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:	Peter
Last name:	Rouse
Location:	Totnes, UK
Role:	Director, Commission Recovery Limited
Job title:	Director
Organisation:	Commission Recovery Limited
Are you responding on behalf of your organisation?	Yes
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.

Relevant Consultation Questions

Q2. To what extent does third party funding promote equality of arms between parties to litigation?

Q8(e). Should the costs of litigation funding be recoverable as a litigation cost in court proceedings? i. If so, why? ii. If not, why not?

Q23. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules, including the rules relating to representative and/or collective proceedings, to cater for the role that litigation funding plays in the conduct of litigation? If so in what respects are rule changes required and why?

Q26. What role, if any, should the court play in controlling the pre-action conduct of litigation and/or conduct of litigation after proceedings have commenced where it is supported by third party funding?

The case for permitting '*Essar'* -type orders in funded litigation brought under CPR 19.8

1. In my view, the CJC should consider implementing Professor Rachael Mulheron's recommendation that *Essar*-type orders should be available to prevent 'scorched earth' tactics in funded litigation.[1]
2. Paragraph 6.56 of the CJC Interim Report states "There is however possibly something in the argument that 10 years on since the Jackson reforms a re-evaluation of the issue of recovery of funding costs is justified." I believe such re-evaluation is justified and that limited provision can and should be made to "...curb the more egregious behaviour of defendants..." (per Mulheron, quoted in paragraph 6.54).
3. As director of a Representative Claimant in CPR 19.8 proceedings, I have direct experience of Defendants making unsuccessful applications (strike out and subsequent appeal) that resulted in significantly increased costs and delays to the progress of the main action towards trial. The clear purpose of these applications was to prevent the pleaded issues ever coming to trial, albeit that those matters could equally well have been addressed at trial as was the defendants' pleaded intention in any event.
4. This increase in costs had a predictable knock-on effect with regard to funding costs. While the Defendants were entitled to make their applications, and if successful would have avoided disclosure and examination of the issues by the Court, the Defendants were, knowing that the Claimant had the benefit of litigation

[1] Mulheron, 'A Review of Litigation Funding in England and Wales – A Legal Literature and Empirical Study' (28 March 2024), Legal Services Board https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf pp.123.

funding, also doubtless cognisant of the impact that increased costs would have on the economic viability of the claim from the funder's perspective.

5. Claimants who procure litigation funding do so on the basis of an estimated costs outlay; the price of the funding, and the level of risk associated with the litigation, is ultimately linked to this initial figure. While the defendants to my claim could procure additional resources over the course of litigation as is required, I am not in a position to do so; the costs of my claim had to be budgeted for at the outset. Unwarranted or unnecessary costs accrued during the early stages of litigation affects funded litigants by rapidly depleting a finite resource. In my experience, this makes funded litigation particularly vulnerable to unfavourable litigation strategy by defendants, who may take the view that if they can run up enough costs, or cause enough delays, the claim will eventually go away.

6. In my case, the Defendants also knew the potential value of the claim, something that they did not volunteer until eventually ordered to do so. Once disclosed, and 3 months before trial, the claim was settled.

7. It is my view that defendants in CPR 19.8 claims that make unsuccessful interlocutory applications should be at risk of an Essar-type order. This risk is one that would be insurable in the same way that a funded claimant obtains ATE cover. Insurance would have the added benefit of greater scrutiny as to the merits of such applications and deter those made for the primary purpose of derailing, or at least delaying, a claim.

8. The added benefit of the availability of an Essar-type order would, I believe, be to enforce the intention of the Overriding Objective, potentially saving Court time and resources. Parties that focus on the issues for trial and related disclosure are more likely to come to settlement.

9. Finally, by ensuring claimants' pursuit of justice, and funders' pursuit of fair profit are not unfairly undermined, CPR 19.8 class members are far more likely to achieve fair recovery should their claims succeed. Class members should expect any recovery to come at a cost, though not one artificially inflated by defendants seeking tactical advantage through unsuccessful interlocutory applications.

Peter Rouse

Commission Recovery Limited