The consultation closes on **Friday 31 January 2025 at 23:59**.

Consultees do not need to answer all questions if only some are of interest or relevance.

Answers should be submitted by PDF or word document to **CJCLitigationFundingReview@judiciary.uk**. If you have any questions about the consultation or submission process, please contact **CJC@judiciary.uk**.

Please name your submission as follows: 'name/organisation - CJC Review of Litigation Funding'

You must fill in the following and submit this sheet with your response:

Your response is (public/anonymous/confidential):	Public
First name:	Justin
Last name:	Gutmann
Location:	Rome
Role:	Class Representative
Job title:	
Organisation:	
Are you responding on behalf of your organisation?	no
Your email address:	[redacted]

Information provided to the Civil Justice Council:

We aim to be transparent and to explain the basis on which conclusions have been reached. We may publish or disclose information you provide in response to Civil Justice Council papers, including personal information. For example, we may publish an extract of your response in Civil Justice Council publications or publish the response itself. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the General Data Protection Regulation and the Data Protection Act 2018.

Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Civil Justice Council.

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your organisation, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous, we will not include your name in the list unless you have given us permission to do so. Please let us know if you wish your response to be anonymous or confidential.

Response to CJC call in relation to review of litigation funding from Justin Gutmann

A. My relevant experience

1. I am the Class Representative (CR)/Proposed Class Representative (PCR) in three actions in the Competition Appeal Tribunal (CAT).

2. The first of these, where I am the CR, is the Boundary Fares action against a number of Train Operating Companies (TOCs) as follows:

CAT No. 1304 First MTR South Western Trains Ltd and Stagecoach South Western Trains Ltd

CAT No. 1305 London & South Eastern Railway Ltd

CAT No. 1425 Govia Thameslink Railway & Others

Funder: Woodsford Litigation Group (WLG) WLG is a member of the Association of Litigation Funders (ALF).

Further information at www.boundaryfares.com or under the CAT case numbers at www.catribunal.org.uk

3. The second is the iPhone claim against Apple Inc. and subsidiaries where I am the CR.

CAT No. 1468

Funder: Balance Legal Capital, Balance is a member of ALF.

Further information at www.theiphoneclaim.com

4. The Third is the Handsets case against the four Mobile Network Operators (MNOs): Vodafone, 3, EE and O2 where I am the Proposed CR - CPO Hearing 31st March - 3rd April 2025

Funder: Litigation Capital Management (LCM), LCM is not a member of ALF.

Further information at www.loylatypenaltyclaim.com

B. I am an active member of the Class Representatives Network (CRN) and have been since it started. I have responded to the questionnaire circulated to members which formed the basis of its own submission. Nevertheless, I am making this separate submission as my extensive experience leads me to particularly strong views about litigation funding and its regulation. I am aware that my submission may be made public as part of the report that will eventually be produced.

C. My involvement with the regime

I am not a lawyer and have no detailed knowledge of the law. I became a PCR as a result of my long-term interest in the boundary fares scandal following my experience working for London Underground (1994 - 2002), as a London Commuter and as a market researcher/policy-maker for Consumer Focus/Citizens Advice (2009 - 2016).

Whilst at Citizens Advice, though not directly involved with the consultation leading up to the 2015 Consumer Rights Act, I was fully aware of its development and subsequent passing into legislation, a development that I welcomed. Nevertheless, I recognised then and my view remains, that the right to bring collective proceedings on an opt-out basis for large numbers of small claims whilst valued and necessary, is a **last resort** when all else fails - the market itself, exhortation and regulatory intervention - to hold corporate wrong-doers who harm individual consumers to account.

3. As all who are now involved in this recognise, it is a long, drawn-out and expensive process with no guarantee of success. For example, my involvement in the Boundary Fares case began at the beginning of 2018. Filing the CPO Application took place in February 2019 and the first trial took place in June/July 2024 with the result not yet handed down.

D. FUNDING

1. Before my involvement with the 2015 Act I knew nothing about litigation funding. When I became involved I had to learn quickly. At that time I relied almost entirely on my solicitors to advise me. Now, especially since *Reifa*, I have independent advice on my LFAs from a specialist cost KC.

2. Obtaining funding for the Boundary Fares case was difficult because then as now the key aspects for a funder were difficult to evaluate viz.:

- The degree of risk/probability of success
- The length of time from filing to final decision
- The total amount of necessary funding (including for unanticipated delays,appeals, defendant tactics etc)

3. Though a good deal of experience has been gained in the intervening years these parameters remain problematic for funders. Of course this has always been true for all litigation requiring funding, nevertheless the Regime set up under the 2015 Consumer Rights Act will only be ten years old this October and to date there has only been one final judgment handed down (*Le Patourel*).

