July 2025 | Part 1

KINGS CHAMBERS

The Civil Justice Council Final Report on Litigation Funding

Costs Newsletter

By Andrew Hogan

Kings Chambers
Manchester, Leeds and Birmingham
3rd July 2025

Overview

It all begins with PACCAR. In July 2023, the Supreme Court held that most third-party litigation funding agreements (LFAs) were, in law, damages-based agreements (DBAs). That meant that unless they complied with the strict statutory regime applicable to DBAs, they were unenforceable. The judgment sent shockwaves through the funding industry. Many existing agreements were instantly compromised, and collective actions stalled while lawyers and funders scrambled to re-paper deals in compliance with a regime they had previously assumed did not apply to them.

In political terms, the decision triggered a swift and unambiguous response. The then-Conservative Government pledged to overturn PACCAR by legislation. The Litigation Funding Agreements (Enforceability) Bill was published in March 2024 and proposed to do precisely that—with retrospective effect. But before it could pass into law, the general election was called, Parliament was dissolved, and the Bill fell. The new Government decided to pause and wait for the Civil Justice Council to report.

Now it has. The Final Report, published in June 2025, is the second of two documents from the CJC Working Party. The Interim Report appeared in October 2024 and addressed the wider landscape of third-party funding in England and Wales. The Final Report returns to PACCAR and proposes a legislative response, but its ambition is broader: a comprehensive rules-based regime governing the operation, terms, disclosure, and consequences of funding agreements.

At its heart is a single conclusion: the effect of PACCAR should be reversed by primary legislation, and all third-party funding should be regulated under a new statutory framework. The recommendation is that litigation funding agreements should be carved out of the definition of DBAs and treated separately. In short, the CJC agrees with the funders, the Government, and many others that PACCAR was wrongly decided. But unlike the Bill that would have reversed it in one line, the CJC proposes to replace the current vacuum with a fully-fledged system of regulation.

The inspiration, as so often, comes from Europe. The report is firmly grounded in the **Principles Governing the Third Party Funding of Litigation** published by the European Law Institute in 2024. In particular, it endorses Principles 4 to 12, which set out the fundamentals of responsible regulation: capital adequacy, anti-money laundering, transparency of funder identity, prohibition on control of litigation, and fair treatment of funded parties. These ideas now form the blueprint for a new "light-touch" regime in England and Wales.

But how light is "light-touch"? There is a growing sense that the legal profession has captured this regulatory process. The proposals are replete with references to the responsibilities of funders and the rights of claimants, but curiously quiet on commercial freedom or market discipline. Counsel's opinion will be required on every LFA where the funded party is a party to collective proceedings, a representative action or a group action or is a consumer. Courts will then review the terms of the agreement and the reasonableness of the funder's return. Non-compliance may render the agreement unenforceable. A standing committee will collect data, monitor outcomes, and propose future reform.

These are not merely regulatory nudges. They amount to a transfer of power, from funders to lawyers, and from the marketplace to the courtroom. It is a transition from contractual autonomy to supervisory control. What was previously unregulated, at least in form, despite the conclusion of the Supreme Court that litigation funding agreements, in a sense, were regulated by the Courts and Legal Services Act 1990 and its provisions on damages based agreements, is now to be governed by detailed and mandatory rules. Some of these will be legislative. Others will emerge through revised Civil Procedure Rules, applicable both in the courts and in the Competition Appeal Tribunal. Together, they herald nothing less than the arrival of a rules-based order for litigation funding.

The consequences are likely to be profound. With mandatory requirements around capital adequacy, disclosure and conflict management, there is ample scope for satellite litigation. Funders who fall foul of the new rules may find their agreements struck down and their recoveries extinguished. Class representatives will be required to disclose the funder's identity and proposed return in every opt-out notice. Judges will be invited to scrutinise and approve terms which, up until now, were matters of private contract. There will be fertile ground for arguments, challenges, and appeals.

