# A seismic shift?

The enforceability of litigation funding agreements is under challenge, writes **Andrew Hogan**

Enforceability challenges have an enduring appeal in costs litigation. They are also protean and have taken many forms across the years. In recent times they have found a home in the austere environs of the Competition Appeal Tribunal (CAT), in the context of collective proceedings brought for alleged infringements of competition law.

At the current time of writing, the Supreme Court has just heard argument (on 16 February 2023) and reserved judgment in the appeal from the decision of the Court of Appeal (or the Divisional Court to be precise) in the case of *Paccar Inc and Others v Road Haulage Association Limited and Others* [2021] EWCA Civ 299.

This case concerned an interesting argument made in the CAT, lost in the CAT and then lost again in the Court of Appeal, that litigation funding agreements are in fact a species of damages-based agreement, and accordingly subject to the formality requirements imposed by section 58AA of the Courts and Legal Services Act 1990 and the Damages Based Agreements Regulations 2013. It would follow that a litigation funding agreement which did not comply with these provisions would be subject to the statutory sanction of unenforceability.

Instinctively, one would consider such an argument hopeless: after all, as is well known, litigation funding is largely unregulated in the jurisdiction of England and Wales, and moreover, section 58B of the Courts and Legal Services Act 1990 contains an enabling power permitting the lord chancellor to bring in a scheme for the regulation of litigation funding agreements, together with the application of a sanction of unenforceability for agreements which do not meet the lord chancellor's prescribed requirements.

But that section introduced by section 28 of the Access to Justice Act 1999 has never been brought into force. It would therefore be a surprising conclusion that section 58AA had brought in such a scheme, effectively through the backdoor, and rendering section 58B redundant, imposing upon the litigation funding industry a set of statutory requirements that they had no inkling of, and incidentally rendering the majority of litigation funding agreements in current use unenforceable.

## IN THE COURT OF APPEAL

But the issue was forcefully argued in the Court of Appeal, and has now gone to the Supreme Court for consideration. While the Supreme Court anxiously deliberates upon the arguments they have heard, the judgment of the Court of Appeal bears further consideration, as it contains a very useful exposition of the principles of statutory interpretation which enabled the Court of Appeal to reach, with reasons, the instinctive conclusion I tendered above.

The sole substantive judgment in the Court of Appeal was that of Henderson LJ, with which Carr and Singh LJJ concurred. He framed the issue in these terms: 'The issue, which I will call "the substantive issue", is in general terms whether funding agreements entered into with claimants by third parties who play no part in the conduct of the litigation, but whose remuneration is fixed as a share of the damages recovered by the client, are "damages-based agreements" within the meaning of the relevant legislation which regulates such agreements. If they are, the likely consequence would be that most, if not all, litigation funding agreements currently in existence would be unenforceable, as would the specific agreements which the tribunal was asked to approve in the present case.'

Put in those apocalyptic terms, one suspects that whatever attempts to 'roll the pitch' were made, it was fundamentally tilted uphill for the appellant. By way of background, the court also noted: 'Over the last thirty years, litigation funding in England and Wales has changed out of all recognition. Third-party litigation funding is now a substantial industry which, although driven by commercial motives, is widely acknowledged to play a valuable role in furthering access to justice.

'Following the recommendations of Sir Rupert Jackson's review of civil litigation costs in 2009, that industry is currently self-regulated, although parliament enacted provisions in section 28 of the Access to Justice Act 1999 (AJA 1999) which have never been brought into force but remain on the statute book and, if brought into force, would enable litigation funding agreements (LFAs) to be regulated by subordinate legislation made by the lord chancellor.

'Other forms of litigation funding have come into existence which, from their inception, have been subject to statutory control. They include (a) conditional fee agreements (CFAs), first introduced by section 58 of the Courts and Legal Services Act 1990 (CLSA 1990), under which lawyers were permitted in specified circumstances to charge success fees for their litigation and advocacy services; and (b) of particular relevance to the present case, damages-based agreements (DBAs), also sometimes called contingency fee agreements, under which (again in specified circumstances) it became permissible for lawyers providing certain types of services to stipulate for remuneration in the form of a share of the damages ultimately recovered by the client.'

