CIVIL JUSTICE COUNCIL

Review of Litigation Funding

Final Report

Contents

1. Foreword

1.1 In July 2023, the UK Supreme Court in ***R (PACCAR) v Competition Appeal Tribunal*** **[2023] UKSC 28; [2023] WLR 2594 (*PACCAR*),** by a majority, held that certain types of third party litigation funding agreements, or **litigation funding agreements (LFAs)**, were a form of **damages-based agreement (DBA)**. Consequently, the validity of a significant number of such agreements, not least those which had been used to fund litigation in collective proceedings in the **UK Competition Appeal Tribunal (CAT),** were called into question.

1.2 At the time the Government's response to this development was twofold. First, it intended to bring forward legislation, the Litigation Funding Agreements (Enforceability) Bill 2024,[1] which was to clarify that such funding agreements were not DBAs. Secondly, the Lord Chancellor requested advice from the **Civil Justice Council (CJC).** That advice concerned broader questions relating to **litigation funding** and its regulation, as well as concerning other forms of litigation funding. With the general election in July 2024, the Bill fell. The incoming Government indicated that it would consider what steps to take, including questions concerning possible legislation, once the CJC had reported.

1.3 This Report is the final of two reports, which the CJC has produced further to the Government's request for advice. Its first, Interim Report and Consultation, was published on 31 October 2024 (**the Interim Report**).[2] It explored the background to the development of **third party funding (TPF)** in England and Wales, not least with reference to the self-regulatory approach taken as well as the effect of the Jackson Costs Review (2009) on that approach. It also considered the nature of the current approach to self-regulation, as well as approaches to regulation of TPF in other jurisdictions, and placed TPF in the broader context of other litigation funding mechanisms, such as **conditional fee agreements (CFAs)**, DBAs, and **legal expenses insurance (LEI)**. The Interim Report therefore answered the questions posed in Part 1 of its Terms of Reference.[3]

1.4 This, the Working Party's Final Report, focuses on the questions posed in Parts 2 and 3 of its Terms of Reference. It thus focuses on questions of access to justice and the effectiveness of

[1] The Bill is available here: https://bills.parliament.uk/bills/3702.

[2] The Interim Report is available here: https://www.judiciary.uk/wp-content/uploads/2024/10/CJC-Review-of-Litigation-Funding-Interim-Report.pdf.

[3] The Terms of Reference are set out in **Appendix B** for ease of reference.

the current regulatory approach to TPF, before going on to identify alternatives to that approach.

1.5 It should be noted at the outset that the current regulatory approach, following the UK Supreme Court's decision in *PACCAR*, is twofold: it encompasses regulation of some forms of TPF as DBAs, and it encompasses self-regulation.

1.6 This Report also makes a series of recommendations for the reform of litigation funding.

1.7 The Working Party has been greatly assisted by the answers that were provided to the consultation questions that were included in the Interim Report. Eighty-four responses were submitted to the consultation questions.[4] Consultation responses were submitted on an open (i.e. public) basis, either anonymously or with the respondent's name accredited to their response.[5] The summary of responses set out in the Report are reflective of that. Consequently, reference is not made to matters set out in confidential responses, although they have been taken into account. The Working Party also took account of the **European Law Institute's (ELI)** *Principles Governing the Third Party Funding of Litigation* (August 2024) (**the ELI Principles**) and the European Commission's study *Mapping Third Party Litigation Funding in the European Union* (March 2024). This Report should be read alongside the ELI Principles.

1.8 The Working Party has also been assisted by the many participants who took part in discussions concerning various aspects of litigation funding at the CJC's National Forum on 29 November 2024 and at a consultation event held at Pembroke College, Oxford (and online) on 26 February 2025 (**the two consultation meetings**). The Working Party has considered all responses and points raised in those discussions carefully.

1.9 The Working Party has also been supported by the members of its Wider Consultation Group who have very kindly given up their time and shared their expertise with it.

1.10 The membership of the Working Party and of the Wider Consultation Group is set out at **Appendix C**.

1.11 The Working Party notes that the CJC, as is its usual practice, will review the extent to which the Recommendations in this Report have been taken forward in its next Annual Review.

1.12 The Working Party thanks all those who have contributed. The Working Party would also like to thank the CJC Secretariat, particularly Sam Allan, Amy Shaw, Freya Prentice, and Joshua

[4] The consultation ran from 31 October 2024 to 3 March 2025.

[5] Those responses which were not submitted confidentially can be found on the CJC's webpage here: https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/third-party-funding/

Gammage, for all the help and support they provided to it in the carrying out of its work and the preparation of its two reports.

Mr Justice Simon Picken (Working Party, co-chair)

Dr John Sorabji (Working Party, co-chair)

2 June 2025

2. Executive Summary

2.1 The Report recommends a series of reforms to litigation funding, the aim of which is to promote effective access to justice, the fair and proportionate regulation of third party litigation funding, and improvements to the provision and accessibility of other forms of litigation funding.

2.2 Litigation funding should continue to develop as an essential part of the overall litigation funding landscape, while providing appropriate and effective protection for funded parties and defendants. The Report therefore makes a series of recommendations for the **introduction of light-touch regulation** of litigation funding. This is intended to be consistent with the approach taken in the ELI Principles.

2.3 Its initial recommendation concerns *PACCAR*. It recommends the effect of the Supreme Court's decision be reversed by legislation, which should be both retrospective and prospective in effect. It should make clear that there is a categorical difference between **contingency fee funding**, i.e., funding provided to a party to a dispute by their **legal representative** (through a CFA or DBA) and **litigation funding**, i.e., funding provided by an individual or a business who is not a party's legal representative (**litigation funders**) for the purposes of dispute resolution. The two are separate and should be subject to separate regulatory regimes.

Litigation Funding

2.4 The recommendations therefore propose the introduction of statutory regulation of litigation funding through Regulations issued by the Lord Chancellor. Regulation by the **Financial Conduct Authority (FCA)** is **not** recommended at this stage, although consideration of the need to move to it as the regulator should be revisited in five years following the introduction of the light-touch approach. The Regulations themselves should **not** apply to the funding of arbitration proceedings.

2.5 Differential regulation should apply to litigation funding provided to commercial parties and to that provided to consumer parties and parties engaged in collective proceedings, representation actions and group litigation. Regulation where commercial parties are concerned need be minimal. Greater, but still light-touch, regulation is, however needed

where the funded party is a consumer or where funding is provided in collective proceedings, representative actions or group litigation.

2.6 A minimum, base-line, set of regulatory requirements should therefore apply to litigation funding generally. These should include provision for: case-specific capital adequacy requirements; codification of the requirement that litigation funders should not control funded litigation; conflict of interest provisions; the application of anti-money laundering requirements; and, disclosure at the earliest opportunity of the fact of funding, the name of the funder, and the ultimate source of the funding. The terms of LFAs should **not**, generally, be subject to disclosure.

2.7 Additional, but again still light-touch, regulatory requirements should apply to litigation funding provided to consumers and where it is provided to parties engaged in collective proceedings, representative actions or group litigation. These should include, for instance, the application of a regulatory Consumer Duty; and the requirement for funded parties to be provided with independent legal advice concerning proposed LFAs. They should also include, where for instance collective proceedings are concerned, court approval on a without-notice basis, the terms of the agreement and, particularly whether the litigation funder's return is fair, just and reasonable. Provision should also be made for enhanced notice of the litigation funder's return to class members during the opt-out period in collective proceedings to enable them to make an informed decision whether to opt-out. The Working Party **rejects** the introduction of **caps on litigation funder's returns**.

2.8 Standard terms for LFAs should be developed and annexed to the Regulations. This should help to introduce clarity in the market and improve consumer protection. It should also help to reduce the cost of the provision of litigation funding. Mechanisms should also be introduced to secure the independent, low cost and binding resolution of disputes between funders and funded parties. Such a mechanism should include provision for the promotion of consensual resolution of such disputes. Regulations should also set out the consequences of regulatory breaches.

2.9 To ensure the Regulations and standard terms are sufficiently light-touch in approach, they **should be developed** with reference to **Principles 4 to 12** of the **ELI Principles**.

2.10 There is also a need to ensure that effective legal services regulation is in place where litigation funding is concerned. The legal services regulators should, as a consequence, review their current approaches to regulation. They should consider the efficacy of such

regulation and look to how they can improve their regulatory regimes. This should also be done where other forms of funding are concerned, e.g., the provision of litigation loans, portfolio funding, CFAs and DBAs.

2.11 Further recommendations are made concerning reforms to court rules. A statutory power to enable the civil courts and CAT to manage and budget the costs of funding claims, on application, the pre-action phase of funded litigation should be introduced. They should also be required to consider whether and if other, non-court-based forms of redress are available for proposed funded collective proceedings, representative actions, and group litigation.

2.12 The Government should also consider how best to promote the development and implementation of regulatory and other non-court-based forms of redress schemes for mass claims. **Civil Procedure Rule (CPR)** Pt 19 should be revised to be consistent with the CAT Rules where provision for litigation funding is concerned.

2.13 Further recommendations are made concerning consideration of a **Pre-Action Protocol (PAP)** of mass claims, enhanced costs budgeting and costs management for funded collective proceedings, representative actions and group litigation. Provision should also be made for the recoverability of litigation funding costs in exceptional circumstances (see **Appendix A**, Draft CPR Rule X.3) only and the codification of the current approach to the ***Arkin Cap*****,** i.e., where the court makes a decision concerning a litigation funder's liability for adverse costs of litigation on a case-by-case basis (see paragraph 245 and following). Given the recommendations concerning capital adequacy requirements and other costs protections, **a presumption of security for costs is rejected**. Security for costs should, however, be required, if a litigation funder breaches regulatory requirements concerning capital adequacy.

2.14 Portfolio funding should be regulated as a form of loan. It should be regulated by the FCA. The Government should investigate the impact such funding has had on the legal profession, its regulation, and whether reform of legal services regulation is, as a consequence, necessary.

2.15 Crowdfunding, where it is provided on the basis of a financial return to the crowdfunders, should be regulated as a form of litigation funding. Where, however, it is provided on the basis that the donor is not to receive a financial benefit in the event the crowdfunded litigation is successful it should be subject to minimum regulatory requirements. The aim of those requirements should be to protect donors, minimise the potential for money-

laundering, and ensure that the funds are used only for the purpose for which they were donated. They should also ensure that, should the funds not be used for the purpose on which they were provided, they should be returned to the donors. The approach to pure funding should be codified in the CPR.

Contingency Fee Funding

2.16 Turning to the provision of contingency fee funding, recommendations are made to improve the operation of both CFAs and DBAs. There should be a single regulatory, contingency fee regime, which gives effect to the Mulheron-Bacon reforms to DBAs in so far as they are consistent with other recommendations in this Report. Legislation should clarify that hybrid arrangements are lawful. DBAs should be permitted in opt-out collective proceedings in the CAT, on the same basis that litigation funding is permitted. Where commercial parties enter into such funding arrangements there should be no cap on the lawyer's return. Responsibility for the new regime should be transferred from the Ministry of Justice to the **Civil Procedure Rule Committee (CPRC).**

2.17 Where both litigation funding and contingency fee funding are concerned, the indemnity principle should be abrogated.

Further Recommendations

2.18 The Government should take steps to promote the uptake and utility of LEI. Recommendations made concerning the promotion of home insurance and revision of regulation 6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 by the Jackson Costs Review should be implemented.

2.19 The Government should also consider whether to introduce an Access to Justice Fund, which could provide funding to the civil legal aid fund to be used for the provision of early legal advice and alternative (non-court-based) forms of dispute resolution. This could be funded by a small percentage of profits from litigation funding and contingency fee funding agreements.

2.20 Finally, the Government should effect the various reform recommendations through a single, comprehensive, statute. It should also make provision for the collection of data concerning the various forms of funding, and for the establishment of a Standing Committee

on Litigation Funding, which should be responsible for data collection and the ongoing scrutiny and review of funding.

Implementation

2.21 The Working Party recommends that a twin-track approach to its Recommendations be taken. First, to promote certainty concerning the status of LFAs, its recommendation concerning the reversal of *PACCAR* ought properly to be implemented as soon as possible. Secondly, in respect of all other Recommendations, it is anticipated that, if and in so far as they are accepted, should be the subject of separate primary legislation, which amongst other things should contain provision for the making of secondary legislation, e.g., new Contingency Fee Regulations and Litigation Funding Regulations.

3. Summary of Recommendations

3.1 The following specific recommendations are made in each Part of the Report. No recommendation is made in **Part One**.

Part Two: *PACCAR* and the Regulation of Litigation Funding as Damages-Based Agreements

3.2 **Recommendation 1:** Legislation should be introduced to make clear that **litigation funding** is not a form of DBA and that it is a distinct form of funding from that provided by a party's legal representative. That legislation should reverse the effect of *PACCAR*. It should also make clear that the provision of litigation funding is not a form of claims management service. The legislation should have prospective and retrospective effect.

Part Three: Litigation Funding - Issues

3.3 **Recommendation 2:** The Government should consider establishing alternative means to secure access to justice for low value or small claims, particularly low value or small mass or collective claims. It should in this context consider the viability of establishing further means to establish regulatory redress schemes and a class proceedings fund as a means to secure access to justice and provide an effective alternative and complement to collective proceedings before the courts.

3.4 **Recommendation 3:** The Government should establish a Standing Committee on Litigation Funding. It should be a Standing Committee of the CPRC. It should be responsible for collecting data on the operation of litigation funding, CFAs and DBAs, monitoring their operation and considering what reforms may be necessary concerning their future operation, and resourced accordingly. Data should also be collected concerning crowd and pure funding. Law firms, litigation funders and **His Majesty's Courts and Tribunals Service (HMCTS)** should be placed under a duty to provide it with data concerning such funding arrangements. At a minimum the data collected should include: the nature of the cause of

action; the nature of proceeding; details concerning the party, e.g., whether they are an individual, consumer, business; the remedy sought; how the claim concluded; the nature and type of the funding for each party; the nature of any success fee or return to the funder; the legal costs incurred.

Part Four: Third Party Litigation Funding – Regulation

3.5 **Recommendation 4:** Litigation funding should be subject to a formal, comprehensive regulatory scheme. That scheme should replace the current self-regulatory approach. It should do so by replacing section 58B of the 1990 Act with a comprehensive legislative scheme that covers all forms of litigation funding.

3.6 **Recommendation 5:** Claims management services are a form of litigation funding. To ensure a clear distinction between contingency fee funding and litigation funding, claims management services ought not therefore to form part of the regulation of DBAs (or CFAs). They should be regulated under the same scheme as recommended in Recommendation 4.

