Retrospectivity & Access to Justice in the Litigation Funding Agreements (Enforceability) Bill [HL]

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The Litigation Funding Agreements (Enforceability) Bill [HL] received its First reading on 19 March and its Second reading on 15 April. It returns to the House of Lords on 29 April for Committee stage. This note considers the Bill and some of the key rule of law issues it raises, in particular the question of whether retrospective legislation can be justified in this case.

Background

The Litigation Funding Agreements (Enforceability) Bill [HL] seeks to address the impact of the UK Supreme Court decision in R (PACCAR Inc and Others) v Competition Appeal Tribunal and Others [2023] UKSC 28 in which the Supreme Court found that litigation funding agreements (LFAs) constituted damages-based agreements (DBAs) in some circumstances (1). The Explanatory Notes accompanying the Bill explain that before the Supreme Court judgment, LFAs were unregulated and were not considered to be within the scope of either section 58AA of the Courts and Legal Service Act 1990 (CLSA 1990) or the Damages-Based Agreements Regulations 2013 (the DBA Regulations); and that LFAs are made unenforceable by the judgment because they do not generally comply with the DBA Regulations.

The Bill contains only two clauses. The Explanatory Notes state that the Bill "will restore the position to that which prevailed before the decision of the Supreme Court, that LFAs are not DBAs and hence are enforceable" and will do so by amending the definition of a DBA in the CLSA 1990.

Clause 1(1) of the Bill provides for the amendment of section 58AA of the CLSA 1990. Section 58AA(3)(a) of the CLSA 1990 currently sets out a definition of DBAs. Clause 1(2) of the Bill would insert a new subsection providing that "an agreement is not a damages-based agreement if or to the extent that it is a litigation funding agreement". Clause 1(3) would then define an LFA as "an agreement which provides that - (a) a person providing claims management services ("the funder") is to fund (in whole or in part)— (i) the provision of advocacy or litigation services (by someone other than the funder) to the recipient of the claims management services ("the litigant"), or (ii) the payment of costs that the litigant may be required to pay to another person by virtue of a costs order, and (b) the litigant is to make a payment to the funder in circumstances specified in the agreement". Crucially, Clause 1(4) provides that "[t]he amendments made by this section are treated as always having had effect". Clause 2 sets out that the Act extends to England and Wales only, and that the Act comes into force on the day on which it is passed.

Retrospectivity

Introducing the Bill at Second Reading on 15 April, Lord Stewart of Dirleton (Conservative), the Advocate-General for Scotland and the Bill's sponsor in the Lords, stated that:

The Bill will have retrospective effect. The legality and propriety of the proposed retrospection, including its compatibility with the European Convention on Human Rights, has been considered carefully. The Bill will achieve the important policy objective of preserving the rights of individuals to challenge alleged breaches of the law. Access to justice is an essential component of the rule of law. If the Bill were prospective only, there would be uncertainty as to the enforceability of agreements entered into before the PACCAR judgment but where the claim is concluded after the Act comes into force. This could lead to undesirable satellite
Retrospective effect will also ensure that the contractual rights and obligations agreed under LFAs entered into before the Supreme Court’s judgment continue to have effect as intended. Early commencement will minimise the period of retrospection. These provisions will remove any uncertainty about the enforceability of LFAs in cases that have settled and enable litigation funders to continue to fund cases, including existing cases.

There was support for the retrospection provision during Second Reading, though it was stressed that it will need to be considered fully during Committee stage. For example, Lord Ponsonby of Shulbrede (Labour) stated that LFAs “should be regulated in their own right, but not by regulations that would not have been expected, by either side, to apply when the agreements were being drafted”. He stated that “[w]e recognise the gravity of retrospective legislation, but without it there is no way to preserve all the agreements in cases that have now been concluded”. Lord Thomas of Cwmgiedd (Crossbench) commented that “[g]iven that so many thought that this was an industry that produced access to justice, and many have acted in reliance on what they thought the law was, it is plainly right that the decision should be reversed with retrospective effect”. He suggested that “[i]f there are issues about that, they can no doubt be looked at subsequently, but it is plain that litigation funding does provide access to justice”. Lord Mendelsohn (Labour) similarly noted that “[t]he retrospective arrangements in this Bill mean that everything will be retained as it should have been, and I suspect that there will [be] many cases where the onerous terms that had to be accepted by the litigants should be looked at in some way”. Lord Sandhurst (Conservative) emphasised that “[l]itigation funding agreements, whatever the complicated issues they bring, are an important plank of our justice system” and stated that he believed the retrospectivity provision “to be justifiable” but that “no doubt we shall have to look at it in Committee to see that it really works properly and fairly”.