The appellant's arguments were derived from section 4(2) of the Compensation Act 2006, which defined claims management services in these terms:

'In this Part…

'(b) "claims management services" means advice or other services in relation to the making of a claim,

'(c) "claim" means a claim for compensation, restitution, repayment or any other remedy or relief in respect of loss or damage or in respect of an obligation, whether the claim is made or could be made-

'(i) by way of legal proceedings…

'(3) For the purposes of this section-

'(a) a reference to the provision of services includes, in particular, a reference to-

'(i) the provision of financial services or assistance…'

Under section 58AA of the Courts and Legal Services Act 1990, damages-based agreements are subject to regulation if they relate to advocacy services, litigation services or claims management services, and provide for a payment to be made to the person providing the claims management services, if the recipient obtains a specified financial benefit and the amount of the payment is determined by reference to the amount of the financial benefit obtained. So at first blush, the argument had a grounding in the linguistic construction of section 58AA read with section 4(2). But in law, as in other areas of life, context is everything.

The Court of Appeal reviewed the history of the various provisions in their policy context and noted: 'Taking stock at this point, it seems reasonably clear to me that the purpose of introducing statutory regulation of claims management services in section 4 of the 2006 Act and its associated Scope Order was to enhance consumer protection in areas where the activities of "claims intermediaries" had been causing widespread public concern.

'Typical activities of the kind causing such concern might be broadly described as proactive "claims farming" or the formation of books of

potential claimants to pursue legal claims, followed by assistance in the formulation and bringing of those claims, in relation to matters such as personal injuries, employment, housing, and financial products or services, in all of which consumer protection is likely to be much needed: compare articles 4(2) and (3) of the Scope Order, set out in the tribunal's judgment at [28].

'Conversely, there is no suggestion in any of the material I have reviewed which indicates that regulation of non-champertous funding of litigation by professional third-party funders in return for a reasonable share of the client's recoveries, of the kind exemplified in the Factortame (No 8) and Arkin cases, formed any part of the explicit mischief that section 4 of the 2006 Act sought to remedy.

'Furthermore, should it prove necessary to regulate activities of the latter kind, parliament had already enacted section 58B of CLSA 1990, but the government had chosen not to bring that legislation into force. The natural inference to draw, in my opinion, is not that the legislation was a dead letter, but rather that immediate regulation of the third-party litigation funding sector was not considered necessary, and the continuing presence of section 58B on the statute book (albeit not in force) might meanwhile be expected to help maintain standards and act as a deterrent against abusive practices.'

The Court of Appeal then went onto conclude that section 4(2) was not concerned with litigation funding agreements, where the litigation funder played no part in the management of the claim. They did so for two principal reasons: the first was that parliament had enacted a comprehensive scheme for the regulation of litigation funding agreements, that simply had not been brought into force. It was therefore most improbable that Parliament would have intended by a sidewind to bring litigation funding arrangements which were potentially liable to regulation under section 58B within the ambit of the scheme for the regulation of claims management services introduced by the 2006 Act.

Secondly, the Court of Appeal placed some emphasis on the way that section 4(2) was structured, invoking a principle of statutory construction called the 'potency of the term defined'. Thus the very fact that this was an 'extended' definition related back to the ordinary meaning of the word or phrase defined. Section 4(2) was therefore concerned primarily with claims management, rather than loans for litigation purposes.

## CONCLUSIONS

It would be a surprising result if the decision of the Court of Appeal on the substantive point of whether litigation funding arrangements are regulated under section 58AA, as well as under section 58B, is overturned. But sometimes the Supreme Court likes to throw out surprises, which upset the commentators and where the 'smart money' would predict the converse result: the decision in *Ho v Adelekun* [2021] UKSC 43 was one such ruling in recent years.

Moreover, the very fact that this sort of argument is being run should provoke anxious consideration by litigation funders of their agreements; and lead them to consider what other vulnerabilities may be contained within them, given the continuing appetite for enforceability challenges.

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