clause which contained a phrase: "only to the extent enforceable and permitted by applicable law".
3. The Tribunal erred in its approach to severance, which it dealt with in case it was wrong on point (ii) above.

Arguments in Favour of LFA as DBA

The central issue addressed in submissions for the appellants (defendants in class actions in the Competition Appeal Tribunal) was the proper approach to statutory interpretation when determining whether litigation funding agreements fall within the definition of damages-based agreements, being an agreement where the recipient of advocacy, litigation, or claims management services is to make a payment to the provider if a specified financial benefit is obtained, and the amount of that payment is to be determined by reference to the amount of the financial benefit obtained.

A key aspect of the argument was an insistence on a literal reading of the statutory language, in which it was maintained that the definition of a DBA should be applied according to its plain meaning – if an agreement provides a mechanism by which the payment to the funder or representative is calculated by reference to damages (even if it is one of several possible mechanisms, such as a "whichever is lower" or "whichever is greater" formula), it falls within the statutory definition of a DBA. In doing so, the submissions sought to reject the notion that the determination must be "exclusively" or "primarily" by reference to damages, noting that such qualifiers do not appear in the statute and would undermine the regulatory objectives by allowing easy circumvention.

Throughout the submissions, the appellants also cautioned against judicial attempts to "fix" perceived policy problems in the collective actions regime by adopting a narrow or purposive interpretation of the statutory language. It was argued that such an approach risked undermining the carefully calibrated regulatory scheme for DBAs in other contexts, particularly employment claims, where the mischief to be addressed was well-evidenced and the regulatory response was tailored accordingly. Parliament, it was said, made deliberate choices about the scope and application of DBA regulation, including the prohibition of DBAs in opt-out collective proceedings, and that it is not for the courts to depart from the conventional approach to statutory interpretation in order to achieve a different policy outcome.

Arguments Against LFA as DBA

In reply, the respondents advanced an argument in favour of a narrow construction, drawing a sharp distinction between agreements that are "determined by reference to" damages (meaning those that calculate payment as a percentage of the financial benefit obtained) and those that merely include a cap or limit by reference to damages as a secondary or protective mechanism.

The funder's success fee in the amended funding agreements before the Court of Appeal was primarily a multiple of the amount of funding advanced (whether committed or actually deployed) and it was therefore argued that they do not fall within the statutory definition of a DBA, as their primary mechanism for determining payment is not the amount of damages.

It was contended that this interpretation is necessary to avoid incoherence and unintended consequences across the broader regulatory landscape, particularly in light of the legislative history and the policy objectives underpinning both the

original and subsequent regulatory regimes. It was also emphasised that a broader interpretation – one that would capture any agreement where the payment is in any way capped or limited by reference to damages – would have far-reaching and disruptive effects, including the potential to render standard forms of litigation funding and conditional fee agreements unenforceable. Such an outcome, it was submitted, would undermine access to justice, frustrate the operation of the collective proceedings regime, and contradict the clear intentions of Parliament as expressed in both primary and secondary legislation.

Enforceability of Clauses "Only to the Extent Enforceable and Permitted by Applicable Law"

A further issue arose in relation to clauses in some LFAs which provided for payment of a percentage of damages "only to the extent enforceable and permitted by applicable law."

The appellants argued that the mere presence of such a clause means the agreement "provides for" payment by reference to damages and thus falls within the statutory definition of a DBA, regardless of whether the clause is currently enforceable.

In reply, the respondents contended that such clauses are of no contractual effect unless and until the law changes to permit them. They argued that these provisions are effectively dormant and do not render the agreement a DBA under current law.

Conclusion

Everyone with an interest in litigation funding and collective actions in England & Wales will be awaiting **t**he Court of Appeal's reserved decision and further clarity as to the boundary between DBAs and other forms of litigation funding in collective proceedings.

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