

Litigation funding

Kajal Patel, Cooke, Young & Keidan



Legislation must do more than reverse *PACCAR*

The government's proposed reversal of *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, last December, has been broadly welcomed across the disputes market. However, in practical terms, the position remains far from settled. While the government has indicated its intention to legislate to restore certainty to litigation funding, the transition period is generating fragmentation and tactical behaviour from parties. Until a clear statutory framework is introduced, satellite litigation is not merely foreseeable – it is inevitable.

PACCAR altered the classification of litigation funding agreements (LFAs), bringing many within the scope of damages-based agreements (DBAs) under section 58AA of the Courts and Legal Services Act 1990 (CLSA 1990). The effect was immediate: a substantial number of existing LFAs were rendered potentially unenforceable, introducing significant uncertainty into collective actions and general commercial disputes alike. Although the government response was prompt in principle, its practical effect has yet to be realised. This uncertainty has created ample scope for procedural and strategic manoeuvring.

Tactical manoeuvring on both sides

Corporate defendants were quick to capitalise on the uncertainty. Challenges to funding arrangements are a familiar feature of interlocutory disputes, frequently advanced as preliminary issues that can undermine claims before they are determined on their merits. Even where such challenges fail, they increase costs, prolong proceedings and often exert pressure towards settlement. For well-resourced defendants, the absence of clarity is plainly advantageous.

Claimants and funders have responded with structural innovation. Rather than structuring returns as a percentage of damages, many have redrafted agreements to provide for a multiple of the funder's outlay – an approach validated by the Court of Appeal in *Sony Interactive Entertainment Europe Ltd v Alex Neill Class Representative Ltd* [2025] EWCA Civ 841. The court

confirmed that where a funder's fee is calculated as a multiple of its outlay, it is not determined by reference to the financial benefit obtained, and therefore falls outside section 58AA. That is useful clarity, but it is a market solution available primarily to well-advised institutional funders, not a general access-to-justice remedy.

Claimants are not immune to tactical considerations in the other direction. There is an increasing tendency to revisit funding arrangements following a favourable outcome, with parties seeking to renegotiate – or in some cases avoid – their obligations to funders. If funders cannot be confident of recovering their agreed return, the availability of third-party funding as a means of facilitating access to justice may be materially diminished.

Rise of satellite disputes

The lack of a consistent judicial approach is already apparent. In *Friend v Friend* [2026] EWHC 43 (KB), the High Court adopted a relatively orthodox position when considering the scope of a contractual indemnity for legal costs within an investment agreement. An expansive interpretation of the indemnity that would have enabled costs recovery outside the usual costs regime was rejected. The decision reflects judicial caution about permitting parties to circumvent established costs principles through private agreements, and illustrates the kind of creative funding-adjacent argument that thrives when the statutory landscape is unsettled.

More broadly, judicial approaches have been inconsistent. Some judges have been pragmatic, seeking to preserve the viability of claims by recognising revised funding structures. Others have adhered more closely to the reasoning in *PACCAR*, permitting technical enforceability arguments to succeed. The result is an uneven body of authority that offers limited guidance to practitioners and inconsistent outcomes for litigants.

Complexity in modern disputes

This divergence reflects broader commercial

litigation developments. In companies with complex or layered shareholder structures, it is increasingly common to see minority shareholders orchestrate a series of corporate steps through which effective control is obtained, in some cases enabling the misappropriation of assets or the pursuit of strategies detrimental to other stakeholders. Such disputes are intricate and costly, making litigation funding not a convenience, but an essential component of access to justice. Instability in the funding regime, therefore, carries direct, practical consequences for those claimants.

At the same time, the courts have shown a growing willingness to adopt flexible procedural approaches. Alternative service methods – including via social media platforms such as Instagram – have been permitted in appropriate cases, particularly where defendants are evasive, or proceedings have an international dimension. Yet inconsistency remains, with some judges continuing to favour traditional methods. The tension between pragmatism and procedural orthodoxy is equally visible in the treatment of funding issues, reflecting a system adapting to modern realities without the benefit of clear rules to guide it.

Case for urgent legislation

The need for legislative intervention is both clear and pressing. The proposed reforms must do more than reverse *PACCAR* in formal terms. They must establish a coherent and durable framework that supports access to justice while providing appropriate safeguards.

First, the legislation must make clear that LFAs are not to be treated as DBAs. Without this, the present uncertainty will persist, to the detriment of both claimants and funders.

Second, greater transparency regarding funding arrangements may be warranted. While commercial sensitivity must be respected, a degree of disclosure – particularly to the court – would arguably assist in addressing legitimate concerns regarding conflicts of interest and proportionality of returns.

Third, the legislation should address

funders' remuneration. Funders must be adequately incentivised, but there must also be safeguards against disproportionate or oppressive terms, whether through judicial oversight or structured parameters.

Fourth, safeguards against unmeritorious or vexatious claims should be maintained and, where necessary, strengthened. Existing case management and costs powers will remain important, but the legislative framework must serve to reinforce them.

Finally, any framework must be

sufficiently flexible to accommodate future developments. The nature of commercial disputes continues to evolve and the law must be capable of adapting accordingly.

Critical moment for litigation funding

Litigation funding enables claims to be pursued that would otherwise be beyond the reach of many claimants, particularly in complex, high-value or multi-party matters. That function is too important to be left at the mercy of procedural uncertainty. In

the absence of legislative clarity, costs will increase, confidence will erode and tactical behaviour will become more entrenched.

The government has indicated its intention to act. What it requires now, above all else, is speed. The longer it delays, the more damage that uncertainty will cause, as both claimants and defendants adjust their strategies to exploit the present position.

Kajal Patel is counsel at Cooke, Young & Keidan, London