In commercial terms, the regime will almost certainly reduce the funders' room for manoeuvre. Gone are the days when the return could be dictated by a funder's appetite for risk or a claimant's desperation for capital. The report explicitly rejects the idea of profit caps but proposes instead a regime where the courts will decide, on a case-by-case basis, whether a return is "fair, just and reasonable." That may be worse than a cap: it introduces legal uncertainty and opens the door to ex post challenges. It also amplifies the risk that funders will exit the market, or price their risk more conservatively, with predictable consequences for access to justice.

Nowhere is this tension more acute than in the debate over retrospectivity. The CJC recommends that the legislation to reverse PACCAR should apply both prospectively and retrospectively. That may be politically attractive, but it is legally fraught. As the case against retrospectivity makes clear, there is no real precedent in English law for retrospective legislation affecting private contractual rights in this way. Article 1 of Protocol 1 to the European Convention on Human Rights, which protects the peaceful enjoyment of possessions, is engaged. It is questionable whether Parliament can simply deem that what was unlawful is now, and always has been, lawful without at least acknowledging a departure from the A1P1 rights of one of the funded party. It may yet find itself challenged in Strasbourg or the domestic courts.

For now, the CJC's view is clear. PACCAR was a mistake. It should be reversed. But not by a one-line Bill that simply changes the law. Instead, a full statutory regime should be enacted to bring third-party funding within the rule of law. This is the vision of the report: to embed the commercial practice of funding within a framework of legal accountability. Whether that vision will survive the rigours of political compromise remains to be seen. But it is already reshaping the terrain on which the next battle will be fought.

"Light touch" regulation

The Civil Justice Council's Final Report on litigation funding sets out its most ambitious recommendations in Parts 4, 5, and 6. Its core proposal is that third-party funding should be subject to formal statutory regulation. This marks a deliberate shift away from the current mix of self-regulation and judicial oversight. While the Report characterises its approach as "light-touch," the structure it recommends is substantial, and its practical effects are likely to be far-reaching.

Part 4 of the Report outlines the foundations. Regulation will be introduced by way of statutory instrument, giving the Lord Chancellor the power to define litigation funding agreements, impose conditions on their enforceability, and introduce a regime of oversight. Notably, arbitration proceedings are excluded. The Report recognises that arbitration, particularly international arbitration seated in London, depends on its flexibility and competitiveness. Funders in that space, it concludes, should remain subject to market forces and the rules of arbitral institutions.

The framework in Part 4 is meant to evolve. The Lord Chancellor will be responsible in the first instance, but a new Standing Committee on Litigation Funding will be tasked with reviewing the regime after five years, with an eye to whether more formal supervision, perhaps by the Financial Conduct Authority, should follow.

Part 5 provides the detailed design. It begins by reaffirming the core objective: to ensure that litigation funding supports access to justice while providing protection for consumers, parties to collective actions, and the courts. The regulatory scheme is intended to codify best practice and avoid the uncertainties exposed by the PACCAR decision. The key features are grouped into three broad categories: the general structure, the substantive content of the regulations, and additional safeguards for collective and consumer litigation.

On structure, the proposal is that regulation should focus not on the funders themselves, but on the agreements, they enter into. LFAs will be subject to enforceability conditions, much like conditional fee agreements (CFAs) and DBAs have been under earlier regimes. Enforcement will be private rather than administrative: if a party challenges the validity of an LFA on the basis of non-compliance, the court may find it unenforceable. There will also be scope for waivers, where non-compliance is deemed minor or where strict enforcement would be unjust.

The content of the regulations, as set out in Recommendations 10 to 16, is more extensive than the "light-touch" label might suggest. Funders must meet capital adequacy requirements on a case-specific basis, particularly where claims are brought by consumers or involve collective redress. If insurance is used to meet this standard, it must include robust anti-avoidance measures.

Regulations will also prohibit funders from exercising control over litigation or settlement. Any such control would render the agreement unenforceable and may expose the funder to liability for costs. Transparency is another cornerstone: the fact of funding, the identity of the funder, and the source of funds must be disclosed at the earliest opportunity. The terms of the agreement, however, generally remain confidential unless disclosure is required under the special rules applicable to collective proceedings.

