

APPG on the Rule of Law

Date: Monday 20th May
2024

Time: 4.35-6.00pm

Location: Committee
Room 4A, House of
Lords

Minutes of formal meeting on the Litigation Funding Agreements (Enforceability) Bill and access to civil justice

Attendance

APPG members attending: Sir Bob Neill KC (Hon) MP (Chair of the APPG); Lord Anderson of Ipswich KBE KC (Co-Chair); Lord Carlile of Berriew CBE KC; Lord Hodgson of Astley Abbots; Lord Pannick KC; Lord Sandhurst KC; Lord Trevethin and Oaksey KC; Baroness Whitaker.

Apologies: Jonathan Djanogly MP; Lord Faulks KC; Lord Garnier KC; Baroness Hamwee; Lord Hope of Craighead KT; Peter Kyle MP; Lord Bishop of Leeds; Baroness Prashar; Yasmin Qureshi MP; Baroness Sheehan.

Additional parliamentarians: Lord Carter of Haslemere; the Earl of Devon.

Panel providing expert presentations: Professor Rachael Mulheron KC (Hon) (Professor of Tort Law and Civil Justice at the School of Law, Queen Mary University of London); Nick Rowles-Davies (CEO of Lexolent); Tom de la Mare KC (Barrister, Blackstone Chambers); Jo Hynes (Senior Researcher at Public Law Project); Neil Purslow (co-founder and Chief Investment Officer of Therium, Chairman of the Board of the International Legal Finance Association and board member of the Association of Litigation Funders).

Others attending: Adam Tucker (University of Liverpool and Bingham Centre external fellow); Adrian Vincent (Bar Council); Professor Andrew Higgins (University of Oxford); Anthony Maton (Hausfeld); David Greene (Edwin Coe LLP); Felicity Handley (Hanbury Strategy); Guy Pendell (CMS & Bingham Centre Development Board); Jan van Zyl Smit (Bingham Centre); Kenny Henderson (CMS); Lauren Agnew (Public Law Project); Liza Lovdahl-Gormsen (BIICL); Nandini Mitra (Bingham Centre); Ola Ugwu (Bingham Centre); Dr Ronan Cormacian (Consultant Legislative Counsel); Stephen Kinsella (Law for Change); Steven Marcus (Bugsby and Runlabs); Tyrone Steele (JUSTICE); Will Knatchbull (Bingham Centre); Zoe Bantleman (ILPA).



Meeting Aims

- To consider the Rule of Law implications of the Litigation Funding Agreements (Enforceability) Bill during the remaining parliamentary stages;
- To consider the broader issues in relation to access to justice in the civil courts and tribunals.

Summary of meeting (presentations)

The Chair, Sir Bob Neill KC(hon) MP, opened the meeting, and chaired until handing over to Lord Anderson of Ipswich KBE KC. The following brief summary sets out the main points of panel presentations. It does not include the question and answer session which followed.

Professor Rachael Mulheron KC (Hon) explained that the [Litigation Funding Agreements \(Enforceability\) Bill](#) had been introduced following the decision in [PACCAR](#) [2023] UKSC 28. The UK Supreme Court held that certain litigation funding agreements (LFAs) were damages-based agreements (DBAs) as a result of section 58AA (inserted in 2009, but operative for 'contentious business' as of 2012) of the Courts and Legal Services Act 1990. Those LFAs which calculate their success fee as a share of the financial benefit recovered became unenforceable insofar as they failed to satisfy conditions applicable to DBAs. The Bill seeks to reverse this by carving out LFAs from the definition of DBAs, rather than taking the other tack of legislating that litigation funders do not offer "claims management services" (which the UKSC majority had ruled that funders do).

Prof Mulheron strongly agreed that the Bill was necessary to remedy the effect of *PACCAR* which had made LFAs unenforceable in a range of cases, including both live LFAs funding cases that were still ongoing and closed action LFAs relating to claims which had been concluded. She further agreed that the Bill's retrospective effect was necessary, as *PACCAR* had been unexpected – running contrary to Hansard statements when the Consumer Rights Bill 2014 was discussed in Parliament and the [Jackson Review of Civil Litigation Costs](#), all of which had suggested that LFAs and DBAs were different funding streams.

However, Prof Mulheron suggested that the Bill would benefit from amendment to introduce greater certainty in three respects, so that it covered three further 'real life' scenarios: where LFAs are used for proceedings to enforce an existing judgment (possibly obtained with support from a different funder); where LFAs involve portfolio funding; and where adverse costs orders are to be borne by funders themselves rather than litigants.

Nick Rowles-Davies declared that he had no investment in any matter which is affected by the decision in *PACCAR*. He explained that he had been involved in the litigation finance industry since its inception, and having read many pieces in support of the Bill, he did not feel they accurately captured the industry as he knew it.

Mr Rowles-Davies highlighted in particular that the *PACCAR* decision, whilst a surprise, was not entirely unanticipated (with the argument that

LFAs could breach the relevant legislation having been made more than 10 years ago). As things stand, not all claimants would automatically benefit from *PACCAR* as they might have to secure further funding in order to secure that outcome; instead, many claimants and funders had entered into constructive discussions. To enact fully retrospective legislation would involve shifting the risk of such an outcome away from sophisticated funders who could have been aware of it, to claimants who almost certainly were not. Mr Rowles-Davies further disagreed with the premise in supporting documents accompanying the Bill that it would restore the pre-*PACCAR* position, noting that actors in the litigation funding market had already adapted. He noted that the ECHR memorandum accompanying the Bill considered that the right in Article 1 Protocol 1 of the ECHR had been engaged.