3.7 **Recommendation 6:** Litigation funding of arbitration proceedings should not be subject to formal regulation. It should remain a matter for arbitral centres to determine whether and, if so, how any such regulation should be implemented.

Part Five: Third Party Litigation Funding – Elements of the Regulatory Structure

General

3.8 **Recommendation 7:** LFAs and how funding is provided should be regulated.

3.9 **Recommendation 8:** The Lord Chancellor should be given the statutory power and responsibility for the independent regulation of litigation funding. Regulation should be effected through **statutory instrument (SI).** It should include, amongst other things, provision for sanctions to be applied to funders who fail to comply with the regulations.

3.10 **Recommendation 9:** The Lord Chancellor with the Standing Committee on Litigation Funding should review the operation of litigation funding regulation five years after it commences. The review should consider the effectiveness of regulation by the Lord Chancellor and

whether regulatory responsibility should be transferred to the FCA. A statutory power that would enable any potential transfer of regulatory responsibility should be contained in the legislation introduced to create independent regulation of litigation funding.

Litigation Funding Regulations

3.11 **Recommendation 10:** Litigation Funding Regulations should make provision for funding to be subject to ongoing case-specific capital adequacy requirements. **After-the-event (ATE)** insurance with robust anti-avoidance endorsements should be in place where the funding is provided for a non-commercial party or for collective or group proceedings.

3.12 **Recommendation 11:** Anti-money laundering regulation should be applied to litigation funders.

3.13 **Recommendation 12:** Regulation should codify the prohibition on litigation funders from, directly or indirectly, controlling funded litigation, including settlement proceedings. Breach of this requirement should render the LFA unenforceable as against the funded party and should render the funder liable for the funded party's costs and adverse costs.

3.14 **Recommendation 13:** The fact of litigation funding, the name of the litigation funder and the ultimate source of the funding should be disclosed to the court and the other parties to proceedings at the earliest opportunity after the funding agreement is entered into.

3.15 **Recommendation 14:** Provision should be made for the prohibition and resolution of conflicts of interest.

3.16 **Recommendation 15:** An independent, binding dispute resolution process to resolve disputes between funders and funded parties should be established. The process should make provision for the promotion of the consensual resolution of such disputes. The cost of the dispute resolution process should be borne by the funder.

3.17 **Recommendation 16:** Breach of the Litigation Funding Regulations should render any regulated funding agreement unenforceable. The court should be given the power to waive regulatory breaches where it is just and reasonable to do so. It may impose such terms on such conditions as it considers to be just and reasonable.

Additional requirements where the funded party is a party to collective proceedings, a representative action or group action or is a consumer.

3.18 **Recommendation 17:** Litigation funders should be subject to a regulatory Consumer Duty.

3.19 **Recommendation 18:** Independent legal advice from a **King's Counsel (KC)** should be given to the funded party, prior to entry into the funding agreement.

3.20 **Recommendation 19:** Standard terms for LFAs, consistently with the details specified in paragraphs 8.20 to 8.24, should be developed and annexed to the Regulations.

3.21 **Recommendation 20:** The funded party should disclose to the court, on a without notice basis, the terms of the funding agreement (appropriately redacted to protect privileged or commercially sensitive information) to enable the court to consider whether to approve the agreement. The court should adopt an inquisitorial approach when doing so. The court should particularly consider whether the funder's return is fair, just and reasonable.

3.22 **Recommendation 21:** The funder and the funded party's lawyer should certify to the court, as part of the without notice approval process, that they did not approach either directly or indirectly the funded party to seek their agreement to pursue proceedings.

3.23 **Recommendation 22:** The development of the regulatory structure should be informed by Principles 4 to 12 of the ELI Principles, in so far as they are consistent with **Recommendations 10 to 21**.

3.24 **Recommendation 23:** Legal Services Regulators should review and improve the regulation of the legal profession, including its regulatory obligations and information requirements, where litigation funding is concerned. This should cover all aspects of funding, not just LFAs.

Court rules

3.25 **Recommendation 24:** The civil courts and CAT should be given the power to manage, on application, the pre-action phase of funded litigation.

3.26 **Recommendation 25:** Civil courts and the CAT should consider whether and if there are available consumer or regulatory redress schemes available for proposed funded collective proceedings, representative and group actions.

3.27 **Recommendation 26:** CPR Part 19 should be revised to make it consistent with the CAT Rules applicable to LFAs, not least in terms of approval of LFAs and settlements. Both CPR Pt 19 and the CAT Rules should be amended to include a requirement that upon certification of an opt-out collective proceeding or representative action that is funded a requirement that the opt-out notice specifies that: the class representative is in receipt of litigation funding; the name and details of the funder; and, the funder's approved return in the event of success.

3.28 **Recommendation 27:** The CPRC and the CAT should co-operate to ensure the CPR and CAT Rules adopt a consistent approach to litigation funding.

Part Six: Portfolio Funding and Litigation Loans

3.29 **Recommendation 28**: Portfolio funding should be regulated. It should be regulated as a form of loan and regulated by the FCA. Regulation should, particularly, require funders to comply with anti-money laundering regulation and to have sufficient capital adequacy.

3.30 **Recommendation 29:** The Government should investigate the impact of portfolio funding on the legal profession. It also should consider, as part of that investigation, whether issues concerning portfolio funding require regulatory reform of the legal profession.

3.31 **Recommendation 30:** The **Legal Services Board (LSB)** and the **Solicitors Regulation Authority (SRA)** should consider the need for greater co-operation with the FCA concerning portfolio funding. Such consideration should include whether there is a need to introduce co-regulation by the SRA and FCA of portfolio funded law firms.

3.32 **Recommendation 31:** The SRA and other legal regulators should consider what steps need to be taken to ensure that there is effective guidance for lawyers concerning the use of portfolio funding. This should include consideration of what further or additional guidance, training requirements and/or regulatory oversight is needed to ensure effective client care where portfolio funding is used to fund individual claims.

Part Seven: Crowdfunding and Pure Funding

3.33 **Recommendation 32:** All forms of crowdfunding litigation should be regulated.

3.34 **Recommendation 33:** Where crowdfunding litigation involves the provision of funds on the basis that funders will receive a financial reward in the event that the litigation is successful, it should be treated as a form of litigation funding and regulated as such.

3.35 **Recommendation 34:** Where crowdfunding is not carried out on the basis that funders will receive a financial reward, it should be subject to a separate regulatory regime, which at a minimum, should require: donated funds to be held on trust and used for the proposed litigation only; unused funds to be returned to donors or the Access to Justice Foundation, if consent is given; subject to anti-money laundering regulation; donor identity to be verified and disclosed to the court, if ordered; an independent lawyer's opinion on the merits to be

obtained; the provision to prospective donors of clear and transparent information about the litigation, the independent lawyer's opinion, potential costs liability, and any deductions from donations made by the individual or organisation organising the crowdfunding.

3.36 **Recommendation 35:** Sections 85 and 86 of the Criminal Justice and Courts Act 2015 should be brought into force so as to apply to crowdfunded judicial review proceedings. The CPRC should be given the power to make rules of court that extend the effect of those provisions to other categories of civil litigation in so far as crowdfunding is concerned.

3.37 **Recommendation 36:** The approach to pure funding set out in *Hamilton v Al Fayed* [2002] EWCA Civ 665; [2003] QB 1175, *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* (No 2) [2004] UKPC 39; [2004] 1 WLR 2807, and *Germany v Flatman* [2013] EWCA Civ 27; [2013] 1 WLR 2676 should be codified within the CPR.

Part Eight: Costs and Funding

3.38 **Recommendation 37:** Consideration should be given to the development of a PAP for Mass Claims applicable in both civil proceedings and proceedings in the CAT.

3.39 **Recommendation 38:** Costs budgeting and costs management should be mandatory for all funded collective proceedings, representative actions and group actions. In other funded claims, that the claim is funded should be a factor to be considered in deciding whether to order costs budgeting under CPR PD3D. Legislation should be introduced to make provision for the civil courts and the CAT to carry out, on the application of a party to prospective litigation, pre-action costs budgeting and costs management.

3.40 **Recommendation 39:** Better practice guidance on costs budgeting and management of funded claims should be developed jointly by the CPRC and CAT Rule Committee.

3.41 **Recommendation 40:** Only specially authorised (ticketed) judges should, as a general rule, be allocated to manage funded claims. Authorisation should only be given upon completion of specific training in costs budgeting and costs management.

3.42 **Recommendation 41:** Recoverability of litigation funding costs should be permitted in exceptional circumstances. The CPR and CAT Rules should be amended to provide such a discretion.

3.43 **Recommendation 42:** The post-*Chapelgate* (see the definition of ***Arkin Cap***) approach to the ***Arkin Cap*** should be codified in the CPR and CAT Rules.

3.44 **Recommendation 43:** There should be no presumption of security for costs to be ordered against a litigation funder or funded party. Security for costs should not be available against a litigation funder or funded party where the funder has complied with regulatory requirements concerning capital adequacy, and they have in place a suitable and adequate ATE insurance policy with effective anti-avoidance endorsements.

3.45 **Recommendation 44**: The CPR and CAT Rules should be amended to provide for security for costs to be required of litigation funders where, through no fault of the funded party, the funder fails to comply with the requirements specified in **Recommendation 10**. In such circumstances, court rules should also provide that the funder should be liable for paying the costs of providing security. They should also clarify that the court has a discretion to require a cross-undertaking in damages from the defendant seeking the security for costs order. Where security is required by reason of a funder's failure to comply with **Recommendation 10** the provision of such a cross-undertaking would be unfair. Accordingly, the ability of the court to require cross-undertakings in cases of security for costs against funders should be limited to exceptional circumstances.

Part Nine: Reform of Conditional Fee Agreements and Damages-Based Agreements

3.46 **Recommendation 45:** The current CFA and DBA legislation should be replaced by a single, simplified legislative contingency fee regime.

3.47 **Recommendation 46:** The provision of claims management services ought not to come within the scope of the contingency fee regime or any reformed DBA regime. They ought to be regulated as a form of LFA.

3.48 **Recommendation 47:** The indemnity principle should be abrogated legislatively where contingency fee agreements and LFAs are concerned.

3.49 **Recommendation 48:** Provision should be made to provide the court with a discretion, similar to that provided by section 127 of the Consumer Credit Act 1974, to enable non-compliant contingency fee agreements (or CFAs and DBAs) to be enforceable.

3.50 **Recommendation 49:** Responsibility for CFAs, DBAs or any new single contingency fee regulations should be transferred from the Ministry of Justice to the CPRC. The Lord Chancellor should be given the power to direct the Rule Committee to make regulation for

specified purposes comparable to the power the Lord Chancellor retains in this respect concerning the making of CPR.

3.51 **Recommendation 50:** The Government should review the current CFA success fee levels, particularly where mesothelioma claims are concerned, to ascertain if they require uprating for inflation.

3.52 **Recommendation 51:** The Government should consider adopting in commercial cases, the approach to damage-related caps on success fees taken in section 2(3) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020.

3.53 **Recommendation 52:** Legislation should clarify that hybrid funding arrangements are lawful.

3.54 **Recommendation 53:** The DBA Regulations ought to be reformed as a matter of urgency. The basis of reform should be the Mulheron-Bacon 2019 reform proposals with necessary adjustments to reflect the other Recommendations in this Report.

3.55 **Recommendation 54:** DBAs should be permitted in opt-out collective proceedings in the CAT. Such DBAs should not be subject to any cap, but the return to the legal representative under them should be subject to approval by the CAT on the same basis as the return to a funder under LFAs is subject to approval. Entry into such agreements should be subject to the same notification requirements as apply to LFAs.

3.56 **Recommendation 55:** CFAs and DBAs entered into by commercial parties should not be subject to any cap on the legal representative's return.

Part Ten: Legal Expenses Insurance

3.57 **Recommendation 56:** The recommendations made in the Jackson Costs Review to promote the use of home insurance and revision of regulation 6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 should be implemented. The Government should engage with the insurance industry to consider how greater uptake of **before-the-event (BTE)** insurance policies to employees can be effected. These steps should be part of a more general approach by Government to promote the uptake, utility and use of LEI.

Part Eleven: Supplementary Legal Aid Scheme and Contingency Legal Aid Fund or an Access to Justice Fund

3.58 **Recommendation 57:** The Government should consider whether to introduce an Access to Justice Fund, which requires payment of a small percentage of the profits from litigation funding and CFAs and DBAs to be made available for the purposes of a new and supplemental aspect of civil legal funding. Any money paid to the Access to Justice Fund should be dedicated to fund the provision of early legal advice and alternative forms of dispute resolution. This requirement should be specified in legislation.

Part Twelve: Legislative Reform

3.59 **Recommendation 58:** All legislation, in so far as primary legislation is necessary to implement **Recommendations 2 to 57**, should be contained in a single statute. Existing legislation should therefore be repealed and new and comprehensive legislation concerning civil litigation funding should be contained in a *Litigation Funding, Courts and Redress Act*.

4. Part One – General Issues

Introduction

4.1 The jurisdiction of England and Wales adopts a dual approach to funding civil litigation. This is based on the availability of a combination of publicly-funded civil legal aid and private funding methods. This approach has developed particularly since the 1990s, as Governments have consistently reduced the scope and availability of the former, while increasingly promoting the latter.

4.2 This Report, which is divided into Twelve Parts, focuses on one aspect of that dual schema: private forms of litigation funding. It is important, however, that funding is looked at holistically. It is also important to ensure that funding is not simply looked at as litigation funding. Access to litigation, i.e., access to the court and a dispositive judgment of a dispute, is one aspect of what it means to refer to access to justice. Access to early legal advice to help prevent disputes arising is an equally important aspect of it - as is access to processes that can effect consensual resolution.

4.3 It is important therefore also to ensure that, rather than funding being construed as litigation funding, it is construed as funding for just dispute prevention, consensual resolution, and litigation that leads to court adjudication. This is particularly important given the recent changes to the CPR, which emphasise the court's powers to mandate the use of alternative forms of dispute resolution and its continuing powers to encourage their use. It is also important given the wider focus on the development of the digital justice system and online forms of pre-action dispute resolution. The Working Party has, in so far as possible given its Terms of Reference, approached the issues considered in this Report with this in mind.

Guiding Principles

4.4 The Working Party considers the following to be the overriding principles that should govern a holistic approach to litigation. They are that access to justice (in its broad sense of just prevention, consensual resolution and adjudication) is dependent upon:

a) all parties to a dispute having sufficient resources available to them to pursue effective and proportionate dispute resolution for meritorious claims and defences;

b) the State ensuring that sufficient means are available to promote the just prevention and consensual resolution of disputes as well as to secure an efficient and effective civil court system;

c) the State ensuring such resources available via publicly-funded legal aid and through facilitating the effective provision of private forms of funding; and

d) litigation and adjudication being an option of last resort.