Additional requirements include compliance with anti-money laundering legislation, rules on conflicts of interest, and provision for independent dispute resolution between funders and funded parties. All of this is to be set out in a new set of Litigation Funding Regulations, which in substance and structure are direct descendants of earlier statutory regimes: the Conditional Fee Agreement Regulations 2000, the Conditional Fee Agreements Order 2013, and the Damages-Based Agreements Regulations 2013.

Those earlier instruments were well-intentioned but proved difficult in practice. They created fertile ground for procedural challenge. Parties frequently used technical breaches of the regulations to contest the enforceability of funding arrangements. That litigation came to be known as the "Costs Wars" of the early 2000s—a wave of disputes that generated more case law than the underlying claims themselves. The risk now is that the new Litigation Funding Regulations will continue that tradition, empowering litigants to challenge LFAs on grounds of non-compliance, even where no substantive unfairness has occurred. Rather than empowering a regulator to enforce rules, the scheme places enforcement squarely in the hands of the parties and the courts.

That dynamic is sharpened in Recommendations 17 to 23, which introduce special provisions for consumer claims and collective proceedings. In these cases, further safeguards apply. Funders will be subject to a regulatory Consumer Duty, and funded parties will be required to obtain independent legal advice before entering into an LFA. Specifically, the Report recommends that such advice be provided by King's Counsel.

This is a striking requirement. The Report offers no empirical or legal basis for requiring a silk to advise on the fairness of a commercial funding arrangement. It is not clear that junior counsel or an experienced solicitor could not provide equally effective advice. Nor is it obvious how many KCs would be willing to undertake what is, in effect, a form of certification, particularly if the LFA later becomes controversial. Or indeed, how many may then find themselves conflicted out of involvement in the substantive or satellite proceedings.

Other proposals raise similar questions. Regulation 21 will require the solicitor and funder to certify that they did not solicit or induce the claimant to bring proceedings. This is intended to guard against manufactured claims, but it is likely to prove difficult to apply in practice. What about claims promoted via advertising, crowdfunding platforms, or litigation PR? How much indirect encouragement is too much? These uncertainties may not be fatal, but they do introduce an element of complexity that could frustrate the very certainty regulation is meant to promote.

Behind all this lies a larger question. What problem is this regulatory regime designed to solve? The Report does not cite any particular scandal, systemic failure, or pattern of abuse. There are well known "hard cases" such as the Post Office litigation, which suggests that funded parties have suffered substantial deductions from their compensation, but to what extent are these cases outliers, or examples of a larger problem? There is little empirical data on which to base the need for regulation. The most that can be said is that litigation funding is growing, and that PACCAR created legal uncertainty. Whether that justifies a regime as detailed as the one proposed is a matter of judgment.

One strand of the Report's reasoning is that Parliament has already signalled its intent to regulate, by enacting section 58B of the 1990 Act. But that section was never brought into force. It has remained dormant for more than 25 years. If anything, its neglect suggests a legislative reluctance to regulate this field, not a commitment to do so.

There is, too, a broader caution about regulation as a cure-all. History teaches that regulation often works better in theory than in practice. The Conditional Fee Agreement Regulations 2000 led to a decade of litigation about technical compliance. The DBA regime has seen minimal uptake, in part because of regulatory inflexibility. And in the wider regulatory landscape—whether financial, professional, or institutional, failures of enforcement and oversight are common. Light-touch regulation, once enacted, often becomes anything but.

What the Report proposes is thoughtful and comprehensive. It seeks to build on best practice and respond to real concerns about access to justice, transparency, and fairness. But as the history of legal regulation shows, good intentions alone are not enough. Rules designed to help can easily become hurdles to navigate. And in the absence of clear evidence that the system is broken, the risk is that regulation may solve problems that do not yet exist, while creating new ones along the way.

Law firm funding

Among the many proposals in the Civil Justice Council's Final Report on litigation funding, those in Part 6 stand out as something of an outlier. Here, the Working Party turns its attention to two related forms of legal finance: portfolio funding and litigation loans. Neither involves direct funding of litigants. Instead, they are mechanisms by which third-party capital is provided to law firms. The concern is that these arrangements, while often commercially valuable, can lead to problems when firms overreach or collapse—leaving clients in the lurch.