However, some peers did raise concerns about retrospectivity. Lord Marks of Henley-on-Thames (Liberal Democrat) suggested that retrospectivity may “undermine potential challenges that might have been made to existing LFAs” and stated that the issue of retrospectivity and its effect will need to be “carefully considered” in Committee. Lord Ponsonby of Shulbrede (Labour) noted similar concerns and suggested that while the Bill itself does not include any safeguards, the upcoming Civil Justice Council Review (see further below) is expected to consider the need for further regulation or safeguards. Lord Wolfson of Tredegar (Conservative) noted that because the Bill operates retrospectively and “does not cater for the fact that some litigants may have done all you could reasonably expect of them at the time; that is, going out to replace the unenforceable funding agreement with an enforceable funding agreement”, some could be left with overlapping agreements. He was confident a solution could be found to this “niche, but none the less important, issue”.

Retrospective legislation may undermine legal certainty, a core principle of the Rule of Law, and so the question is whether it can be justified in this case.

The Council of Europe’s Venice Commission stated in its Report on the Rule of Law 2011 that legal certainty “requires that legal rules are clear and precise, and aim at ensuring that situations and legal relationships remain foreseeable” (para. 46). In its view, retroactivity “also goes against the principle of legal certainty, at least in criminal law (Article 7 ECHR), since legal subjects have to know the consequences of their behaviour; but also in civil and administrative law to the extent it negatively affects rights and legal interests” (para. 46).

In Walker v Innospec Limited and Others [2017] UKSC 47, the UK Supreme Court set out that the “general rule, applicable in most modern legal systems, is that legislative changes apply prospectively” and “[u]nder English law, for example, unless a contrary intention appears, an enactment is presumed not to be intended to have retrospective effect” (para. 22) (2).

The Grand Chamber of the European Court of Human Rights has held that “while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature - other than on compelling grounds of
the general interest - with the administration of justice designed to influence the judicial determination of a dispute" (Zielinski and Pradal and Gonzalez and Others v France, 28 October 1999 at para. 57) (3).

There are examples of legislation which has been applied retroactively.

Under the 2002 Labour Government, the then Solicitor General Harriet Harman set out their approach: "The Government's policy before introducing a legislative provision having retrospective effect is to balance the conflicting public interests and to consider whether the general public interest in the law not being changed retrospectively may be outweighed by any competing public interest" (4). Lord Wolfson of Tredegar (Conservative) stated during the Second Reading of the present Bill, "[t]he problem with retrospective legislation is not that it is bad in itself. It is that retrospective legislation should not, or at least should not without very good reason, disturb existing legal rights entered into on the faith of the law as it was".

It is crucial that the Government provides detailed reasons for the retrospection provisions in the Litigation Funding Agreements (Enforceability) Bill [HL], and demonstrates that it has weighed the public interests on all sides.

A detailed Impact Assessment accompanies the Bill and states that the Government's preferred option is "[l]egislate to mitigate the impacts of the UK Supreme Court judgment in PACCAR in all cases, so that LFAs are no longer unenforceable in closed and new claims". It states that, as a result of the Supreme Court's judgment, "there is a risk to litigation funders' investments in closed cases as a result of the relevant agreements now being unenforceable" and that the risk to previous investments in turn "creates risk for future investments, as litigation funders may have less capital to commit to claims and less motivation to do so in a market that is judged unpredictable and unfavourable". It emphasises that uncertainty around litigation funding "risks a detrimental impact on the attractiveness of the England and Wales jurisdiction as a global hub for commercial litigation and arbitration, and on access to justice more broadly".