4.5 The Recommendations set out in this Report are intended to be consistent with these principles.

Collective Proceedings and Representative Actions

4.6 Finally, the Working Party notes that some consultation respondents raised issues that are outside the scope of the Working Party's Terms of Reference. While they cannot be considered in this Report, for completeness they are noted, and are as follows.

4.7 First, that the representative action procedure contained in CPR r.19.8 should be reformed so that it functions in an equivalent fashion to collective proceedings in the CAT. Hence, it was submitted, it should be reformed, either by court rules or by statute, so as to operate as generic class or collective action. It was additionally suggested that both the CPR r.19.8 procedure and the collective proceedings in the CAT could be revised to improve their operation.

4.8 Secondly, and conversely, the availability of collective proceedings in the CAT was criticised, not least on the ground that it only provided a benefit to lawyers and funders rather than consumers and was harmful to business, not least because it was said improperly to divert business resources from their core function, i.e., facilitating innovation and economic growth.

5. Part Two – *PACCAR* and the Regulation of Litigation Funding as Damages-Based Agreements

Recommendation

5.1 The Working Party makes one recommendation in this Part of the Report. It may be treated as a standalone recommendation. It is, however, intended to form part of a holistic set of reforms, which are contained in the further recommendations set out in the Report.

RECOMMENDATION 1

Legislation should be introduced to make clear that **litigation funding** is not a form of DBA and that it is a distinct form of funding than funding from that provided by a party's legal representative. That legislation should reverse the effect of *PACCAR*. It should also make clear that the provision of litigation funding is not a form of claims management service. The legislation should have prospective and retrospective effect.

Summary of Responses

5.2 Four themes arose from the consultation responses that considered the *PACCAR* decision.

5.3 First, it was noted how the decision had produced a significant degree of confusion and uncertainty concerning the validity and enforceability of LFAs. This was apparent, for instance, through the ongoing litigation concerning the validity of funding agreements, where the funder's potential return was calculated as a multiple of the sum that they had provided to the funded party.[6] The question in such cases was whether such agreements were, like percentage-based LFAs, DBAs.

[6] See, for instance, the appeal from *Alex Neill v Sony Interactive Entertainment* [2023] CAT 73.

5.4 Respondents noted how *PACCAR* had resulted in the renegotiation of many percentage-based LFAs as such multiplier-based litigation agreements. It was also submitted further to this that the post-*PACCAR* landscape had resulted in reduced confidence in England and Wales as a jurisdiction in which litigation could be conducted effectively. It had also introduced otherwise avoidable (i.e. unnecessary) cost and delay into litigation. Where multiplier agreements were concerned it was also submitted that there was evidence that they produced worse financial outcomes for funded parties than was the case under percentage-based agreements.[7]

5.5 Secondly, it was submitted that both DBAs and CFAs were materially different from LFAs. The former two forms of funding were provided by legal representatives to litigants for whom they acted, i.e., contingency fee funding. The latter was funding provided by individuals or businesses who were not a party to a dispute's legal representative and who were able to make more capital available to litigants than was available under either of the two forms of contingency fee funding.

5.6 Thirdly, the majority of responses that commented on this issue expressed the view that there is an urgent need to reverse the effect of the *PACCAR* decision. This should be done via legislation. Such legislative reform should not wait for further consideration of any wider reforms that the CJC may recommend.

5.7 Fourthly, and in contrast to the above themes, it was submitted by some that the effect of the *PACCAR* decision should not be reversed. This was because litigation funding was a form of DBA. It was also suggested that reversing *PACCAR* would enable litigation funders to revert to being able to secure very large profits since in that event they would be able to reintroduce percentage-based agreements under which they would receive their return prior to anyone else receiving a share of any damages the funded party secured in the litigation.

Discussion

5.8 The Working Party is required to consider whether and, if required, by whom litigation funding should be regulated. It is currently subject to statutory regulation as a form of DBA. This is a consequence of the *PACCAR* decision. It is also subject to self-regulation under the

[7] *Gormsen v Meta* [2024] CAT 11 at [34]-[40].

Code of Conduct of the **Association of Litigation Funders of England & Wales (ALF).** This Part of the Report is concerned with the issue of statutory regulation as a form of DBA.

The development of litigation funding in legislation

5.9 During the 1990s, there was a shift away from the provision of civil legal aid as the primary means through which litigation funding was provided to individuals who could not otherwise afford to pursue meritorious claims. This was achieved through the introduction of forms of funding that were previously unenforceable on the basis that they were contrary to public policy.

5.10 Historically, the funding of litigation by persons other than parties to litigation was both a criminal offence, a tort, and contrary to public policy. Those restrictions were slowly relaxed, not least following the Law Commission's report of 1966, which resulted in the abolition of the criminal offences and torts of maintenance and champerty.[8] Permissible forms of such funding that particularly developed during the 20th century were, for instance, LEI, funding from trade unions for their members, and, most significantly, civil legal aid.[9]

5.11 The forms of funding that developed during the 1990s were: first, a specific form of contingency fee agreement, which lawyers were permitted to enter into with their clients – the CFA; and LFAs, which permitted the provision of funding by litigation funders.

5.12 As noted in the Interim Report, the former were introduced via section 58 of the Courts and Legal Services Act 1990 (**the 1990 Act**), while the latter were introduced by amendments to that Act via the Access to Justice Act 1999 (**the 1999 Act**).[10]

5.13 The public policy shift that underpinned both developments was the need to secure access to justice for those individuals who could not otherwise afford to vindicate their rights through the civil courts and to do so where access to civil legal aid was being reduced.[11]

---

[8] Law Commission, *Proposals for Reform of the Law relating to Maintenance and Champerty*, (1966); Criminal Law Act 1967.

9 Ibid at 4-5; *Wallersteiner v Moir (No. 2) [1975]* QB 373 at 407-408, *'The maintenance of other people's litigation is no longer regarded as a mischief: trade unions, trade protection societies, insurance companies and the state do it regularly and frequently. The law has always recognised that there can be lawful justification for maintaining somebody else's litigation: today, with the emergence of legal aid, trade unions, and insurance companies, a great volume of litigation is maintained by persons who are not parties to it.'*

[10] Civil Justice Council, *Review of Litigation Funding – Interim Report and Consultation*, (2024) at 2.12-2.13.

[11] J. Peysner, *Access to Justice – A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding*, (Palgrave, 2014).

5.14 CFAs are one specific form of contingency fee agreement. They are ones based on the calculation of an additional payment to the legal representative consisting of a percentage increase to the normal charges.

5.15 In 2012, however, Parliament introduced a second form of such agreement: the DBA. It did so through the insertion of section 58AA into the 1990 Act. Notably, when it did so, it made no amendments to section 58B of the 1990 Act, the section that makes provision for LFAs.

5.16 The position within the primary legislation governing these various agreements in 2012, then, was that there were two statutory regimes, both of which were intended to be comprehensive: first, the contingency fee funding regime applicable to legal representatives, provided for by sections 58, 58A and 58AA of the 1990 Act (i.e. the CFA and DBA regimes); and, secondly, the litigation funding regime applicable to funding provided to parties to disputes by litigation funders, provided for by section 58B of the 1990 Act, which had not been brought into force.

5.17 That the CFA and DBA regime was comprehensive was evident from two points: first, the fact that under s58(2)(a) of the 1990 Act, CFAs will only be payable in 'specified circumstances', which do not include calculation of the fee to be paid to the legal representative on a contingency basis by reference to any damages or settlement that they may secure in the funded litigation; and, secondly, that DBAs are also only valid and payable if they comply with the requirements of section 58AA of the 1990 Act.[12] Absent compliance with the statutory requirements, contingency fee agreements were (and are) invalid and unenforceable.

5.18 That the litigation funding regime under section 58B was also intended to be comprehensive was explained by a Parliamentary Standing Committee in 1999 at the time that that section was being introduced into the Act. The provision was said to amount to '*a comprehensive scheme by which the Lord Chancellor may authorise a person or body to offer . . . litigation funding agreements*.'[13] It was a scheme, which - analogous to CFAs - required the calculation of the fee due to the litigation funder in the event of success to be calculated by reference to litigation costs.

[12] A. Zuckerman, *Zuckerman on Civil Procedure – Principles of Practice* (Sweet & Maxwell, 2021) at 1501.

[13] Standing Committee E, Access to Justice Bill (Lords) (13 May 1999) cited in R. Mulheron, *England's Unique approach to the self regulation of third party funding: a critical analysis of recent developments*, Cambridge Law Journal, 73(3), (2014) 570 at 595.

5.19 The development of LFAs must be understood against this background: one where Parliament had, at least on the face of things, authorised two specific and limited statutory in-roads into the public policy that would otherwise prohibit agreements to finance funding by legal representatives or litigation funders.

The development of LFAs at common law

5.20 The development of LFAs in the 21st century falls outside section 58B of the 1990 Act. It is a common law development, which, if it is correct to say that section 58B provides a comprehensive scheme, arguably ought not to have happened. Having legislated for a comprehensive scheme concerning litigation funding, Parliament could be said to have displaced the possibility of common law development notwithstanding the section not having come into force, just as it evidently did regarding lawyer-based litigation funding: given the introduction of CFAs, it is inconceivable that the courts could have developed the common law to permit other damages-based forms of contingency fee agreements, hence the need for Parliament to introduce section 58AA of the 1990 Act through amendments introduced in 2012.

5.21 Whatever the merits of such an argument, the Court of Appeal legitimised, at common law, a form of LFA analogous to what would be introduced in 2012 as a DBA.[14] As Friston puts it, it did so '*by way of what was not said*'[15] and indirectly by considering questions of the application of non-party costs orders against litigation funders.

5.22 It also did so, evidently, without any real consideration of section 58B or of Parliament's intention to legitimise two separate forms of funding, that provided by legal representatives and that provided by individuals and businesses who were not a party to a dispute's legal representative, which excluded damages-based recovery. Notwithstanding that, it legitimised LFAs that were not within the scope of section 58B and hence not within the scope of statutory regulation; a point noted in *PACCAR*:

> *'… Section 58B was put on the statute book in 1999 (albeit not brought into effect) as a means of permitting litigation funding by exempting it from the common law rules*

[14] *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] EWCA Civ 932, [2003] QB 381; *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 92; *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655, [2005] 1 WLR 3055.

[15] M. Friston, *Friston on Costs* (OUP, 2023) at 1110.

against champerty on a very limited basis, where damages-based remuneration would not be permitted, but only remuneration calculated with reference to the funder's costs: section 58B(3)(e). That limitation was bypassed by development of the common law in Factortame (No 8) and Arkin, which confirmed that third party funding arrangements of the kind at issue in these proceedings were not champertous and hence were enforceable. Section 58B was not designed to regulate third party funding arrangements based on taking a share of the sum recovered of the kind which have been developed in the wake of those decisions, nor is it appropriate for that purpose. By [2006] it was clear that . . . section 58B did not provide a comprehensive scheme of regulation for litigation funders.'[16]

The relationship between DBAs and LFAs *pre-PACCAR*

5.23 DBAs were introduced in 2012 as a consequence of the Jackson Costs Reforms. It is apparent that they were understood by Jackson to be another form of funding to be provided by a party's legal representative - one that calculated their return based on the damages or settlement achieved by their client rather than by reference to their legal representative's costs as required for CFAs. This is evident both from Jackson's discussion of whether legal representatives should, in addition to CFAs, be able to act on contingency fee agreements, i.e. DBAs. It is also apparent from his separate discussion of the nature and status of LFAs, and that they are entered into by litigation funders.

5.24 This distinction was clearly understood by the Government at the time. Its response to the Jackson Costs Review specifically referred to his recommendations concerning what are now DBAs, by reference to lawyer's, i.e., legal representative's, fees.[17]

5.25 Notwithstanding this, concerns did arise following the 2012 amendments to the 1990 Act as to whether common law LFAs fell within the new statutory framework for DBAs. As Mulheron put it in 2014,

[16] *R (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] WLR 2594 at [70].

[17] Ministry of Justice, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: Government Response* (Cm. 8041, March 2011), Question 45, '*Do you agree that lawyers should be permitted to enter into Damages Based Agreements (DBAs) with their clients in civil litigation?*'

> *'Since implementation (of regulations authorising DBAs further to section 58AA of the 2990 Act), a query has arisen in the legal marketplace as to whether a Funder's LFA is a DBA for the purposes of the statutory framework which now governs DBAs.'*[18]

Despite Mulheron setting out the view that LFAs were not DBAs and were not intended to be so for the purposes of section 58 and despite her suggesting amendments to the DBA regulatory regime to clarify that that was the case, no steps were taken then to clarify the position.

5.26 Against that background the use and development of LFAs continued. It did so, as was apparent from *PACCAR*, without LFAs generally being compliant with the requirements for them to be valid DBAs.

5.27 The Government's understanding that there was a distinction between DBAs and LFAs can, however, also be seen from the introduction of opt-out collective proceedings in the CAT through the Consumer Rights Act 2015. In its consultation on private actions in competition law, the Government drew the distinction between contingency and CFAs, when raising the question of whether the former should be permitted in such actions. Both were defined as agreements under which lawyers received fees in the event litigation is successful. The former calculated the lawyer's return as a percentage of damages (i.e. on the same basis as occurs under a DBA). The latter did so as a percentage increase on the lawyer's normal fee (i.e. on the same basis as a CFA). In neither instance, were payments concerning litigation funders considered.[19]

5.28 The sole focus of the Government's discussion of litigation funders was to consider whether they should be able to bring collective actions as a representative party.[20] The Government's view, at that time, was that contingency fees (i.e. DBAs) should not be permitted.

5.29 It maintained this distinction in its formal response to the responses to its consultation.[21] Again, in that response, litigation funding was not addressed.[22] Tellingly, it referred to respondents to its consultation making the point that the 2012 Act introduced contingency

[18] R. Mulheron (2014) at 591 and following.

[19] BIS, *Private Actions in Competition Law: A Consultation on Options for Reform*, (April 2012) at 57.

[20] Ibid at 35-39. In the event, neither law firms nor litigation funders were prohibited, as a matter of principle, from acting as representative parties: see CAT, *Guide to Proceedings* (2015) at 6.30.

[21] BIS, *Private Actions in Competition Law: A consultation on options for reform - government response*, (January 2013) at 6, 26.