Portfolio funding is a form of investment in which a third-party funder provides capital to a law firm across a portfolio of cases, rather than backing a single claim. The return to the funder is typically drawn from the aggregate proceeds of multiple cases, thereby spreading risk and potentially enhancing reward. These deals can be structured in various ways, but the common feature is that the capital is used flexibly—sometimes to underwrite disbursements, sometimes to support fees, sometimes to fund operational costs.

Litigation loans, by contrast, are usually case-specific credit arrangements. A lender, often a litigation funder or specialist finance house, loans money to a law firm to support a specific case or group action, with repayment contingent on recovery. Sometimes, the borrower is the client; more often, it is the firm. Interest rates may be high. Repayment structures vary. But again, the essence is that these are commercial credit arrangements between sophisticated parties, not consumer financial products.

Recommendations 28 to 31 address these forms of lending. The Report recommends that portfolio funding should be regulated as a form of loan finance, not litigation funding. The Financial Conduct Authority (FCA) should be responsible for this regulation. The Solicitors Regulation Authority (SRA) should investigate the impact of portfolio funding on the legal profession, with a view to improving guidance and oversight. The SRA and Legal Services Board (LSB) should explore co-regulatory models with the FCA. Additional training, guidance, and regulatory tools should be developed to assist lawyers involved in portfolio-funded work, especially where client protection is at stake.

These are measured suggestions. The Working Party stops short of suggesting that litigation loans should be banned or subject to the same framework as consumer-focused litigation funding. But it clearly signals that the existing regulatory regime is not working well.

The backdrop is plain enough. There have been a number of high-profile collapses of solicitors' firms, some of which were heavily reliant on external funding. These include firms active in group litigation or low-margin, high-volume claims. In many cases, when the firm collapses, its clients are left without legal representation, disbursements unpaid, and prospects of recovery materially diminished. The loans are often non-recourse, but the damage is real. The courts, regulators, and press have all expressed concern about the impact on clients and the integrity of the justice system.

What's notable is that this is not a consumer-facing problem. Portfolio funding and litigation loans are, by and large, business-to-business lending arrangements between funders and law firms. In England and Wales, such arrangements are usually not subject to financial regulation. The FCA regulates loans to consumers and small businesses under the Consumer Credit Act, but sophisticated commercial entities (including solicitors' firms) fall outside its standard remit. There is no requirement to assess affordability or suitability. The parties are expected to be competent and well-advised.

That makes the CJC's recommendation unusual. This is a call to bring commercial legal finance within the scope of formal regulatory oversight—not because the law firms need protection as borrowers, but because clients may suffer if the borrower collapses. The potential benefits are obvious. Regulation could prevent unsustainable borrowing by requiring minimum capital adequacy or solvency standards. It could introduce risk controls that require funders to scrutinise the underlying cases more carefully. It could ensure better due diligence on the financial health of borrower firms. It could allow for greater transparency in the terms of lending and their implications for clients. In short, regulation might help prevent some of the collapses we have seen—or mitigate their consequences.

But there are problems too. First, regulation may not prevent failure. Law firms go under for all sorts of reasons—poor management, bad cases, uninsurable risk. Regulation may add cost, delay, and bureaucracy without addressing the root problem. Second, regulatory scope is hard to draw. At what point does a commercial loan to a law firm become "portfolio funding"? What about traditional bank lending? Or disbursement funding by insurers? The line between regulated and unregulated finance is porous.

More fundamentally, it is not clear whether this is a problem of absent regulation, or of inadequate enforcement of existing rules. The SRA already has powers to investigate and intervene in firms that are financially unstable or act contrary to clients' interests. If those powers have not been used effectively, the answer may lie in better oversight, not new rules.