Particular emphasis was to be placed on legal certainty. Litigation funding is global and for London as a legal centre it is particularly important that certainty be restored. Mr Rowles-Davies observed clear agreement within the industry on the need for the prospective elements of the Bill, but less agreement on its retrospectivity.

Tom de la Mare KC explained that he was a barrister in independent practice and acted on both sides of the industry.

Mr de la Mare opened his presentation by asking who benefited from the *PACCAR* challenge. In his view, it was no accident that *PACCAR* was brought by defendants seeking, effectively, to obstruct effective collective redress. To further set the scene, Mr de la Mare noted that funded litigation was a complex landscape, involving claimants who could be SMEs or individuals, and with proceedings ranging from collective proceedings in competition cases to group and representative cases in the High Court and other tribunals. However, individual claimants may face difficulty in securing funding for some claims in areas such as consumer protection law, as their claims would often be too low in value to attract funding. This mixed landscape could be improved by a more systematic approach.

Returning to the Bill, Mr de la Mare explained that the 'hotspot of retrospectivity' would be closed cases in which had been damages awarded. In his view, challenges to the transfer of funds were not as simple as a funder taking property from someone else, as envisioned in the ECHR Article 1 Protocol 1 analysis. There were conflicting claims to restriction and those whose claims had been funded had property rights which the funded litigation helped them to secure. In his view, the Bill's retrospectivity would effectively restore the bargaining position of parties who entered into LFAs pre-*PACCAR*, and whose agreements remain live. This would not offend proportionality, as parties had negotiated during the months following *PACCAR* with an eye to the legislation having retrospective effect.

Dr Jo Hynes explained that the Public Law Project (PLP) had analysed the landscape of civil access to justice, and highlighted three developments of great concern.

First, Dr Hynes noted the historic decline in the proportion of the population that eligible for legal aid: from 80% in 1950, to 25% in 2016, according to the last available data from the Ministry of Justice. Prospective claimants had to fulfil both means and merits tests. The

means test threshold had not been updated since 2009, with a particularly severe impact on certain groups, including single persons who are working. Secondly, there had been a decline in the types of cases eligible for legal aid. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 largely removed legal aid for family, housing, employment, and debt claims.

Thirdly, Dr Hynes observed that there had been a decline in legal aid providers, resulting in 'legal aid deserts'. To illustrate this, she discussed both an individual case study of a modern slavery survivor who had been a PLP client, and PLP's wider work to analyse the capacity and challenges faced by providers of legal aid-funded immigration services. For instance, in the South West of England, only 10 of the 31 legal aid providers were found to have capacity to take on referrals; of this number, only five in the entire region could take on asylum appeals. These numbers reflect the broader picture of civil legal aid services provision. The Law Society had produced [colour-coded heat maps](#) of England and Wales indicating the number of legal aid providers in each local authority. The most recent heat maps, updated in February 2024, provided a stark picture in which large parts were coded either red (a single provider) or dark red (no providers). Dr Hynes observed that the statement in *R (Law Society of England and Wales) v Lord Chancellor* [2024] EWHC 155 (Admin), that the criminal legal aid system 'depends to an unacceptable degree on the goodwill and generosity of spirit of those currently working within it' would apply to civil legal aid, too.

Neil Purslow declared that he was currently the Chief UK Investment Officer of Therium, a litigation fund which is active in the UK; Chairman of the International Legal Finance Association; and Board Director of the Association of Litigation Funds in England and Wales.

Mr Purslow opened his presentation with an observation that litigation finance is a tool for access to justice, as seen in its use in the postmasters' challenges to their convictions in the Post Office/Horizon scandal. Litigation finance is also used in other kinds of cases, for example, in SMEs' challenge to Mastercard's unlawful charge of administrative fees; and consumer cases brought against large multinational corporations. Furthermore, he explained that collective proceedings in the Competition Appeal Tribunal are made possible with litigation funding. It is in the interests of both claimants and funders to have certainty in their funding arrangements.

In relation to the Bill, he made three observations. First, it had never been government policy that LFAs should be treated as DBAs, and this was not the intention of the drafters when the relevant amendments was made. Secondly, the UK Supreme Court decision in *PACCAR* had already resulted in multiple challenges to LFAs, with yet more challenges on the horizon as people try to take advantage of the windfall post-*PACCAR*. Whilst the industry had renegotiated LFAs to mitigate against these effects, there was uncertainty as to whether their efforts would be successful: future decisions in the Court of Appeal would determine this.

Thirdly, Mr Purslow welcomed the Bill's retrospective effect. Neither side of the LFAs affected by the Supreme Court's decision would have entered into their agreements on the basis that they would be unenforceable. However, he also considered that that minor amendments to the Bill were needed. In his view, the carveout of LFAs

from DBAs should capture all forms of litigation finance, otherwise it would risk some LFAs falling into the scope of DBAs on matters of technicality.