[22] Ibid at 63, where the prohibition on litigation funders (and lawyers) acting as representative parties was reiterated.

fees.[23] As noted above, the 2012 Act introduced DBAs, while the 1999 Act had introduced provision for one form of litigation funding and the Court of Appeal had given effect to another form of such funding. Its conclusion makes patent the distinction that it drew:

> *'Prohibiting the use of damages-based agreements (DBAs), sometimes called contingency fees, was one of the key safeguards highlighted by many respondents as necessary to ensure that an opt-out collective actions regime did not lead to a 'litigation culture'. The Government agrees that this prohibition would be an important safeguard and that allowing DBAs could encourage speculative litigation, thereby placing unjustified costs on defendant businesses and creating an incentive for lawyers to focus only on the largest cases. No win no fee conditional fee agreements (CFAs) and after the event insurance will remain available for use in these cases, subject to the changes in the* ***Legal Aid, Sentencing and Punishment of Offenders (LASPO)*** *Act 2012.*
> *The Government has therefore decided to prohibit DBAs in collective actions cases in the CAT. This will require an amendment to the LASPO Act 2012 for this new type of case.'*[24]

That prohibition is now contained in section 47(C)(8) of the Competition Act 1998 and Rule 113 of the CAT Rules 2015.

PACCAR and LFAs

5.30 The UK Supreme Court in *PACCAR* answered the question noted by Mulheron in 2014. It clarified that those LFAs that the Court of Appeal had indirectly legitimised at common law, and which sat outside the unimplemented section 58B of the 1990 Act, were DBAs. In doing so, it conflated the two separate funding regimes: the one focused on legal representative funding and one focused on litigation funding that Parliament had separated out via sections 58A and 58B of the 1990 Act. It did so despite the Jackson Review's understanding that DBAs were a form of funding provided by legal representatives to their clients and that LFAs were a form of funding provided by litigation funders and also despite the fact that the Government introduced the Consumer Rights Act 2015 and the opt-out collective action procedure in the CAT on the same basis.

[23] Ibid at 38.
[24] Ibid at 41.

5.31 All other things being equal, the Supreme Court's decision could be said to be justified on the basis that it brings within statutory regulation a form of funding that ought never to have been unregulated. That that is the case flows from two aspects of the background:

a) first, in the 1990 Act, Parliament intended there to be two comprehensive schemes that permitted contingency fee funding and litigation funding;

b) secondly, outside those schemes there was no proper basis for the courts to acknowledge the validity of other forms of either such funding as made clear by the fact that a second form of contingency fee funding (DBAs) was only, and hence could only be, permitted as a consequence of further statutory reform in 2012.

5.32 We return to regulation in **Part 3**.

5.33 The basis of the Supreme Court's decision could, however, also be said to be at odds with the background to the development of CFAs, DBAs and LFAs.

5.34 It could be said, in particular, to run counter to the binary nature of the statutory schemes: one focused on legal representatives and one focused on litigation funders.

5.35 It could also be said to be inconsistent with the intention that underpinned both the Jackson Costs Review, which both recommended the introduction of DBAs and recognised the presence of valid (albeit unregulated) common law LFAs, and the Government's introduction of reforms to collective proceedings via the Consumer Rights Act 2015. The latter, particularly assumes, as made clear in its Explanatory Memorandum, that DBAs only referred to agreements that concerned payments being made to legal representatives and that section 58AA of the 1990 Act was only to be amended to make provision for DBAs on that basis to be prohibited from being used where proceedings were conducted as opt-out collective proceedings in the CAT.[25]

5.36 It could also be said that it did this due to the paucity of the drafting of statutory provisions unrelated to sections 58A, 58AA or 58B of the 1990s.

5.37 The Supreme Court's decision rests on the question whether LFAs are a form of claims management service. Section 58AA(3)(a) defines a DBA as an agreement between a person

[25] Consumer Rights Act 2015, Explanatory Memorandum at [438], '*. . . [section 47C(8) of the Competition Act 1998 as inserted by schedule 8, para. 6 of the Consumer Rights Act 2015] provides that damages-based agreements are not allowed in opt-out collective actions. A damages-based agreement is where some of the damages are paid to the legal representatives. Paragraph 37 amends section 58AA of the Courts and Legal Services Act 1990, to make clear this restriction on damages-based agreements applies, notwithstanding the other provisions of that Act.*'

'*person providing advocacy services, litigation services or claims management services and the recipient of those services*.' Self-evidently, litigation funders do not provide advocacy or litigation services and the agreements that they enter into with litigants are not DBAs on that basis; a point apparent in the Explanatory Memorandum to the 2015 Act. The Supreme Court, however, made clear that, on a proper interpretation of the legislation that defines *'claims management service*', the provision of litigant funding or (in the words of the relevant legislation '*financial services or assistance*'[26]) is such a service. Thus, agreements for the provision of such services, where they fall within the other terms of section 58AA and regulations made under it, are DBAs.

5.38 The difficulty with this approach, correct as it may be as a matter of statutory interpretation, is threefold.

5.39 First, the underlying legislation that defines claims management services is so widely drafted that it has a tendency to be overly-inclusive. As Lady Rose, dissenting, put it in *PACCAR*, its drafting is '*so broad as to be almost meaningless*' in terms of what amounts to a 'service' in respect of claims management services.[27] The potential for overly inclusive and broad interpretations of what amounts to a claims management service has, for instance, previously raised the question whether the assistance provided to a litigant by an expert witness is a claims management service. That an expert witness could be viewed as such is patently absurd and amendments to the claims management regulatory regime were made to make clear that the provision of expert evidence is not a claims management service.[28]

5.40 The inclusion of litigation funding within the scope of the claims management service is equally, in our view, an accident of overly-inclusive drafting. The majority's decision in *PACCAR* is the inevitable consequence of such legislative drafting.

5.41 Secondly, if it is the case that the financial assistance provided by a litigant funder is a claims management service, then, it is not apparent why there was any need to include reference to the provision of litigation or advocacy services in section 58AA. Where lawyers agree to act on a DBA, or a CFA, they are in reality providing financial assistance to their client. If

[26] Section 419A(1)(a) of the Financial Services and Markets Act 2000.

[27] *PACCAR* at [216].

[28] See the explicit exclusion contained in section 419A(2) for expert evidence, which was introduced further to His Majesty's Treasury's consultation concerning the transfer of claims management regulation from the Ministry of Justice to the Financial Conduct Authority: His Majesty's Treasury, *Claims management regulation: response to the consultation on secondary regulations and policy statement for transitional provisions*, at 2.11 (July 2018).

litigation funding is the provision of financial services or assistance and thereby constitutes a claims management service by parity of reasoning, then so must the financial assistance or services provided to a client by their legal representative under a CFA or DBA. Section 58AA could thus arguably render redundant both sections 58A and 58B of the 1990 Act given the potential to interpret how the financial benefit to the person providing the financial services (lawyer or non-lawyer) is capable of being calculated.[29] This could not have been the Government's intention. Again, this arises due to the overly-inclusive drafting of the provisions that define claims management services.

5.42 Thirdly, the approach conflates contingency fee funding and litigation funding. This distinction exists and is widely recognised in many jurisdictions across the world. It is a distinction that properly allows Governments and courts to draw principled distinctions between the approaches they take to whether such forms of funding should be permitted, the basis on which they are permitted, and whether and how they are regulated.[30]

Conclusion and Recommendation

5.43 The Working Party has concluded in the light of the foregoing that:

(1) The Supreme Court's decision in PACCAR rests on and highlights the existence of overly-inclusive legislation concerning the nature of what is a 'claims management service'. In doing so, it has brought LFAs within the scope of statutory regulation, despite the validity of such LFAs having been permitted at common law in circumstances where there was, and remains, a statutory regulatory scheme that had not been brought into force. It thus brought under statutory regulation a form of LFA that the courts had authorised despite Parliament's intention to introduce a comprehensive statutory regulatory scheme for both contingency fee funding and litigation funding.

(2) From 2006, when the Court of Appeal first approved LFAs outside the scope of section 58B of the 1990 Act until *PACCAR* there were doubts as to whether such LFAs were DBAs. Notwithstanding those doubts, Parliament enacted reforms to permit collective proceedings

[29] On the potential scope of this see the challenge to the multiplier-based LFAs arising from *Alex Neill v Sony Interactive Entertainment* [2023] CAT 73.

[30] As evident, for instance, from the discussion of TPF and 'success fees', i.e., contingency fee agreements, in the *ELI-UNIDROIT Model European Rules of Civil Procedure* (OUP, 2021) at 280-282; Legal Professions Act 1966 (Singapore), s.115A (CFA regulation) and Civil Law Act 1909 (Singapore), ss.5A and 5B (litigation funding regulation).

to be brought on an opt-out basis in the CAT in 2015. It did so on the basis that DBAs were not a permissible form of contingency fee funding for such actions. To the extent that LFAs were to be viewed as a form of DBA for the purposes of those reforms, that ought properly to have been made explicit in the Government's consultations and on the face of the amendments to the collective proceedings regime contained in the Consumer Rights Act 2015.

(3) The failure to make this explicit or to consider the potential application of the claims management regulations to LFAs underpins the present problematic situation. In the absence of such statutory clarity, and notwithstanding the doubts identified by Mulheron, which were not clarified until *PACCAR*, it was reasonable for litigants, legal representatives and litigation funders to conclude that common law LFAs were not DBAs.

(4) A consequence of *PACCAR* is that two distinct forms of funding have been conflated. This issue was not considered by the Supreme Court in *PACCAR* when it considered the question of whether construing LFAs as DBAs offended the presumption against absurdity in statutory interpretation. Its relevance does, however, call into question maintaining the status quo post-*PACCAR*.

5.44 To overcome the difficulty that has been caused to the integrity of the CFA, DBA and LFA regimes caused by the overly-inclusive drafting of claims management regulation, we recommend that the Government legislate to make clear that the provision of litigation funding pursuant to common law LFAs or the provision of such LFAs (i.e. those outside the scope of s58B of the 1990 Act) does not amount to the provision of claims management services. For the avoidance of doubt such legislation should make it clear that common law LFAs include both those where the funder's return is calculated by reference to the funded party's damages or settlement or by multiplier. The legislation ought therefore to go beyond what was intended in the Litigation Funding Agreements (Enforceability) Bill 2024.

5.45 We further recommend that such legislation should have retrospective effect. This is for three reasons: first, it is justified in the light of evidence submitted that common law, percentage-based, LFAs can result in a reduction in a litigation funder's return (i.e., they may increase the share of damages or any settlement retained by the funded parties); secondly, the use of such LFAs was encouraged by the Government consultations concerning reform to the collective proceedings regime in the CAT and the introduction of opt-out collective proceedings via the Consumer Rights Act 2015 predicated on the availability of percentage-

based LFAs and the express non-availability of DBAs; thirdly, such LFAs will have been entered into in respect of claims that were ongoing at the time *PACCAR* was decided as well as those that had concluded. Renegotiating the former may have been possible. It is doubtful whether that was the case for concluded claims. Moreover, that *PACCAR* may adversely affect concluded claims, through for instance applications challenging the enforceability of LFAs in circumstances where a funded claim had settled prior to *PACCAR*, is: disruptive of what would otherwise be the settled legal position; may result in unintended adverse consequences to the parties, their legal representatives and litigation funders; and may arise where renegotiation is or was not reasonably possible.[31]

5.46 We therefore recommend that the Government introduce legislation at the earliest opportunity to clarify that LFAs are neither DBAs nor claims management services and that such legislation be both prospective and retrospective in effect.

[31] The Class Representative Network's December 2024 study of its members provides some support for the proposition that not all pre-*PACCAR* LFAs have been renegotiated onto a multiplier footing: CRN, *Selecting Litigation Funders and Negotiating Funding Agreements - A report by the Class Representatives Network*, (2024), which is available here: https://classrepresentativesnetwork.org/wp-content/uploads/2024/09/Final-CRN-Report-20th-September-2024-second-edition-2.pdf.

6. Part Three – Litigation Funding – Issues

Recommendation

6.1 The Working Party makes two recommendations in this Part of the Report.

RECOMMENDATION 2

The Government should consider establishing alternatives means to secure access to justice for low value or small claims, and particularly low value or small mass or collective claims. It should in this context consider the viability of establishing further means to establish regulatory redress schemes and a class proceedings fund as a means to secure access to justice and provide an effective alternative and complement to collective proceedings before the courts.

RECOMMENDATION 3

The Government should establish a Standing Committee on Litigation Funding. It should be a Standing Committee of the CPRC. It should be responsible for collecting data on the operation of litigation funding, CFAs and DBAs, monitoring their operation and considering what reforms may be necessary concerning their future operation, and resourced accordingly. Data should also be collected concerning crowd and pure funding. Law firms, litigation funders, and HMCTS should be placed under a duty to provide it with data concerning such funding arrangements. At a minimum the data collected should include: the nature of the cause of action; the nature of proceeding; details concerning the party, e.g., whether they are an individual, consumer, business; the remedy sought; how the claim concluded; the nature and type of the funding for each party; the nature of any success fee or return to the funder; the legal costs incurred.

Summary of Responses

6.2 Respondents identified a range of benefits and drawbacks of litigation funding. These were as follows.

Benefits of Litigation Funding – Access to Justice

6.3 Some respondents expressed the view that it is patently the case that litigation funding increases access to justice. This is especially the case where collective proceedings are concerned. This is the case due to the cost of such proceedings, the fact that they incur considerable upfront costs to legal representatives and the fact that CFAs and DBAs do not make financial provision that could enable them to carry the cost to them of unpaid work-in-progress during the course of proceedings so as to mean that litigation funding is the only means by which legal representatives instructed by funded parties can afford to conduct litigation. As some respondents put it, for certain forms of litigation, such as collective proceedings,[32] litigation funding is not simply a funding method of last resort, but the only funding method available.

6.4 It is also the case that the type of claims that are brought via opt-out collective proceedings are not themselves capable of being litigated as individual claims. Due to the low and often very low value of such claims, when looked at individually, it is simply not economically viable to litigate them. Consequently, where there are large scale breaches of the law that have resulted in multiple individual claims, significant harm can occur to a large number of individuals and the public interest without the genuine possibility that their rights can be vindicated. It was pointed out that for such claimants, funding opt-out collective proceedings or group litigation is the only way in which they can secure access to justice, in the sense of access to the court and any judgment.

6.5 Other respondents pointed out that access to justice is a broader concept than access to the court. They emphasised how it encompasses access to settlement, to regulatory redress schemes and to Ombudsman schemes. Where the latter two forms of justice are concerned, litigation funding is unnecessary. Such schemes typically facilitate redress, including for (and in some cases especially for) small or low value claims, and do so at no or low cost. In such cases, litigation funding does not facilitate access to justice: it is unnecessary. *Smyth v British*

[32] A point noted by the Court of Appeal in *BT Group plc v Le Patourel* [2022] EWCA Civ 593 at [29].