The Report suggests the FCA is best placed to regulate the funders, given its role in supervising financial services. But it also sees a continuing role for the SRA, particularly in regulating the law firms themselves. In reality, there is a good argument that this is not a question of litigation funding at all. It is a professional regulation issue. Funders are commercial investors. Their conduct may be aggressive, but they do not owe duties to clients. Solicitors, by contrast, do. The question is whether firms are managing their financial obligations in a way that respects their professional duties. That is a matter for the SRA and the LSB.

This part of the Report, while important, feels somewhat separate from the rest. The CJC is grappling with third-party litigation funding as a mechanism to promote access to justice. Portfolio funding and litigation loans are more about the financial structure of legal businesses. They involve different relationships, different risks, and arguably, a different regulatory focus.

The concern may be better addressed by refining the SRA's rules on financial management, and by ensuring that those who lend money into the legal sector are doing so with open eyes. If some funders are too ready to back high-risk firms without sufficient case analysis or contingency planning, that is a commercial risk they take. But the clients, who may have sound claims, are too often the collateral damage.

In truth, the challenge is one of discipline, not design. There is already a regulatory regime for solicitors. There are existing powers to monitor firm stability. And there are market signals that funders ignore at their peril. The issue may be less about new regulation and more about enforcing what we have—and asking hard questions of those who put short-term profit ahead of long-term viability.

Courts, enforceability, and case management

Parts 5 and 8 of the Final Report reveal that the Civil Justice Council's ambition extends well beyond regulation. It proposes fundamental change to the rules of court and to case management itself, shifting control over litigation funding agreements from private negotiation to judicial oversight. The impact of that shift may be profound. If adopted, these recommendations will reshape how cases are conducted, how costs are controlled, and what may ultimately be recovered.

Recommendations 24 to 27 sit in Part 5. Their focus is on procedural reform. Recommendation 24 suggests that the Civil Procedure Rules should be amended to require disclosure of litigation funding agreements to the court in certain categories of cases—specifically, all opt-out collective proceedings, and any case where the court is asked to approve the terms of the funding. The identity of the funder and the existence of funding must be disclosed in every case, even if the terms remain confidential.

Recommendation 25 goes further: where approval of the agreement is required, the court should be asked to rule on whether the funder's return is "fair, just and reasonable." The test is undefined. It invites value judgments by judges about risk, proportionality, and reward. It may expose funders to judicial trimming of their expected returns, even after they have taken on substantial financial risk.

Recommendation 26 would allow the court to disallow or adjust the funder's entitlement in cases of serious non-compliance with the new regulatory regime, or with applicable conduct rules. This would operate independently of enforceability under contract law. It gives the court a new supervisory role over funding terms, potentially long after the agreement was formed.

Finally, Recommendation 27 invites further consideration of whether all litigation funding agreements in opt-out proceedings should be subject to judicial approval. That would bring funding into line with settlement, which already requires approval in such proceedings. But it also significantly expands the court's case management burden.

Together, these four recommendations create a more interventionist judicial role in the litigation funding landscape. The court will become not just a forum for adjudication, but a gatekeeper for funding fairness. While this may provide protection for claimants, particularly in collective actions, it raises difficult questions about the boundaries of private contract and judicial discretion.

In Part 8, the focus shifts to costs and funding. Recommendations 37 to 44 reflect a deep concern with how the cost of litigation is managed, particularly in funded cases. Recommendation 37 proposes that a new pre-action costs management process be considered. This is novel. At present, costs management begins once a claim is issued and allocated. The proposal would push budgeting into the pre-action stage, where no claim form exists, and judicial scrutiny would be based on preliminary exchanges.

That would be an unprecedented shift. Costs budgeting is already a demanding and contested exercise. Doing it before proceedings even begin raises practical and conceptual difficulties. How are budgets to be managed where the pleadings are not yet settled, evidence untested, and timetables fluid? Who will bear the cost of pre-action hearings? And what sanctions will apply if the parties disagree or the case later evolves?

Recommendations 38 and 39 call for more consistent application of budgeting in group litigation and collective proceedings. Recommendation 40 suggests a new approach to the treatment of funder costs within the budgeting process. It seeks greater transparency and clearer guidance for judges about how funding costs should be treated when managing budgets.