The Impact Assessment states that the Bill will "remove this risk of uncertainty" and "allow Government to deliver a return to a funding regime so that claimants can continue to get funding from litigation funders to bring big and complex claims, against bigger, better-resourced corporations, which they could not otherwise afford". It explains that the Bill "will also have retrospective effect and early commencement, so that previous cases are unaffected" and that this "will remove any uncertainty about the enforceability of closed LFAs and enable litigation funders to continue to fund cases, including existing cases, with confidence".

The Impact Assessment acknowledges that "no formal consultation has taken place", but notes that "the Government engaged with experts both in support of the judgment and against it" and that the views of the judiciary have also been sought. Following these discussions, the Government "firmly believes that restoring the position that existed before the judgment is the best way forward to enhance access to justice".

The Government considers that the Bill is compatible with the European Convention on Human Rights and a statement to this effect is made under section 19(1)(a) of the Human Rights Act 1998. A separate ECHR memorandum accompanies the Bill. It expands on the justification for retrospective effect in the Bill and it considers Article 1 Protocol 1 in particular. It concludes that while it "might be engaged in this instance, the retrospective effect is justified and, in any event, it will not impact on any property rights for the purposes of Article 1 Protocol 1".

Given the general rule that legislative changes apply prospectively, it will be important for Parliament to closely examine the Government's stated justifications for the retrospection provision in the Bill, and to consider whether the Government has provided sufficient information to enable effective scrutiny in this regard.

Finally, in this respect, it was noted during Second Reading that the PACCAR judgment has led to "a huge amount of satellite litigation about funding agreements themselves, rather than the cases the funding agreements are there to support". It was also highlighted that some funding agreements were renegotiated after the Supreme Court's judgment (5).
In light of the time that has elapsed since the Supreme Court’s judgment, careful consideration should be given to developing robust transitional clauses.

Access to justice

As noted above, the Impact Assessment and ECHR Memorandum both discuss the impact of the Supreme Court judgment on access to justice. Ahead of the Bill’s introduction in Parliament, Alex Chalk, the Lord Chancellor and Secretary of State for Justice, similarly emphasised the importance of the proposed legislation for access to justice and for the competitiveness of the UK legal sector. A Ministry of Justice press release made a similar point and highlighted the Post Office litigation as a recent example. It noted that the new legislation “makes it easier for members of the public to secure funding for their legal fights against powerful corporations - such as those caught up in the Horizon scandal”.

During Second Reading, several peers referenced the wider access to justice context here, including the decline of legal aid provision in England and Wales (see, for example, discussion by Lord Wolfson of Tredegar (Conservative), Lord Marks of Henley-on-Thames (Liberal Democrat) and Baroness Jones of Moulsecoomb (Green Party) ). In concluding remarks, Lord Stewart suggested that while legal aid will remain “an important feature of how access to justice is delivered”, it is the Government’s view that “we must take steps to address the necessity of third-party funding to permit access to justice” in some cases.

It is against this backdrop that we welcome the Civil Justice Council’s review of third-party litigation funding, established at the request of the Lord Chancellor.

The Review’s recently published Terms of Reference state that an interim report is planned for summer 2024 with a full report by summer 2025. The Review will set out the current position of third-party funding and will explore whether the current arrangements deliver effective access to justice. It will also make clear recommendations for reform, including consideration of whether and how third-party funding should be regulated, whether a funder’s return on any agreement should be capped, and whether provision is needed to protect claimants.

We also welcome Lord Stewart’s statement that the Government will consider the timeline for making improvements to the DBA Regulations.

Concluding remarks

With the UK’s legal services sector estimated at £34 billion, there is much at stake and strong views on all sides of the debate. The Bill is expected to become law later this year and so it is on a quicker trajectory than the Civil Justice Council’s Review. However, the Bill seeks to address only one part of the funding landscape which we suggest could be better addressed as part of more comprehensive legislation following proper consultation and a systematic review. Inclusive, well-planned and evidence-based law-making is critical for legal certainty (6).

Lucy Moxham is a Senior Fellow at the Bingham Centre, and is leading a new phase of the Centre’s Rule of Law Monitoring of Legislation project. For more information about the project and its previous phase of work, including analysis of Bills during the period 2020-2022, see here.

Footnotes

3. See further discussion, ibid.


URL: https://binghamcentre.biicl.org/comments/129/retrospectivity-access-to-justice-in-the-litigation-funding-agreements-enforceability-bill-hl