4. Nevertheless, and this speaks volumes, I did find funders, others have too and continue to do so. Though the number of players in the market is small there is a high degree of expertise and, it would seem, with ready access to capital. Such funders are and have been essential for the development and success of the regime.

5. Rachael Mulheron has looked closely at funding and the various alternatives that might be available in an excellent report. I have no intention of repeating or summarising what she has said here. My submission is about funders returns particularly in light of the *PACCAR* judgment in the SC and my experience and views.

E. FUNDERS' RETURNS

In my naivety when I first became involved with the regime I was shocked to discover that funders' returns were based on a percentage of damages won. This seemed to me to bear no relation to a rational model of lending that a layperson like myself might imagine would consist in some way of the following elements:

- The amount of capital at risk
- The cost of capital in the market (interest rates that the funder pays to borrow capital from its investor(s))
- The estimate of risk of failure
- The the length of time the capital is deployed (all lending deployed on day one is very different to uniform deployment over the duration of the case and is very different to all capital deployed at the end of the case)

But I soon learned two things about litigation funding. The first was that returns based on a percentage of damages was 'standard practice' unalterable and non-negotiable. The second was that in the LFA the distribution waterfall ensured that the funder received payment before anyone else and that this, likewise, was (and is) unalterable and non-negotiable. Whilst over time it became clear to me that it was possible to 'go to market' for litigation funding and that in fact there are litigation funding brokers available it is still, nevertheless, a tight market. Hardly surprising perhaps given the highly specialised nature of the market and the necessary high level of skill that those involved in it require.

But tight or not, risky or not it seems to me still that in such market it is unwarranted for funders to seek a return based on the amount of damages won as this can lead to what I regard as windfall returns rather than returns based on a reasonable, rational and calculable business model that has a degree of transparency to it.

F. PACCAR

So, bearing in mind the above, I was delighted with the PACCAR judgment in the SC. This has meant, of course a number of things:

- A huge amount of work for those cases already before the CAT where LFAs needed to be made compliant under the new ruling
- A great outcry, particularly from funders themselves, about the urgent need to revert to the status quo ante by means of legislation
- Doom and gloom amongst commentators about the viability of the regime for the future if changes cannot be brought about swiftly

Nevertheless, LFAs have been made compliant (usually by inserting some formula around varying multiples of capital employed, growing with the length of the litigation), funding has not so far dried up and the regime has continued albeit with a good deal of hand-wringing.

I do not wish to see this government, following receipt of the CJC report, introduce legislation to effectively set aside the PACCAR judgment. The LFAs introduced at the start of the regime in the CAT were in my view Damages Based Agreements (DBAs) and as such were illegal. I am glad PACCAR recognised that. There are good reasons why DBAs are banned and there are good reasons why they are unnecessary. It is unsurprising that funders in particular wish to see a reversion to the status quo ante as this gives them opportunities for very big returns indeed. I have no objection to funders getting an appropriate return on the capital deployed, the length of time it is deployed and the risks that they take, that is the nature of litigation funding and as is obvious, without it there is no opportunity for people like me to act on behalf of consumers who left to themselves cannot seek redress for harms done. The development of the regime shows, sadly, that there is a definite need for this kind of redress. It also shows that there is no lack of people of skill, passion and goodwill to come forward to act as Class Representatives, that there are lawyers willing to act and, above all, that there are funders with capital available who are willing to risk it in support.

G. REGULATION

Given the nature of the litigation funding market as I have described it above it seems to me that some form of regulation is essential.

Currently, litigation funders are ‘self-regulating’ in that their own industry body The Association of Litigation Funders (ALF) carries out this role by imposing a Code of Conduct on its members and providing a disputes process. I do not propose here to set out a critique of this Code or Disputes procedure. What I will say is that I see this as wholly inadequate. I have described the litigation funding market as ‘tight’. There are a limited number of players, which is not surprising. I would not go so far as to say this market is oligopolistic but it is certainly close and, consequently, in my view, is crying out for some independent oversight.

In the current political climate I’m afraid that it is impossible to expect that the government would consider the setting up of a new regulatory body. It is not appropriate for the CAT to act in such a way but it seems to me that the FCA could be given powers of oversight of this market, develop and strengthen the current code of conduct, ensure that all litigation funders are licensed under this scheme to operate in the market (currently not all funders are members of ALF) and manage a disputes procedure independently of funders themselves. Litigation funders are lenders so it would be entirely appropriate for the FCA to act as the regulator of the market.

Justin Gutmann

28.02.2025