Airways (2024)[33] can arguably be seen as illustrative of this. In that case, preference was given by the court to use of a no-cost compensation scheme, **alternative dispute resolution (ADR)** processes and the small claims track procedure in the County Court, rather than to a funded representative action.[34]

6.6 In many instances, it was, however, noted that there is no available regulatory or Ombudsman scheme available to potential claimants. That being said, respondents suggested that the better approach to secure access to justice would be to promote the introduction of consumer redress schemes, not least through the use of section 404 of the Financial Services and Markets Act 2002.

6.7 Where access to settlement through negotiation, mediation and other forms of ADR are concerned, however, litigation funding was noted as having an important part to play. In such cases, it was said to increase access to justice as it signals to defendants that a claimant is well-resourced and able to litigate effectively. That funding has been made available, it was said, also demonstrates that the claimant is pursuing a claim that has been assessed by a litigation funder as being of merit, not least due to litigation funding only being made available by reputable funders following a detailed merits-assessment. Taken together, these points promote effective engagement by defendants with settlement processes. Access to funding thus also promotes access to settlement and not simply access to litigation.

6.8 Some respondents also pointed out that litigation funding helps promote access to justice for claims other than small or low value mass claims. For instance, it was said to enable insolvency practitioners to pursue claims to the benefit of creditors of insolvent estates which could not otherwise be pursued. Similarly, it was said to be an essential support for the promotion of litigation that is brought not only in the interests of the claimants, but also in the wider public interest. Claims such as *Bates v The Post Office* (2019)[35] were referred to as illustrative of this point.

6.9 Others pointed out that the use of litigation funding promotes access to justice for both claimants and defendants. This was said to arise due to litigation funders having an important input into cost-budgeting and in helping to promote budgetary discipline by the funded party. The corollary of this is that by helping to keep costs down, especially in

[33] *Smyth v British Airways Plc* [2024] EWHC 2173 (KB).
[34] Ibid at [39].
[35] *Bates v Post Office Limited* [2019] EWHC 3408 (QB).

complex litigation, financial barriers to the court through otherwise high litigation costs are capable of being ameliorated, even if just to some extent.

6.10 Other respondents took issue with the claim that litigation funding secures access to justice. It was said that the fact that in opt-out collective proceedings so few class members seek and obtain any damages or settlement amount due to them gives the lie to any claim that litigation funding promotes access to justice.

6.11 Moreover, given that even those claimants in collective proceedings who claim their damages only secure their damages minus a significant reduction as a result of the litigation funder's return on their funding, this impacts on any claim that funding promoted access to justice. Examples such as the small amount said to be due to claimant class members in the *Merricks v Mastercard* litigation[36] and class action claims resolved in Australia, were said to bear this out.[37] The funder's return was, by some, said to be an effective tax on claimants in so far as it reduces their damages.

6.12 It was also said that the fact that litigation funders only choose to fund 3-5% of potential claims that seek funding from them demonstrates that the idea that it promotes access to justice is untrue or, at best, exaggerated. This point was, however, contrasted with the claim that litigation funding has also resulted in excessive amounts of litigation: the fact that since 2015 every UK citizen has, in effect, been represented in 8.1 separate collective proceedings was said to illustrate this (at the end of 2023, there were 540 million class members in respect of opt-out collective proceedings brought in the UK).[38] There is, it might be said, something of an inconsistency between the two claims.

6.13 It was also said that the fact that litigation funders decline to fund so many potential claims itself promotes access to justice. It was said to do so due to discouraging the litigation of weak or otherwise speculative claims. If litigated, such claims would have an adverse effect on defendants and on the proper administration of justice, not least due to unnecessarily taking up scarce court resources that would be better allocated to meritorious claims.

---

[36] *Merricks v Mastercard* [2025] CAT 22.

[37] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, (2018) at Chapter 3, which is available here, https://nla.gov.au/nla.obj-2993377664/view.

[38] CMS, *European Class Action Report 2024,* at 2, which is available here, https://cms.law/en/media/international/files/publications/publications/cms-european-class-action-report-2024?v=4.

6.14 It was also critically submitted that, if and to the extent that litigation funding promotes access to justice, then it does so by way of an incidental by-product and not because this is its aim. The aim of funding, it was said, was profit-seeking by funders, who treat litigation as an asset class.[39]

6.15 Finally, it was noted that, where litigation funding is not available, e.g., for small or low value claims that cannot be litigated as collective proceedings, and CFAs and DBAs are not viable funding options, there remains an access to justice gap. That legal aid is not available to meet that need was also noted. Where legal aid was concerned, it was suggested that making it available could obviate the need for collective proceedings.

Equality of Arms and Other Benefits of Litigation Funding

6.16 A large number of respondents identified the promotion of equality of arms for claimants, and particularly for claimants in opt-out collective proceedings, as a key benefit of litigation funding's availability. This was linked with the point that it promotes access to justice. Its availability was noted as being especially important as a means to ensure that financially weaker claimants have sufficient means to obtain highly skilled legal representation, obtain appropriate evidence, and carry out the conduct of litigation effectively. Given that it was suggested that defendants typically outspend claimants by a factor of three-to-one, the availability of funding is essential as a means to promote equality of arms. *Bates v the Post Office* (2019) was referred to as an example of such a case where litigation funding enabled the claimants to continue to participate in litigation in circumstances where the defendant significantly outspent them, not least during the disclosure process.

6.17 Notwithstanding these points, it was also pointed out that not all defendants are well-resourced. In such cases, the availability of litigation funding for claimants does not, it was suggested, promote equality of arms. On the contrary, it was said to promote an inequality of arms, particularly where a corporate defendant does not have sufficient resources to fund their defence either at all or to an equivalent level. This was particularly pertinent where a defendant does not itself have access to litigation funding.

6.18 Broader benefits of litigation funding were also highlighted. These include the fact that litigation funding through facilitating private law litigation (and particularly collective

[39] See, for instance, *Rowe v Ingenious Media Holdings PLC* [2021] EWCA Civ 29; [2021] 1 WLR 3189, at [74].

proceedings) promotes the public interest. This was said to arise in two ways: first, by deterring unlawful behaviour through making available legal proceedings to its potential victims, so deterring poor corporate governance and helping promote good corporate governance leading to more competitive and efficient markets, thus further promoting the public interest; and, secondly, through helping to develop substantive law, particularly through interpreting and explaining legislation.

6.19 It was also submitted that the availability of litigation funding helps to support the UK's legal services industry, which in turn helps maintain its position as a leading dispute resolution centre that provides a substantial annual contribution to the UK economy. Care needs to be taken in this regard, it was suggested, because of developments in other jurisdictions, notably in Europe where the Representative Actions Directive has been implemented since that could increase competition with England and Wales as a jurisdiction of choice for collective proceedings. Litigation funding needs to remain available in England and Wales to ensure that it can compete effectively in this regard.

6.20 Other respondents supported the conclusions reached by the LSB in its report on litigation funding. That is, they supported its conclusion that litigation funding: promotes the public interest and the rule of law; helps promote financial resilience of law firms; helps protect defendants through providing security for costs and the payment of adverse costs; promotes effective cost budgeting by funded parties; furthers the CPR's overriding objective by enabling witnesses and parties to give their best evidence; minimises the potential for the court's resources to be expended on unmeritorious litigation; and improves the public's understanding of their rights.[40]

6.21 Further benefits identified were that litigation funding enables some claimants, particularly corporate claimants, to pursue litigation without having to divert finances from their core businesses. They may also utilise it to limit the financial risk to their business from litigation. Furthermore, it was said to enable some businesses, such as those responsible for investment management, to pursue litigation where they would otherwise not be able to do so due to restrictions placed on their use of funds under their management. It was also noted as being able to support insolvent businesses, which might not otherwise have funds to secure recovery of the insolvent estate for the benefit of their creditors.

[40] R. Mulheron, *A Review of Litigation Funding in England and Wales*, (A Report for the Legal Services Board, 2024), Sections 4 to 6. Also see pages 30-32, 147 and 149.

Drawbacks of Litigation Funding – Unmeritorious Litigation

6.22 Respondents took opposing views on whether the availability of litigation funding promotes speculative or unmeritorious litigation.

6.23 Those respondents who supported the view that litigation funding promotes unmeritorious litigation did so on several bases. First, it was submitted that there was good evidence from the United States that it does so. This was particularly based on its promotion of class action litigation there. Secondly, it was said that its availability has given rise to many 100s of such claims, albeit details of such claims were not provided.

6.24 Examples were given of some claims that were said to be unmeritorious, and which had been funded by litigation funders. What was said to be unmeritorious litigation was said to include litigation that results in little benefit to claimant class members in opt-out collective proceedings in the CAT. Examples include *Lloyd v Google* (2021),[41] *La Patourel v BT Group Plc* (2024),[42] *Merricks v Mastercard* (2025),[43] *Prismall v Google* (2024),[44] *Smyth v British Airways* (2024),[45] *Wirral Council v Indivior plc* (2025).[46] Other respondents, however, highlighted *Lloyd v Google* (2024), for instance, as an example of meritorious litigation even though the claim ultimately failed.

6.25 Several respondents, however, submitted that the availability of litigation funding does not promote such litigation. It was said that, due to the expensive nature and risks inherent in litigation, there is no incentive on the part of funders to pursue unmeritorious claims. If they do so, they were, it was suggested, simply likely to lose money.

6.26 Others suggested that there is no evidence to support the view that such behaviour is occurring in England and Wales. What evidence there was focuses on experience in the United States, and there are differences in the structure of collective proceedings in England and Wales and the US which militate against the replication of problems said to be associated with litigation funding of class action litigation in the US.

6.27 It was also pointed out, noting the Mulheron Report commissioned by the LSB, that funders typically only fund 3-5% of potential claims and only do so following a rigorous due diligence

[41] *Lloyd v Google LLC* [2021] UKSC 50; [2022] AC 1217.
[42] *Le Patourel v BT Group Plc and British Telecommunications PLC* [2024] CAT 76.
[43] *Merricks v Mastercard* [2025] CAT 22.
[44] *Prismall v Google UK Limited and DeepMind Technologies Limited* [2024] EWCA Civ 1516.
[45] *Smyth v British Airways Plc* [2024] EWHC 2173 (KB).
[46] *Wirral Council v Indivior plc* [2025] EWCA Civ 40.

process. As such, they only fund claims that they conclude have a reasonable prospect of success. That, again, it was submitted, does not support the claim that funding promotes unmeritorious litigation. Others made the point that an increase in litigation, and particularly opt-out collective proceedings, should not be equated with the promotion of unmeritorious litigation.

Further Drawbacks of Litigation Funding

6.28 The promotion of speculative or unmeritorious litigation was not the only drawback that respondents identified as flowing from availability of litigation funding. A wide range of other drawbacks were identified in the consultation responses.

6.29 First, a general criticism was made that litigation funding through fuelling the growth of collective proceedings as well as other claims, is harming UK businesses. It was said that it has led to, or is leading to, the UK being viewed as a high-risk jurisdiction for businesses to operate due to the threat posed to business from funded litigation. This point was linked to the view, although not exclusively, that litigation funding is promoting speculative litigation. Businesses are, it was said, having to divert more of their finances away from their core business to paying legal fees.

6.30 Further to that point, it was also said by some respondents that the diversion of funds away from core business activities is hampering business innovation in the UK. By hampering innovation, litigation funding was also said to be harming the UK's competitiveness. This is compounded more generally by a decline in business investment that was said to be a consequence of a decline in business confidence due to the increasing likelihood of funded litigation, particularly funded collective proceedings.

6.31 Secondly, it was said that litigation funding, rather than promoting access to justice, is no more than a means to enrich litigation funders and legal representatives. It was said to provide no benefit to consumers. In some cases, this was said to be due to the fact that funded claims are brought not because claimants or potential claimants seek funding to secure access to justice, but due to legal representatives and litigation funders seeking claimants in order to use their potential claims as a vehicle for their own enrichment. In other cases, this was said to be due to the ability of funders to ensure via LFAs that they

would receive excessive profits in the event the funded claim succeeded. *Merricks v Mastercard* (2025) was identified as an example of this issue.[47]

6.32 This latter problem was said to arise due to the lack of any cap, such as those imposed on CFAs and DBAs, on success fees or payments where litigation funding is concerned. That funders could secure such returns on their funding is, it was then suggested, a factor in the promotion of speculative or unmeritorious litigation. It was suggested that effective controls, whether via regulation or court oversight, should be put in place to ensure such problems do not arise in future.

6.33 It was, however, pointed out by other respondents that there is a lack of understanding where these issues were concerned. It was pointed out that litigation funding involves significant risk to the funder. That risk leads to two things. First, it militates against litigation funders funding speculative litigation due to the risk that they will lose their funding for no return. Secondly, due to the risks of litigation, i.e., that not all meritorious claims succeed, funders have to price their return on funding accordingly. This can lead to the misperception that they are seeking and obtaining excessive profits.

6.34 Other respondents identified problems concerning the ability of funded claimants, particularly those in opt-out collective proceedings, to negotiate the terms of funding agreements effectively. It was suggested that this arises, in some cases at least, because funding terms have been negotiated by the funder and the funded party's legal representative before the funded party is approached to pursue the litigation. In some cases, this is because the legal team has identified a potential funder before a potential claimant has been identified or before they have been approached by one. This is linked to another problem: that parties seeking funding are not fully able to make an informed choice concerning a proposed funding agreement as there is a lack of transparency in the funding market that enables them to choose between agreements and terms offered by different funders.

6.35 Indirectly linked to the previous issue, other respondents suggested that there is an absence of effective regulation of the legal profession where litigation funding is concerned. A need for clear, targeted and detailed regulation and guidance is required. At the present time, it is lacking.

[47] *Merricks v Mastercard* [2025] CAT 22.

6.36 Other respondents did, however, take the view that these matters are properly dealt with through the current ALF Code and hence there is no need for reform. Others took the view that such matters could be overcome through the terms of LFAs or through existing court oversight.

6.37 Some respondents also suggested that litigation funding gives rise to concerns that foreign governments are using it as a means to harm national interests. They did so in reliance on concerns about the use of such funding in the United States. No evidence was provided relating to England and Wales.

6.38 Finally, and while not a criticism of litigation funding, it was also pointed out that there is a lack of data concerning the use of litigation funding.