The most controversial proposal comes in Recommendation 41: that the costs of litigation funding should be recoverable in "exceptional circumstances." This would be a sea change in English costs law. The position since the LASPO reforms has been that the costs of litigation finance—whether in the form of success fees or ATE insurance premiums—are not recoverable from the losing party. That position was confirmed by the Supreme Court in **Hirachand v Hirachand [2024] UKSC 44,** where it was held that a success fee could not be included as part of a financial provision award under the Matrimonial Causes Act 1973. The rationale is consistent: these are costs voluntarily incurred to enable litigation, and not properly recoverable as costs of the action.

Yet in **Essar Oilfields Services v Norscot Rig Management [2016] EWHC 2361 (Comm)**, a High Court judge upheld an arbitral award that allowed recovery of litigation funding costs under the general discretion conferred by section 59 of the Arbitration Act 1996. The decision did not go to the Court of Appeal. It has been doubted, and rightly so. It sits awkwardly with established costs principles. It creates a divergence between arbitration and court proceedings that is hard to justify. And it blurs the line between commercial risk and compensable loss.

The CJC's recommendation imports that logic into the court system. The problem, of course, is that "exceptional circumstances" is an open door. Every case will now be argued to be exceptional. Every claimant with funding will assert that their case presents unique features justifying departure from the general rule. Satellite litigation will inevitably follow.

Judges will have to decide whether the funding was necessary, whether it was proportionate, and whether the case is truly unusual. That will involve detailed evidence about the market for funding, the claimant's options, and the terms of the deal. It will raise precisely the kind of mini-trials on costs that budgeting was designed to reduce.

There is also a conceptual inconsistency. If funding costs can be recovered in exceptional cases, why not success fees? Why not ATE premiums?

These are all elements of litigation finance. They often work in tandem. A claimant may use third-party funding to pay for the premium. If one cost is recoverable, the logic for excluding the others becomes strained. The line becomes arbitrary.

The Report attempts to manage this tension by limiting recoverability to funder costs only, and only in rare cases. But that boundary will not hold. Once an exception is created, it will be tested. And if a funder's return is recoverable, it is difficult to see why a solicitor's uplift should not be treated the same way.

These are not idle concerns. The history of English costs law is littered with unintended consequences. Conditional fee agreements were meant to solve the problem of access to justice. They did—but they also created the costs wars. The LASPO reforms were meant to restore balance. They did—but they also curtailed recoverability for many legitimate expenses.

If the aim is certainty, the path the Report proposes is a risky one. It invites complexity, discretion, and litigation over threshold tests. It may deter funders, not because the costs are unrecoverable, but because recovery will be unpredictable and hard-fought.

There is merit in the idea that funding should be more transparent and better integrated into the litigation process. But recoverability is a step further. It changes incentives. It changes how funding deals are priced. And it raises difficult questions about fairness between winners and losers.

The Civil Justice Council seeks to bring coherence to a fragmented area. That is a worthwhile aim. But in this part of the Report, coherence may give way to confusion. The rules of the game are changing. But whether they will be more easily played—or simply more often litigated—remains to be seen.

Conditional Fee Agreements and Damages Based Agreements

The Civil Justice Council's proposals for the future of CFAs and DBAs are, in some ways, the most far-reaching of all. After years of tinkering with funding arrangements, Part 9 of the Final Report signals a more fundamental reappraisal of how litigation is paid for, and what returns lawyers may lawfully receive.

The headline is Recommendation 45: the removal of the indemnity principle. This is no small step. For over a century, the indemnity principle has underpinned recoverable costs. A litigant cannot recover from their opponent more than they are themselves liable to pay. It is a rule born of fairness, but in practice it has generated volumes of technical disputes. The CJC proposes its abolition. That would mean that costs recovery is governed not by the claimant's liability, but by what is deemed reasonable and proportionate. The rules of the court, not the parties' agreement, would determine what the losing party pays.

