BCLP. Client Intelligent

Insights

PACCAR: A NEW DIRECTION FOR THE FUNDING OF CLASS ACTIONS?

Aug 07, 2023

SUMMARY

The Supreme Court's decision in *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)* [2023] UKSC 28 has caused a stir in the legal industry, leaving a number of question marks over the future direction of litigation funding. In this insight, we consider how the Supreme Court's ruling might specifically impact class actions in both the Competition Appeal Tribunal (CAT) and the High Court.

WHAT DID THE RULING SAY?

The case concerned two collective actions brought in the CAT, arising out of the European Commission's decision in 2016 that certain truck manufacturers had infringed competition law.

Both proposed class representatives were funded by litigation funding agreements (LFAs). The LFAs provided that the third-party litigation funders' only involvement in the collective proceedings would be to provide funding and that they were to be remunerated by a share of any damages recovered. The proposed class representatives maintained that such arrangements did not constitute damages-based agreements (DBAs), which the Competition Act 1998 specifically prohibits from being used in opt-out collective proceedings in the CAT.

The CAT and Divisional Court had held that the LFAs were not DBAs, on the basis that they did not fall within the definition of "claims management services" which is part of the statutory definition of DBAs.

The Supreme Court disagreed. It held that LFAs, in which the funder plays no part in the conduct of the litigation but their remuneration is based on a percentage of any damages recovered, are DBAs.

All DBAs (which now include these types of LFAs) must comply with the Damages-Based Agreements Regulations 2013, otherwise they will be unenforceable. The Damages-Based Agreements Regulations 2013 are notoriously opaque and difficult to comply with, and it has been

accepted for some time that they require reform. This places litigation funders, legal advisers and parties in a difficult position.

Meanwhile, some LFAs are structured to provide a return based on the higher of a multiple or a percentage of the recovery, whichever is the higher. These LFAs are likely to contain an express severance clause. The enforceability of these LFAs following the Supreme Court's judgment requires careful consideration on a case-by-case basis.

WHAT ARE THE IMPLICATIONS FOR OPT-OUT CAT COLLECTIVE ACTIONS?

Section 47C(8) Competition Act 2006 specifically prohibits DBAs from being used in opt-out collective actions in the CAT. As Lady Rose observed in her dissenting judgment, most if not all of the LFAs underlying the many collective proceedings that are before the CAT at present will now be rendered unenforceable. This could have acute ramifications for existing and future opt-out claims in the CAT.

For existing claims, it remains to be seen how funders might seek to restructure LFAs so that they are not considered DBAs. Given the broader prohibition on DBAs in opt-out claims in the CAT, restructuring funding agreements so as to comply with the Damages-Based Agreements Regulations 2013 will not be sufficient for class representatives in the CAT. It is expected that many LFAs will be revised to provide funders with an investment-based return (rather than a damages-based return). However, this may impact the attractiveness of opt-out collective actions in the CAT for funders going forwards, while funding arrangements involving investment-based returns may result in less closely-aligned incentives for funders and class representatives when considering settlement outcomes.

Funders and class representatives will need to act quickly to review and restructure their arrangements for opt-out claims in the CAT. In order to bring collective proceedings in the CAT, a proposed class representative needs to demonstrate that they have adequate funding arrangements to meet their own costs and adverse costs orders. Proposed class representatives have used LFAs to meet this requirement. Proposed defendants resisting certification, and defendants in claims that have already been certified, may now seek to re-open this issue. In light of the Supreme Court's ruling, it remains to be seen whether legislative reform to s.47C(8) Competition Act 2006 will be required to safeguard the opt-out regime.

Meanwhile, the impact on opt-in claims in the CAT will be comparable to class actions in the High Court. Here there is no blanket prohibition on DBAs. Where LFAs are classified as DBAs, they will however now need to comply with the Damages-Based Agreements Regulations 2013 or be modified accordingly. In a separate judgment that was handed down by the Court of Appeal in the same Trucks collective proceedings, just one day before the Supreme Court's judgment. According to the Court of Appeal, the proposed class representative seeking to bring an opt-in claim had

provided assurances that "if the [Supreme Court] judgment went against the funders, the [opt-in] funding arrangements could be easily adjusted to be compatible with the DBA Regulations." Just how easy this will be in practice of course remains to be seen.