Discussion and Recommendations

Access to Justice

6.39 Litigation cost is unarguably one of the most significant barriers of access to justice. It is a direct barrier where litigation is concerned. It is also an indirect barrier where consensual settlement of disputes is concerned, as the possibility of exposure to litigation cost can result in parties to potential disputes taking no steps to pursue their claim. There are two ways to ameliorate these problems: reduce litigation costs and provide funding for the pursuit of justice. While steps have been taken repeatedly to achieve the former over the last two hundred years, high litigation cost remains an intractable problem. Even where such steps are, and have been, successful, the second problem remains. It does so in, at least two ways.

6.40 First, some claims will always remain economically unviable where the pursuit of justice is concerned due to the nature and value of the claim and the costs associated with dispute resolution, whether through litigation or ADR. Typical of this type of claim are small or low value claims and particularly small or low value mass claims. Secondly, some claims despite their nature and value making them economically viable, will not be capable of being pursued or defended because the party concerned lacks the financial resources to do so.

6.41 Where the first type of claim is concerned the provision of funding to finance a claim, however that funding is provided, is one but not the only means to promote or secure access to justice. It could be secured through making available public or private funding sources. Their availability would not necessarily, however, overcome the problem that the claim is

not itself economically viable because the cost to achieve resolution either through a court judgment or settlement process outweighs and may well significantly outweigh the cost of its achievement. Litigation funding may finance access but at too great a cost. Effective access to justice in such cases may well be better achieved through a regulatory or consumer redress scheme, such as those that can be established by the Competition and Markets Authority under section 49C of the Competition Act 1998.[48] In that regard, the Working Party notes that it is asked to consider possible alternatives to litigation funding as a means to deliver effective access to justice.

6.42 The Working Party strongly supports the use of regulatory redress schemes or consumer redress schemes. Regulatory redress and other such schemes have worked well in the past.[49] If designed and operated effectively and more systematically, they could provide a low-cost and efficient means of managing and providing just resolution of disputes, particularly mass disputes, and fair levels of compensation to those who had suffered harm. It also notes that such suggestions, particularly regarding giving priority to the use of redress schemes, are consistent with the approach that the CJC previously recommended should be taken to certifying collective proceedings:

> *'Certification [of collection proceedings] serves another and wider purpose. It is not simply aimed at ensuring that the most appropriate form of civil procedure is adopted in the prosecution of any claim. It is also aimed at ensuring that the use of civil process is in and of itself the most appropriate, the superior, means of prosecuting any claim and achieving effective redress. Certification will also therefore require an assessment of non-court based redress mechanisms, such as, where available, Ombudsman and regulatory action. In this way certification provides the mechanism whereby the court can ensure that the use of collective action through the court process forms a complementary aspect of an overarching system of effective redress. It is not proposed that collective actions be the only means of ensuring effective redress, but that their introduction and control through certification, will enable the civil justice system to effectively and efficiently play its proper role in enabling individuals, employees and businesses to enforce their substantive rights.*

[48] The Competition Act 1998 (Redress Scheme) Regulations 2015 (SI 1587/2015). Also see, for instance, the redress schemes referred to in the Digital Markets, Competition and Consumers Act 2024 Schedule 25, part 2.

[49] As noted in C Hodges & S. Voet, *Delivering Collective Redress: New Technologies* (Hart, 2018).

It is anticipated that where more effective non-court based redress mechanisms e.g., regulatory mechanisms or Ombudsman schemes, exist certification would be refused.'[50]

6.43 As noted above, access to litigation is only one part of what it means to secure access to justice.

6.44 The Working Party therefore recommends that the Government consider what legislative and other steps should be taken to increase the availability and use of such schemes. While we do not recommend any particular approach, the following possibilities, amongst others might be considered: the introduction of a statutory duty to create user-friendly schemes where a defendant has admitted or been found to be liable by a regulator or court, as suggested by one consultation response; the creation of a general power exercisable by an appropriate authority to create a scheme that could be administered, where there is one, by an appropriate existing Ombudsman.[51]

6.45 Alternatively, where liability is not admitted, an option may be, as also suggested by other consultation respondents, to introduce a variant on the Canadian Class Proceedings Fund,[52] which could provide financing for collective proceedings. Such a development could, in appropriate circumstances, be combined with a regulatory or consumer redress scheme, i.e., use of the class proceedings fund to finance collective proceedings to establish whether a defendant is liable, with the regulatory or consumer redress scheme then being available to determine the level and nature of redress. Such developments could complement access to litigation and, particularly, where low value mass claims are concerned, complement opt-out collective proceedings and other forms of group or collective action.

6.46 There will, however, inevitably be claims that cannot be pursued through a regulatory redress or similar scheme. For them, effective access to justice will only be available through a form of collective or group litigation before the civil courts and the CAT. That was clearly recognised by Parliament in 2015 when it introduced the possibility of pursuing opt-out collective proceedings in the CAT alongside its introduction of a collective settlement

[50] CJC, *Improving Access to Justice through Collective Actions*, (2008) at 152.

[51] For an example of recent reform considerations see, FOS & FCA, Modernising the Redress System – Call for Input (November 2024), which is available here: https://www.fca.org.uk/publication/call-for-input/call-for-input-modernising-redress-system.pdf.

[52] Such a fund could, for instance, be run by a public body established by legislation. It could either be publicly funded or funded via undistributed damages or settlements from collective proceedings.

procedure. For some cases, litigation as a last resort is the only means to secure access to justice.

6.47 In this respect, it should be emphasised that access to justice, as the Supreme Court emphasised in *R (Unison) v The Lord Chancellor* goes beyond delivering justice in any specific or individual case: the determination of a dispute by court judgment provides access to justice more widely as it provides the framework within which individuals and businesses order their affairs on a secure legal footing, can take steps to minimise the prospect of disputes arising, and resolve their disputes consensually. Additionally, and importantly, it secures justice in the sense that it gives effect to the substantive law as enacted by Parliament and developed through the common law.[53]

6.48 Where potential collective proceedings and group litigation is concerned, litigation funding may and often will be the only viable means of securing access to justice. The nature and cost of such litigation will be such that CFAs, DBAs, LEI or Trade Union funding are not viable funding methods. Equally, the suggestion that public civil legal aid could provide a means to fund such litigation does not stand scrutiny: the cost of such proceedings would, inevitably, require a significant recapitalisation of the civil legal aid fund and, in a likelihood, it would require a recapitalisation to a level it never previously reached. The Working Party do not believe that that is a realistic option.

6.49 In the circumstances, the Working Party concludes, as others have previously, that for certain types of claim, particularly opt-out collective proceedings, litigation funding is and is likely to continue to be the only viable funding mechanism.[54] As such it is an essential means to promote and secure access to justice.

6.50 Turning to the second category of claim, i.e., those that are economically viable but in respect of which the claimant or defendant does not have the resources to pursue them, the Working Party also concludes that litigation funding is an essential means of promoting access to justice, albeit one amongst others.

6.51 We note that it may also assist defendants as, in principle, a defendant to proceedings could and should be able to utilise such funding on the basis that the litigation funder will receive

[53] *R (Unison) v The Lord Chancellor* [2017] UKSC 51; [2020] AC 869 at [66] and following.

[54] See, for instance, Alex Chalk MP LC, *Cases like Mr Bates vs the Post Office must be funded*, (The Financial Times, 3 March 2024); Heidi Alexander MP, *Keynote Address to the Civil Justice Council National Forum 2024*, at [16] which is available here, https://www.judiciary.uk/wp-content/uploads/2024/12/Heidi-Alexander-speech-to-CJC-National-Forum-2024.pdf.

payment in the light of proceedings being defended successfully. Such payment obviously will not amount to a share of damages (except and in so far as a defendant pursued a counterclaim). There is no reason, in principle, why the return to the funder could not be determined in other ways, i.e., by the defendant placing a value on defending the claim.

6.52 The most obvious types of claim that fall into this second category of claim are commercial claims, such as *Arkin v Borchard Lines Ltd*,[55] where a commercial claimant does not have sufficient resources to fund their claim. Equally, it facilitates access to justice for insolvency practitioners who would not otherwise be able to pursue claims brought on behalf of an insolvent estate where they would not otherwise have available resources. Moreover, it is also clear that it facilitates access to justice for commercial parties who cannot divert their resources from their business to fund litigation or obtain other forms of funding for their claim, e.g., CFA, DBA, LEI or loan funding.

6.53 Finally, the Working Party rejects the suggestion that as litigation funders only agree to fund 3-5% of potential claims it does not promote access to justice. It does so as funded claims include opt-out collective proceedings. As pointed out, such proceedings have resulted in UK citizens being represented in litigation eight times over since the introduction of such proceedings through the Consumer Rights Act. Each such opt-out proceeding thus can be said to bring proceedings on behalf of more individuals than is the case for all other types of claim within the civil courts. Moreover, they do so in a way that could not be achieved through ordinary, individual civil proceedings.

6.54 The Working Party concludes that litigation funding is an essential means to secure effective access to justice, and that for some types of dispute it is the only viable means by which dispute resolution can be funded.

Equality of Arms and Other Benefits of Litigation Funding

6.55 The Working Party accepted that it was clear that the availability of litigation funding helped to promote equality of arms, helps to promote the wider public interest and the other benefits identified.

6.56 It also accepted though that in some cases where a claimant was funded, a defendant may not have access to equivalent funds. In such cases though, the issue is how to enable such

[55] *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655; [2005] 1 WLR 3055.

defendants to gain access to resources to fund litigation. The answer is not to accept that funding may provide greater resources for a claimant and therefore conclude that they should not have access to funding. That approach is to deny access to justice. The proper approach is to take steps to promote effective access to justice, and through it equality of arms, for both parties to a dispute. As such there ought to be greater availability of a range of funding sources, whether CFAs, DBAs, LEI or litigation funding, to defendants.

Drawbacks of Litigation Funding – Unmeritorious Litigation

6.57 Significant concerns were raised that litigation funding fuels the pursuit of speculative or unmeritorious litigation. The basis of such concerns was, however, not entirely convincing.

6.58 First, reliance was placed on evidence from the United States. That evidence was intended to demonstrate that the availability of litigation funding had promoted speculative, unmeritorious litigation there to the detriment of business, innovation and the economy.

6.59 There is, however, a fundamental problem with reliance on the United States as a comparator to illustrate the effect of litigation funding. That problem is the fundamental differences that exist between the 51 civil justice systems (State and Federal) that exist in the United States and the English and Welsh civil justice system. Those differences include: the absence of cost shifting in the US and the widespread availability of contingency fee agreements; the more ready availability of strike out and summary judgment processes in England and Wales; the availability and wide scale use of pre-trial disclosure, including witness disclosure via deposition in the US. The use of disclosure as a functional equivalent to the pleading process, which operates on the basis of notice pleading rather than fact pleading as is the case in England and Wales. The witness deposition process in the US has no equivalent in England and Wales. It differs from the availability of deposition evidence in limited circumstances permitted under CPR Pt 34; the prevalence of civil juries as the tribunal of fact in civil claims in the US; the availability of punitive damages in a wider range of circumstances than is the case in England and Wales.

6.60 The differences can be multiplied. Each of them separately ought to give pause for thought before comparing the operation of the two country's civil justice systems. Taken together the differences make it acutely difficult to draw valid comparisons. If, and to the extent that it is correct that litigation funding lies behind a growth in speculative, unmeritorious litigation in the United States, given the fundamental differences between the US and

England and Wales, there is no good reason to conclude that the US situation provides any guide to the situation in the latter. On the contrary, the very features of English and Welsh civil justice that differ from those of the US system strongly support the former's ability to deter the growth of such litigation as much as the latter system may, through its practices and procedures, not do so. At the very least, just as the Court of Appeal noted in respect of comparisons between the approach to collective proceedings in Australia and in England and Wales, the two countries have different systems and what occurs in one should not be taken as evidence of what is happening or may happen in the other.[56] That is all the greater the case where differences between the US and England and Wales are concerned.

6.61 The Working Party did not, therefore consider that evidence from the United States assisted on this point.

6.62 Secondly, various cases were relied on to show that unmeritorious litigation had been pursued due to litigation funding. The difficulty with those cases is that they do not support that conclusion.

6.63 *Lloyd v Google* (2021) cannot properly be described as a claim that lacked merit. While the claim failed at first instance and ultimately failed before the Supreme Court, it succeeded before the Court of Appeal. Unmeritorious or speculative claims do not succeed before the Court of Appeal. If, however, what was meant by the point that it was unmeritorious was that it was a claim that sought damages that individually were of a very low value and as such the claim ought not to have been pursued, that argument fails also. It does so because Parliament has enacted legislation to enable mass claims of such types to be capable of pursued through the courts. It has done so not only to enable those claims to be vindicated, i.e., the law given effect, and compensation for breaches of the law to be compensation, it has done so to enable private enforcement of the law to complement public enforcement, and to provide an effective means to deter potentially tortious behaviour.

6.64 *Prismall v Google* (2024) presents a stronger argument in favour of the claim litigation funding promotes unmeritorious litigation. It does so as the claim was struck out at first instance and that decision was upheld by the Court of Appeal. That being said, it raised an important point of legal principle concerning the correct application and interpretation of the Supreme Court's decision in *Lloyd v Google* (2021) and the operation of CPR r.19.8. On that ground alone it can properly be seen to have merit as it clarified the law. Furthermore,

[56] *Wirral Council v Indivior PLC* [2025] EWCA Civ 40 at [132] and [141].

that permission to appeal from the strike out was given demonstrates that the appeal had a real prospect of success or there was another compelling reason for an appeal to be heard. In either case, it cannot therefore properly be said to have been a claim that lacked merit. Similar points can be made concerning *Wirral Council v Indivior plc* (2025).

6.65 *Le Patourel v BT Group Plc and British Telecommunications PLC* [2024] was the first opt-out collective proceeding to conclude at trial in the CAT. The claim failed. That a claim fails at trial does not properly mean that it was unmeritorious or speculative. There is nothing in the judgment to suggest that the Tribunal considered the claim to be either of these things. That applications to strike out the claim or obtain summary judgment in the defendant's favour were dismissed in 2021 is illustrative of that point.[57]

6.66 *Merricks v Mastercard* (2025) was also put forward as an example of an unmeritorious claim. Again, it can be noted that it was not made subject to an order to strike it out or grant summary judgment in the defendant's favour. The claim settled without any admission of liability. It could be said that it was an unmeritorious claim because under the settlement, the represented class members may receive a lower proportion of the settlement sums relative to the sums payable to the litigation funder and legal teams. A meritorious claim on this basis would be one where claimants secured a substantial sum in damages or settlement and/or the funder secured a lower, perhaps significantly lower, return.