The effect of that change would be both legal and cultural. Technical challenges to CFAs based on non-compliance or inconsistencies would fall away. So too would arguments about enforceability and form. The rules would become simpler, but the discretion of the court would loom larger. Whether that brings clarity or uncertainty depends on your perspective. For those who favour substance over form, it is a welcome move. For those who rely on the discipline of contract, it may feel like an erosion.

The Report also proposes that the regulation of funding arrangements should be transferred from the Ministry of Justice to the Civil Procedure Rule Committee. This reflects the view that funding and costs are no longer merely matters of policy, but integral to the conduct of proceedings. The CPRC, with its judicial and practitioner membership, is seen as better placed to craft rules that reflect practical realities.

There is also a suggestion, floated in Recommendation 49, that success fees under CFAs may need to be increased to account for inflation. But this needs to be treated with caution. Inflation does not erode the value of a percentage uplift; it inflates the base costs to which the uplift is applied. Since those base costs remain recoverable between the parties, the success fee, calculated as a percentage of those costs, rises with them. To increase the percentage itself would be to double count the effects of inflation. It would also risk recreating the conditions that led to the LASPO reforms in the first place.

In contrast to England and Wales, Scotland has already legislated for a more liberal approach to success fees. Under the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, solicitors may agree damages-based success fees with clients, subject to statutory caps. Those caps differ by case type, and the regime applies more readily to personal injury and consumer claims. There is a single system, no separate CFA and DBA structures, and greater flexibility. But it remains too soon to say whether the Scottish model has delivered materially greater access to justice or market stability.

The Report turns next to damages-based agreements, which remain a regulatory backwater. Introduced by section 45 of LASPO and governed by the Damages Based Agreements Regulations 2013, DBAs were heralded as a modern funding tool. But their use has been stunted. The Regulations are inflexible, the drafting is opaque, and their structure is commercially unattractive. Few firms offer DBAs. Fewer still use them in large-scale litigation.

The Mulheron-Bacon proposal, an attempt to revise the Regulations to make them more workable, has been with the Ministry of Justice for years. It recommends a series of technical amendments to allow hybrid DBAs, clarify termination provisions, and enable partial success. The CJC endorses that reform package but goes further. It proposes that DBAs should be permitted in opt-out collective proceedings, where they are currently barred. That would align DBAs with CFAs and litigation funding agreements, both of which are now widely used in the CAT.

The idea is to provide claimants with a menu of options. The court would have to approve any DBA in a collective case, and the risk of abuse would be managed through transparency and judicial oversight. But one striking suggestion is that in such cases, the representative's return might be uncapped. At present, caps exist to ensure that claimants retain a reasonable share of damages—often two-thirds or more. But in large group claims, where the amounts are significant and the risks high, the CJC floats the idea that no cap may be needed. That would mark a departure from current thinking. It would also reopen the broader policy debate about what share of damages a lawyer—or funder—is entitled to.

There are arguments on both sides. Those in favour of uncapped returns say that they reflect the real economics of litigation and reward those who take the biggest risks. Those against say that the claimant should always come first, and that access to justice should not come at a premium. The CJC does not resolve that tension. It simply acknowledges it.

The Report closes its substantive proposals here. It does not deal in detail with crowd funding, before-the-event (BTE) insurance, or supplementary legal aid schemes. That is no oversight. These are marginal topics. Crowd funding has niche appeal but limited traction. BTE is declining, not growing. Supplementary legal aid has not taken off, despite occasional interest. There is little prospect of these mechanisms becoming central to litigation funding in England and Wales. They remain, as they have always been, peripheral.

What matters now is what happens next. The Competition Appeal Tribunal has become the crucible in which modern litigation funding is being tested and forged. It has developed a body of case law on funder approvals, returns, conflicts, and enforceability. It has adapted its rules to reflect the realities of group litigation. And it is here that the proposed reforms, if adopted, will first be tested in practice. The CAT is no longer a specialist tribunal. It is the laboratory of the new regime.

Practitioners would do well to watch it closely. The CJC Report is the theory. The CAT is the experiment. What emerges may well shape the future of civil justice for years to come.

My blog on costs and litigation funding can be found at www.costsbarrister.co.uk

KINGS
CHAMBERS