Interested parties will pay close attention to how funders, class representatives and the CAT approach the Supreme Court's decision.

WHAT ARE THE IMPLICATIONS FOR HIGH COURT CLASS ACTIONS?

The High Court does not have the same opt-out collective proceedings regime as the CAT, and DBAs are not prohibited in the High Court. In theory then, as long as a DBA complies with the Damages-Based Agreement Regulations 2013, it should be enforceable in any High Court class action proceedings. However, in practice the majority of LFAs in High Court class actions are likely to include some provision for damages-based, rather in than investment-based, returns, and are likely therefore to constitute DBAs under the Supreme Court's ruling. Many (if not most) of these will not currently be compliant with the Damages-Based Agreement Regulations 2013 and will therefore be unenforceable.

Most immediately, this will raise concerns on both the claimant and defendant side of High Court class action proceedings. Claimants will want to ensure that their funding arrangements are enforceable, either by ensuring they comply with the Damages-Based Agreement Regulations 2013, or by restructuring the arrangements so that they provide for an investment-based return. On the defendant side, there will be an immediate concern over increased costs risk. Whilst the rules in the CAT require class representatives in collective proceedings to disclose their funding arrangements, there is no requirement for parties to High Court litigation to notify the other parties that they have litigation funding, or to disclose the details of those arrangements. A party defending a class action in the High Court may therefore not know that the claimants have litigation funding arrangements in place. If the claimants are being funded pursuant to a DBA which does not comply with the Damages-Based Agreements Regulations 2013, and which is therefore unenforceable, the defendants may be unable to recover their costs from the claimants or the third party funder. This will offer a renewed impetus for defendants to High Court class actions to seek security for costs and/or to seek to formulate arguments to support applications for disclosure of information on funding.

Also in the immediate term, parties to recently concluded or settled class action claims may be considering whether there is the possibility of claims in relation to pay-outs that have been made under unenforceable agreements.

In the medium term, during the time that it takes for legislative reform to revisit the definition of DBAs, or for DBAs to otherwise be permitted in opt-out collective actions in the CAT, class action claimants may begin to consider bringing large class action claims in the High Court rather than in the CAT. Whilst historically many class actions have been brought in the CAT under a competition

law cause of action to exploit the CAT's developing collective action procedure, litigation funders may prefer to exploit the High Court's acceptance of DBAs by bringing claims there instead.

OVERALL

Parliament has recognised that funding is indispensable not only to the continued development of opt-out collective proceedings regime in the CAT but more widely to enable continued access to justice.

Whilst a joint statement by the International Legal Finance Association and the Association of Litigation Funders of England and Wales immediately sought to downplay the impact of the decision on the funding industry, saying that, whilst disappointing, the decision "*is not generally expected to impact the economics of legal finance and will not deter our members' willingness to finance meritorious claims. It will only affect how legal finance agreements are structured so that they comply with the regulations*", it has nevertheless still been suggested that Parliamentary involvement is needed to pass primary legislation to exclude LFAs from the meaning of DBAs. A new updated version of the Damages-Based Agreement Regulations was drafted in 2019, and specifically excluded LFAs from the meaning of DBAs. These new regulations remain in draft form: perhaps the Supreme Court ruling will re-focus legislative attention on this issue.

In the long term, the impact of the Supreme Court's decision on the approach of litigation funders to the types of claims they fund and where those claims are brought could have a pervasive impact on the types of class actions we see going forward. Many class action claims will not be able to commence or proceed without litigation funding. To some extent the future of class actions brought in both the CAT and the High Court now depends on how litigation funders react to this Supreme Court ruling.

RELATED PRACTICE AREAS

- Business & Commercial Disputes
- Class Actions
- UK & EU Class Actions
- Litigation & Dispute Resolution

MEET THE TEAM

Georgia Henderson-Cleland

London

georgia.henderson-
cleland@bclplaw.com
+44 (0) 20 3400 3714

Ben Bolderson

London

ben.bolderson@bclplaw.com
+44 (0) 20 3400 2123

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be "Attorney Advertising" under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.