6.67 The difficulty with that approach is that it fails to give appropriate weight to the fact that Parliament introduced the opt-out collective proceeding precisely to enable such claims to be pursued. The alternative to such a claim, and the level of damages available to represented claimants, is no access to justice as such claims would otherwise not be capable of being litigated. Their value and the cost of litigation militate against that. The alternative to such litigation and to damages reduced in amount through deductions made for funders is not higher damages awards to individual claimants, it is no damages at all. There is a separate question over the amount of any deductions made by funders to damages or settlement awards and whether they should be capped. Whatever the answer to that question, which is considered later in this Report, deductions do not render the ability to pursue a claim and to vindicate rights accordingly unmeritorious. Such claims also, again, do not give appropriate weight to the wider public benefits of access to justice, noted above.

[57] *Le Patourel v BT Group Plc and British Telecommunications PLC* [2024] CAT 76 at [6].

6.68 One case that does go some way to support the claim that litigation funding has promoted unmeritorious litigation are *Smyth v British Airways* (2024). The difficulty with this case is that the funding arrangements were opaque. What appears to be clear though is that they were made available by the prospective representative party's employer.[58] The claim does not appear, therefore, to have resulted from an established litigation funder. Nor does it seem to suggest a general pattern in terms of funding producing unmeritorious litigation. That the court refused to permit the claim to go forward under CPR r.19.8 could also reasonably be said to demonstrate the efficacy of the civil court's powers to control the pursuit of such claims. At its highest, this claim provides additional support for regulation that would apply to all LFAs. It does not, however, provide support for a general conclusion that litigation funding generally promotes unmeritorious litigation.

6.69 While the above claims may not provide any real support for the contention that litigation funding promotes unmeritorious litigation generally, they may not represent the true picture. Some respondents pointed out they were aware of many 100s of instances where companies have been subject to unmeritorious claims that were supported by litigation funding. These claims were not detailed in the consultation responses. There may well be good reason for that. However, the absence of detail poses a problem for placing weight on them, not least as it means there is no way to consider whether they were unmeritorious or not.

6.70 Notwithstanding this, the Working Party is concerned that there may well be some unmeritorious claims. Amongst these claims there may well be some that are resulting in defendants settling them on economic grounds rather than defending them in court. That

[58] *Smyth v British Airways Plc* [2024] EWHC 2173 (KB) at [36], '*There has been and there continues to be a lack of transparency regarding Ms Smyth's motivation, funding and suitability. On the material before me, I do not accept that her motivation lies in a desire to secure redress for consumers. She has had no prior involvement in such activities. Her evidence suggests or is only really consistent with that interest having been sparked by the chance (though common enough) experience of her cancelled flight. But she has not explained how and by what process that led her to the very considerable undertaking of a representative action brought by her on behalf of many millions of others. The availability of funding from Mr Armour, her employer, strikes me as unlikely to have been fortuitous. She was not at all forthcoming about her links with Mr Armour and there is inconsistency between Mr Preston KC's letter of 21 February 2023 (claimant has no financial interest in the claim) and the somewhat careful wording of paragraph 117 of her second witness statement (her position is "reserved" but "as matters presently stand I have no commercial interest"). Neither she nor Mr Armour have given any context to or reassurance concerning the investigation by the NZFMA into Mr Armour's share-buying activities in 2010. Such activities seem to me to be thoroughly inimical to his taking a role in this litigation, in which role he would be in a position to influence Ms Smyth. That influence would be the more likely and the more powerful given that he is her employer. Mr Bear KC described him as dominus litis, i.e. the person who was really running the litigation and the description seems apt.*'

such a risk does exist, and was supported by some respondents, provides additional support for steps to be taken to reduce the prospect of this happening in the future. The Working Party considers that the measures it recommends in **Parts 4 and 5** ought to address such concerns.

6.71 Subject to this final point, the Working Party's overall conclusion is that litigation funding does not promote unmeritorious or speculative litigation. In so far as it might, the courts have sufficient powers to deal with such litigation and deter it from being pursued. Furthermore, recommendations made later in this Report ought properly to reduce the prospect that such litigation is threatened or pursued as a consequence of litigation funding being available.

Further Drawbacks of Litigation Funding

6.72 The Working Party considered that there was force in some of the other suggested drawbacks that are said to result from litigation funding.

6.73 The criticism that litigation funding through fuelling collective proceedings harms UK business does, however, appear to miss its target. In so far as the growth of such proceedings is concerned, that is a consequence of the introduction of opt-out collective actions in 2015 rather than the means by which they are funded. The availability of funding is means by which this form of process is able to be used effectively. As a criticism this is in reality a criticism of opt-out collective proceedings. Whether or not opt-out collective proceedings ought to be permitted is outside the scope of this Report. The Working Party simply notes that having permitted such a form of proceeding, a necessary corollary is the permissibility of some means to fund them. As noted earlier, other forms of funding are not, however, available to fund such proceedings. That being said, and as noted early, steps can and should be taken to reduce the burden on business posed by speculative or unmeritorious claims to limit the diversion of funds from core business activities.

6.74 Excessive profiteering by lawyers and funders, caps on funders' returns, the ability of funded claimants (particularly representative parties) to negotiate funding terms, and legal professional regulation, are all considered in **Part 5**.

6.75 There is force in the criticism that there is an absence of data concerning litigation funding. A similar point is made concerning the use of CFAs and DBAs.[59] This ought to be remedied, not least so as to provide an empirical basis for ongoing monitoring and future policy development and reform. The Working Party therefore recommends the establishment of a Standing Committee on Litigation Funding. This should collect data concerning CFAs, DBAs, litigation funding, as well as other forms of litigation funding, such as pure and crowdfunding. It should do so from law firms and HMCTS, which should be under a duty to provide it with such information, which where necessary should be appropriately anonymised. At a minimum the data collected should include: the nature of the cause of action; the nature of proceeding; details concerning the party, e.g., whether they are an individual, consumer, business; the remedy sought; how the claim concluded; the nature and type of the funding for each party; the nature of any success fee or return to the funder; the legal costs incurred. To avoid the introduction of a new public body, such a Committee could be, for instance, a standing committee of the CPRC given the recommendation made later in this Report that it take on responsibility for CFAs and DBAs.[60]

[59] See para. 297, below.

[60] See **Recommendation 49**. The Working Party notes that in due course responsibility may be transferred to the Online Procedure Rule Committee in this respect and in respect of other recommendations in this Report concerning the Civil Procedure Rule Committee.

7. Part Four – Third Party Litigation Funding – Regulation

Recommendation

7.1 The Working Party makes three recommendations in this Part of the Report.

RECOMMENDATION 4

Litigation funding should be subject to a formal, comprehensive regulatory scheme. That scheme should replace the current self-regulatory approach. It should do so by replacing section 58B of the 1990 Act with a comprehensive legislative scheme that covers all forms of litigation funding.

RECOMMENDATION 5

Claims management services are a form of litigation funding. To ensure a clear distinction between contingency fee funding and litigation funding, claims management services ought not therefore to form part of the regulation of DBAs (or CFAs). They should be regulated under the same scheme as the recommended in **Recommendation 4**.

RECOMMENDATION 6

Litigation funding of arbitration proceedings should not be subject to formal regulation. It should remain a matter for arbitral centres to determine whether and, if so, how any such regulation should be implemented.

Summary of Responses

7.2 Respondents set out the main approaches to regulation. These responses, and those in **Part 5**, which follows, need to be considered in the light of the matters discussed in **Part 3**, above.

7.3 A minority of respondents considered that the current self-regulatory approach works well and, therefore, that there is no need for regulatory reform. It was suggested that the combination of self-regulation via the ALF and its Code of Conduct, combined with the rules concerning champerty and maintenance and a competitive funding market, provide effective regulation. Linked to this, some respondents considered that self-regulation could be kept in place with some amendment to improve consumer protection.

7.4 It was also said that, in the absence of any specified harm, there is no reason to move from self-regulation to formal regulation. This is particularly pertinent given the harm that would arise from the imposition of formal regulation, i.e., the cost to litigation funders that may result in a reduction in available funding. Where there is a need for reform to the ALF Code of Conduct to improve self-regulation, that could best be achieved through the ALF working in consultation with the CJC.

7.5 Specific suggested reforms of the current self-regulatory approach included, for instance, mandating ALF membership for all funders who operate in England and Wales, increased capital adequacy requirements in the Code of Conduct and a more effective approach to sanctions for non-compliance with the Code. Others suggested that there is quite simply no case for regulation to be established.

7.6 The majority of respondents, however, favoured the replacement of self-regulation with some form of formal, statutory regulation, whether that was funder licensing, the application of a mandatory code of practice, and/or regulation of funding agreements. The absence of formal regulation was said to be anomalous given the degree of regulation that exists for CFAs. That absence was particularly difficult to understand given the fact that litigation funding is typically provided for more complex consumer claims and involves greater sums of money than is the case where CFAs are entered into. Its absence was also said to be anomalous given that it is a type of loan funding and other types of loans are subject to regulation, not least by the FCA. The fact that it is subject to self-regulation was also queried on the basis that Parliament had, through the 1990 Act, intended litigation funding to be subject to statutory regulation.

7.7 Some respondents also raised the point that England and Wales is, if not an outlier where regulation is concerned, that it is becoming so. It was pointed out that, for instance, litigation funding is being made subject to regulation in other jurisdictions, e.g., the United

States, Singapore, Hong Kong, and the European Union due to the application of the Representative Actions Directive.[61]

7.8 Self-regulation was also suggested to be inadequate for various reasons, which was said to justify the move to formal regulation. These included:

a) The fact that not all litigation funders active in England and Wales are members of the ALF and subject to its Code. It was said that a third or less than a third of all active funders are ALF members. There is thus differential protection for funded parties in terms of the Code's application.

b) The terms of the ALF Code of Conduct do not provide adequate protection for funded parties, e.g., because its capital adequacy requirements are insufficient, it does not have an effective complaints (which it was said had not been used since the Code was put in place) or sanctions for non-compliance mechanism, or it does not provide appeals from its complaints mechanism to go to an independent Ombudsman. It also fails to manage conflicts of interest between litigation funders and funded parties effectively or provide an effective mechanism to resolve them. It was thus suggested that more effective provision needed to be put in place to deal with this, not least to ensure that funded parties should be required to obtain advice from an independent KC on the merits of any proposed funding arrangement, that funders should owe fiduciary duties to funded parties, that effective means to identify, manage and resolve conflicts should be put in place and be paid for by funders.

c) It does not provide for litigation funders to be subject to anti-money laundering regulation or make provision for funders to comply with any applicable sanctions regime.

d) It does not provide consumer protection equivalent to that provided by the FCA's Consumer Duty,[62] and nor does it make provision for a fair return to claimants as it does not provide for caps on funder profits. It was particularly said that the present

[61] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC. Also see, V. Waye, N. Chamberlain & V. Morabito, *How to Address the Regulation of Third-Party Litigation Funding of Class Actions?*, (2025) 141 LQR 131.

[62] Details of the Consumer Duty are available here: https://www.fca.org.uk/firms/consumer-duty/how-using-duty.

position leaves claimants and potential claimants exposed to misleading adverts to the effect that funded litigation is a means to litigate free of any financial risk;

e) It does not provide sufficient protection for defendants to funded claims from, for instance, unmeritorious or speculative litigation or from undue pressure to settle such claims

7.9 The lack of effective regulation was said to create further problems. Those were

a) No effective civil court scrutiny of settlements in funded cases. While the CAT has a role in settlement approval where opt-out collective proceedings are concerned, court approval is not generally required for other types of funded litigation – and anyway not because the litigation is funded. Moreover, approval arises after a settlement has been agreed. Problems were said to arise during the process through which a settlement is negotiated. It was suggested that, during such negotiations, funders who aim to maximise their return can interfere in ways that reduce the possibility that the settlement will provide a just return to the funded party. Settlement processes thus are another instance where conflicts of interest can arise and adversely affect funded parties.

b) Litigation funders can take effective control of funded litigation. Such control was said potentially to arise either or both directly and indirectly, the latter through exerting influence by, for instance, threatening to withdraw or withhold funding or through renegotiation of funding terms, i.e., making renegotiation contingent on the funded party ceding control of aspects of the litigation or settlement or giving priority to the litigation funder's interests. This was said to arise notwithstanding the continued application of the doctrines of maintenance and champerty. This was said to be on example of a wider problem: that there is a significant imbalance of power between litigation funder and funded party, which the current regulatory environment does nothing to assuage.

The contrary position of other respondents was that litigation funder control does not occur in practice, not least due to the continued application of the doctrines of maintenance and champerty. Again, the *Merricks v Mastercard* litigation was said to provide an example of attempted funder control, in that case control in terms of the proposed settlement. Reference was also made to *Smyth v British Airways* (2024)

where the court agreed that the funder was '*dominus litis*', i.e., in effective control of the litigation.[63]

Other respondents, however, suggested that litigation funders ought to have control over funded litigation given the fact that they fund it and are, as a consequence, also taking on the financial risk of its failure.

c) A lack of transparency concerning the fact of funding and the terms of funding. It was pointed out by some respondents that funded parties should be under a duty to inform the defendant of the fact that they are funded at the earliest possible opportunity.

d) It was also said to raise problems for both funded parties and defendants were litigation funders to withdraw funding during the course of proceedings.

7.10 It was also argued that self-regulation is inappropriate now given that the litigation funding industry is well-established; its value being said to be between £1.5 and £4.5 billion. As some respondents pointed, the English and Welsh litigation funding market is now the second largest such market worldwide and one which has grown tenfold since 2011 from £198 million to one worth £2.2 billion by 2021.[64] This growth has primarily been fuelled, it was said, through the introduction and growth of collective proceedings and of portfolio funding. Given such growth, and the fact that not all funders were ALF members, it was also argued that the basis on which the Jackson Costs Review concluded that self-regulation was appropriate no longer held good. On the contrary, it was said that the factors the Review identified as justifying a move to regulation had been met.

7.11 The Jackson Costs Review concluded that self-regulation would be appropriate if all litigation funders subscribed to the ALF Code and that Code has satisfactory capital adequacy requirements. It also concluded that given the, then, '*low volume of third party funding . . . and the fact that most clients are commercial parties with access to full legal and financial advice*', this means that it was not appropriate to recommend full regulation. If, however, the use of litigation funding was expanded, it concluded that there may be a case for regulation.[65] At the time that the Jackson Costs Review was conducted, opt-out collective proceedings were not permitted in the CAT.

[63] *Smyth v British Airways Plc* [2024] EWHC 2173 (KB) at [36].
[64] See, for instance figures in S. Latham & G. Ress, *The Third Party Litigation Funding Law Review*, (6th edn, 2022).
[65] R. Jackson (December 2009) at 120-121.

