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Be careful what you wish for

Cost Litigation Newsletter

By Andrew Hogan
Kings Chambers
Manchester, Leeds and Birmingham
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In the last year, there have been two developments which are likely to be of systemic significance for the future of the litigation funding industry: the first was the decision of the Supreme Court in the case of **R (On the application of Paccar v Competition Appeal Tribunal [2023] UKSC 28.**

Through unprecedented efforts the industry managed to obtain the promise of retrospective legislation to reverse the **Paccar** decision, but the Litigation Funding Agreements (Enforceability) Bill died in the dissolution of Parliament when the general election was called, as it failed to enter the washup procedure. This series of events has raised to public prominence the entire question of regulation of litigation funding agreements, as the **Paccar** decision meant that despite popular opinion, those agreements had been subject to regulation with the penalty of unenforceability for many years. The effect of the Bill would have been to restore the popular perception. But it has placed on the table the question as to whether and in what degree litigation funding agreements, and litigation funders should be subject to regulation.

The second is the backdrop of the Horizon Scandal, the consequences of which are still playing out. But a key component of the affair was the use by hundreds of former sub-postmasters of third-party litigation funding to take action against the Post Office. An article in the **Financial Times** noted that due to the costs of the third party litigation finance from Therium, and other irrecoverable costs of the litigation, the postmasters were left to share £12 million, out of an overall settlement of £58 million. Despite a spirited defence by Therium that their share of the settlement pot was far short of the £46 million, pointing out the wider benefits of the case for the postmasters and identifying the high cost of contingent non-recourse finance; for a claimant to lose just under 80% of their settlement in irrecoverable "costs" and charges, is a victory that might be described as Pyrrhic. It has further placed on the table, whether and to what degree litigation funding agreements should be subject to statutory caps in the same way that costs under conditional fee agreements and damages-based agreements are capped, for the protection of clients, and indeed what further regulation might be required.

The Civil Justice Council

The government has moved swiftly, with the Lord Chancellor requesting the Civil Justice Council to undertake a review into third party civil litigation funding. The Civil Justice Council's terms of reference have been set, and the purpose of the review is to consider whether current arrangements deliver effective access to justice and make clear recommendations for reform. An interim report is to be provided by the summer of 2024, and a full report by the summer of 2025. The terms of reference include not only the requirements to set out the current position of Third-Party Funding, but to consider access to justice, effectiveness and regulatory options. The third tranche of the CJC's work is to consider these options:

- As to whether and how and, if required, by whom, TPF should be regulated.
- As to whether and, if so, to what extent a funder's return on any TPF agreement should be subject to a cap;
- How TPF should be best deployed relative to other sources of funding, including but not limited to; legal expenses insurance, and crowd funding;
- As to the role that rules of court, and the court itself, may play in controlling the conduct of litigation supported by TPF, or similar funding arrangements, including whether and, if so, what provision needs to be made for the protection of claimants whose litigant is funded via TPF; and the interaction between pre-action and post-commencement funding of disputes;
- The relationship between TPF and

litigation costs;
- Duties concerning the provision of TPF, including potential conflicts of interest between funders, legal representatives and funded litigants;
- As to whether funding encourages specific litigation behaviour such as collective action.

The working group

Transparency in the appointment of the working group, would have aided understanding of its membership. Thus, in this case the working group is co-chaired by Mr Justice Simon Picken, and John Sorabji with other eminent legal figures, but what is surprising is that the initial membership announced does not contain any litigation funders themselves, any litigation funding brokers who place cases for funding, or any solicitors who have experience of structuring applications and bringing forward cases for funding. At the time of writing the possibility of co-opting further members of the working party, remains, but these are surprising omissions from the roster of those likely to have informed views and access to information, to strengthen the conclusions of the working party.

The content of the review

So, what is likely to emerge from the review? I think there are likely to be a number of issues, nascent as yet, but which will undoubtedly be grappled with in the course of the review, though the conclusions are likely to be less easy to predict. The first, is that if litigation funders are going to operate in the consumer space, they are likely to be subject to regulation. This would run with the grain of FCA led protection for consumers and the longstanding public policy of placing caps on lawyers remuneration. Correlatively, it may be thought that the need for regulation of litigation funding in the B2B space where there are sophisticated commercial counterparties to any litigation funding agreement, is simply not made out.

Secondly, the imposition of caps on funders returns, particularly in the consumer space is a live issue, requiring not only clear evidence of market failure: where litigation funders were exploiting a monopolistic or oligopolistic positions, but also whether a cap would simply mean that the "hot money" poured into litigation finance in the UK, would move overseas, to regions and case classes, which are unconstrained by such caps. There will need to be clear evidence as to the "burning costs" of litigation finance, as otherwise, the true cost and consequent return on investment (ROI) will remain opaque, precluding any sensible consideration of the effect of caps.

Thirdly, the consideration of crowd funding and legal expense insurance is surprising: each of those topics of their own, would justify an in-depth inquiry and report. Crowdfunding is usually not for profit and takes place in the context of cases of significance to the public, rather than as a commercial business. In this country, for many years, legal expense insurance has been divided into after the event (ATE) insurance and (BTE) insurance. The former is a natural corollary to litigation funding, the latter is of marginal relevance to increasing access to justice and likely to remain so.

The notion that rules of court and the court itself should have a role in controlling third party funding, does, putting it mildly seem like a very bad idea. The involvement of the courts in regulating returns under conditional fee agreements, and the recovery of ATE insurance premiums has been an unhappy one: and largely solved only through the abolition of recoverable additional liabilities, with the court being gracefully removed from the process.

One issue that should be squarely grappled with is whether and to what extent the costs of litigation funding should be recoverable

on an inter partes basis. There remains an intriguing anomaly that the costs of funding are recoverable (at least in principle) in arbitration proceedings, but not in litigation in the civil courts. Should this be addressed, or should it remain in its box?

Other topics which will fall to be considered such as the scope for conflicts of interest and whether the availability of litigation funding fuels particular types of claims, raise philosophical issues as well as practical ones. For many years now, lawyers have acted on conditional fee agreements or other forms of contingency arrangements, notwithstanding that until 1995 such arrangements in litigation were unlawful.

One of the reasons for their illegality, was that such arrangements were thought to constitute champerty and maintenance, but a further reason was the potential for a conflict of interests between the client (who wants a trial) and the lawyer (who wants a settlement-with costs) was part of the public policy. These concerns were swept aside for pragmatic reasons. In respect of litigation funding encouraging claims to come forward, the real question is whether such claims should exist at all. If Parliament has legislated for a remedy in competition proceedings or whatever, then the balance of public policy has been decisively struck. The funding tail does not wag the dog, of substantive rights at law.

Conclusions

If they remain unrepresented on the working party, the litigation funding industry is going to have to take serious steps not only to make appropriate submissions to the working party, but to obtain evidence and data, on their work, their deals and their returns, to avoid caps on their returns or to ensure that any regulation is light touch. The working party in turn faces an invidious challenge of ensuring that any proposals are not only principled but practical: if they result in funding avoiding this jurisdiction, then the result will likely be fewer cases brought, and access to justice impaired.

A version of this article first appeared in Litigation Funding magazine.

My blog can be found at *www.costsbarrister.co.uk*

Andrew Hogan practice from Kings Chambers in Manchester.

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