7.12 It was also argued that formal regulation could help to reduce the cost of funding. At present, it was submitted, parties that seek funding have to engage in costly due diligence concerning funders. That cost could be eliminated if all litigation funders were subject to regulation. It was, however, also noted that formal regulation would increase compliance costs for funders, which could have an adverse impact on the availability of funding. While that was said to be a price worth paying to mitigate the risks of self-regulated funding and secure effective consumer protection, it was also noted that the cost of compliance ought not to be such as to affect adversely access to justice for those who require funding. Given that latter point, if regulation were to be introduced, it should be 'light-touch regulation.'

7.13 Different views were expressed concerning the scope of regulation. Some respondents who favoured regulation considered that it ought to apply to all forms of funding and should therefore apply to all forms of litigation and arbitration. Any divergence in approach could, it was said, lead to unnecessary complexity. Simplicity was called for, albeit that there could be a higher degree of regulation where collective proceedings are concerned.

7.14 Others took a differential approach. They either argued for its application to litigation but not arbitration or its application to consumer claims and collective proceedings but not commercial litigation or arbitration. Where commercial litigation was concerned, it was said that there is no real need for regulation as funded parties are sophisticated, well-advised and need less protection than consumers. Similar points were made concerning arbitration, as was the important point that there is a need to ensure that London-based arbitration retained its pre-eminent position and remained competitive vis-à-vis other arbitral centres around the world.

7.15 Where arbitration is concerned, it was also said that there is no reason to bring it within regulation. Any steps concerning regulation of arbitration funding is a matter for arbitral tribunals and arbitral rules. Additionally, regulation was said only to be justified where there is, as the ELI Principles concluded,[66] an identifiable problem or market failure. Neither issue arises where arbitration is concerned.

[66] ELI Principles at 12.

Discussion and Recommendations

7.16 It is apparent that Parliament initially expected litigation funding to be permitted only if it complied with a statutory scheme of regulation - that provided for in section 58B of the 1990 Act. The development of common law litigation funding was, arguably, inconsistent with that approach. It was a development that was, however, tacitly endorsed by successive governments and Parliament when it enacted the Consumer Rights Act 2015, given the fact that opt-out collective proceedings, from a practical perspective, depend upon such funding. This is the case notwithstanding the decision in *PACCAR*. The question for the Working Party therefore focuses on whether there is a reason to depart from that approach and recommend the replacement of self-regulation.

7.17 The Working Party has concluded that there is good reason to depart from self-regulation. It therefore recommends the replacement of the current approach with that of formal, statutory light-touch regulation. It specifically recommends the replacement of section 58B of the 1990 with a new legislative provision that applies to all forms of litigation funding.

7.18 The Working Party also recommends, in combination with the recommendations made in **Part 9** concerning CFAs and DBAs, that the new legislative scheme draws a principled distinction between the regulation of lawyer-funding (CFAs and DBAs) and non-lawyer funding (litigation funding). The two are distinct and should be treated as such. One consequence of this is that the regulation of funding via claims management services ought not to be regulated through the regulation of DBAs. Claims management services, in so far as they provide funding, do so through non-lawyers providing funding to litigation. It should therefore be made subject to the regulation of litigation funding. Statutory regulation is recommended for the following reasons.

7.19 First, it is apparent that the basis on which the Jackson Costs Review concluded that self-regulation was appropriate no longer holds good. Its conclusions were predicated on three points.

a) First, that all litigation funders would be subject to the self-regulatory scheme. That is patently not the case. As such, those seeking funding are placed both at risk and disadvantage. They are placed at risk as there is no guarantee that the funder they deal with will be subject to or abide by the terms of the ALF Code. They are placed at a disadvantage, since, as pointed out in the consultation responses, they have to

expend time and money on carrying out due diligence on any proposed funder, thus increasing the cost to them of seeking access to justice.

b) Secondly, that the ALF Code's capital adequacy requirements are set an appropriate level and all litigation funders were subject to it. That may have been the case when the Code was revised following the Jackson Costs Review but, as noted in **Part 3**, it is doubtful, at best if that remains the case today. While that could be rectified by revision of the Code, any such revision would depend on the willingness of ALF members to revise their code. If implemented, however, it would not resolve the problem that non-members would not necessarily meet its capital adequacy requirements.

c) Thirdly, the Jackson Costs Review's recommendation was predicated on litigation funding principally being available to sophisticated, commercial parties. It did not consider, nor would it have done at that time, its availability as a means to fund consumer claims, specifically large-scale opt-out consumer collective proceedings, as is now the case. It did not, therefore take account of the need for consumer protection.

7.20 Secondly, another point can be made concerning the Jackson Costs Review. A further rationale that underpinned its conclusion on self-regulation was that litigation funding was at that time in its infancy. Regulation, it was suggested, might adversely affect a nascent industry. The ELI Principles have recently also stressed the need not to stifle the development of litigation funding in new markets through the imposition of more than self-regulation.[67] The validity of this point was of doubtful force at the time that the Jackson Costs Review was carried out. It is even more doubtful now. Litigation funding is established worldwide. It is an industry that the ELI Principles note is estimated to be worth US$15.8 billion worldwide.[68] It is not an industry that is in its infancy. It may be in a nascent stage of development in specific jurisdictions, but it is one that is supported by quite considerable resources. In such circumstances, it is difficult to accept that it is an industry within England and Wales that requires self-regulation in order to establish or maintain itself. In this regard,

[67] ELI Principles at 26.
[68] Ibid at 17.

it is noteworthy that neither Singapore nor Hong Kong concluded that self-regulation was required to establish litigation funding when they permitted their use.[69]

7.21 Thirdly, it is also apparent that the failure to ensure that all litigation funders are subject to self-regulation was considered to be a valid justification for the introduction of formal regulation by ELI. It concluded that there were two justifications for formal regulation: market failure or an identifiable problem with self-regulation.[70] Such an identifiable problem is the ALF Code's non-application to all litigation funders, and hence the absence of best practice being applicable consistently across all funders.[71]

7.22 Fourthly, there are further identifiable problems that can only be rectified through the application of formal regulation: first, that all litigation funders are made subject to anti-money laundering regulation; and, secondly, the imposition of statutory regulation is the only sure means to protect against capital adequacy risk, both for the funded party and defendants to funded proceedings. It is also the only means to effectively ensure the application of other regulatory requirements across the industry. Linked to this, formal regulation can, in ways not available under self-regulation, help drive up standards consistently across the industry to the benefit of all funded parties, and particularly those who seek funding for consumer opt-out collective proceedings. The application of regulation applicable to all funders would additionally help promote more effective competition between them. It would do so as they would all be required to comply with the same regulatory requirements, i.e., some would not gain an artificial competitive advantage by not complying with self-regulation.

7.23 For these reasons, the Working Party therefore recommends the introduction of formal regulation of litigation funding. Care will, however, need to be taken to ensure that regulation is implemented in a light-touch way that properly secures its objectives without unduly harming the litigation funding market and hence access to justice. The nature of that regulation is considered in **Part 5**.

7.24 Where arbitration is concerned, however, the Working Party does not support regulation. The Law Commission raised the question of (third party) litigation funding, specifically regarding disclosure and costs, in its 2022 Review of the Arbitration Act 1996.[72] No

[69] Interim Report at 5.16 and 5.24.
[70] ELI Principles at 27.
[71] Ibid at 28.
[72] Law Commission, *Review of the Arbitration Act – a consultation paper*, (Cons 257) at 113.

significant support was provided in its consultation or the responses to it for reform.[73] Were the nature and operation of litigation funding in arbitral proceedings in English and Welsh seated arbitration perceived to be either problematic or that it posed a risk to arbitral parties or the public interest, those issues would have been brought to light during that consultation process or during the passage of the Arbitration Act 2025's passage through Parliament.

7.25 In those circumstances and given that no significant concerns have been raised concerning litigation funding in arbitration in the consultation responses to the Interim Report, there is no justification for the extension of regulation to this area. It should remain a matter for arbitral centres in England and Wales to determine if and, if so, how funding of arbitration is regulated (or not). They are best-placed to determine this issue and, in doing so, ensure that arbitration and its funding remains competitive.

[73] Law Commission, *Review of the Arbitration Act – responses to the first consultation paper*, at 53-54; Law Commission, *Review of the Arbitration Act – Final Report and Bill*, (Law Com 413) at 169.

8. Part Five – Third Party Litigation Funding – Elements of the Regulatory Structure

Recommendation

8.1 The Working Party makes 21 recommendations in this Part of the Report.

RECOMMENDATION 7

LFAs and how funding is provided should be regulated.

RECOMMENDATION 8

The Lord Chancellor should be given the statutory power and responsibility for the independent regulation of litigation funding. Regulation should be effected through SI. It should include provision for sanctions to be applied to funders who fail to comply with the regulations.

RECOMMENDATION 9

The Lord Chancellor with the Standing Committee on Litigation Funding should review the operation of litigation funding regulation five years after it commences. The review should consider the effectiveness of regulation by the Lord Chancellor and whether regulatory responsibility should be transferred to the FCA. A statutory power that would enable any potential transfer of regulatory responsibility should be contained in the legislation introduced to create independent regulation of litigation funding.

8.2 The Litigation Funding Regulations should make provision for the requirements specified in the following recommendations.

RECOMMENDATION 10

Litigation Funding Regulations should make provision for funding to be subject to ongoing case-specific capital adequacy requirements. ATE insurance with robust anti-avoidance endorsements should be in place where the funding is provided for a non-commercial party or for collective or group proceedings.

RECOMMENDATION 11

Anti-money laundering regulation should be applied to litigation funders.

RECOMMENDATION 12

Regulation should codify the prohibition on litigation funders from, directly or indirectly, controlling funded litigation, including settlement proceedings. Breach of this requirement should render the LFA unenforceable as against the funded party and should render the funder liable for the funded party's costs and adverse costs.

RECOMMENDATION 13

The fact of litigation funding, the name of the litigation funder and the ultimate source of the funding should be disclosed to the court and the other parties to proceedings at the earliest opportunity after the funding agreement is entered into.

RECOMMENDATION 14

Provision should be made for the prohibition and resolution of conflicts of interest.

RECOMMENDATION 15

An independent, binding dispute resolution process to resolve disputes between litigation funders and funded parties should be established. The process should make provision for the promotion of the consensual resolution of such disputes. The cost of the dispute resolution process should be borne by the funder.

RECOMMENDATION 16

Breach of the Litigation Funding Regulations should render any regulated funding agreement unenforceable. The court should be given the power to waive regulatory breaches where it

is just and reasonable to do so. It may impose such terms on such conditions as it considers to be just and reasonable.

8.3 The following recommendations concern additional requirements for the regulation of litigation funding where the funded party is a party to collective proceedings, a representative action or group action or is a consumer.

RECOMMENDATION 17

Litigation funders should be subject to a regulatory Consumer Duty.

RECOMMENDATION 18

Independent legal advice from a KC should be given to the funded party, prior to entry into the funding agreement.

RECOMMENDATION 19

Standard terms for LFAs, consistently with the details specified in paragraphs 8.20 to 8.24, should be developed and annexed to the Regulations.

RECOMMENDATION 20

The funded party should disclose to the court, on a without notice basis, the terms of the funding agreement (appropriately redacted to protect privileged or commercially sensitive information) to enable the court to consider whether to approve the agreement. The court should adopt an inquisitorial approach when doing so. The court should particularly consider whether the funder's return is fair, just and reasonable.

RECOMMENDATION 21

The funder and the funded party's lawyer should certify to the court, as part of the without-notice approval process, that they did not approach either directly or indirectly the funded party to seek their agreement to pursue proceedings.

RECOMMENDATION 22

The development of the regulatory structure should be informed by Principles 4 to 12 of the ELI Principles, in so far as they are consistent with **Recommendations 10 to 21**.

RECOMMENDATION 23

Legal Services Regulators should review and improve the regulation of the legal profession, including its regulatory obligations and information requirements, where litigation funding is concerned. This should cover all aspects of funding, not just LFAs.

8.4 The following recommendations concern court rules.

RECOMMENDATION 24

The civil courts and CAT should be given the power to manage, on application, the pre-action phase of funded litigation.

RECOMMENDATION 25

Civil courts and the CAT should consider whether and if there are available consumer or regulatory redress schemes available for proposed funded collective proceedings, representative and group actions.

RECOMMENDATION 26

CPR Part 19 should be revised to make it consistent with the CAT Rules applicable to LFAs, not least in terms of approval of LFAs and settlements. Both CPR Pt 19 and the CAT Rules should be amended to include a requirement that upon certification of an opt-out collective proceeding or representative action that is funded a requirement that the opt-out notice specifies that: the class representative is in receipt of litigation funding; the name and details of the funder; and, the funder's approved return in the event of success.

RECOMMENDATION 27

The CPRC and the CAT should co-operate to ensure the CPR and CAT Rules adopt a consistent approach to litigation funding.

Summary of Responses

8.5 Respondents proposed a range of potential approaches to any regulatory scheme. They also proposed specific reforms to the CPR and CAT Rules.

Elements of the regulatory structure

8.6 Those respondents who favoured the replacement of self-regulation with regulation identified a variety of elements that they considered to be necessary for there to be effective regulation.

8.7 First, a need to regulate litigation funders and/or the terms of LFAs was identified. The clear view was that, whichever of these approaches is taken, litigation funding should be regulated as a financial service by the FCA. Independent and impartial regulation should be put in place. Having the FCA as the regulator would ensure, in particular, for instance, that funders are subject to its consumer duty and would help to promote consumer confidence and consumer protection. Others suggested what could be understood as co-regulation, with both the FCA and the SRA regulating different aspects of litigation funding.

8.8 Some respondents, however, took a different view. Some suggested that the ALF could be further developed as an effective regulator, not least if membership of it was to be made mandatory via legislation. Some, however, doubted whether that was feasible on the basis that it would remain regulation by the industry itself.

8.9 Secondly, whichever body was given responsibility for regulation, the regulatory structure was, variously, said to require the following:

a) The introduction of mandatory capital adequacy requirements for all funders, ATE cover with anti-avoidance endorsements and a presumption that security of costs will be given where a party is funded. Failure to comply with these, or other regulatory requirements, should result in withdrawal of a funder's licence to provide funding. Funders should also be liable for adverse costs.

b) Funders should be subject to the same anti-money-laundering regulation as banks and other lenders.

c) There should be a prohibition, whether through legislation, regulatory control or mandatory terms in funding agreements on funder control of litigation, whether direct or indirect. It was also suggested that problems concerning funder control of

litigation could be overcome by the funded party being supported by an experienced claimant management committee, which would have responsibility for managing the litigation and/or by requiring the funded party's solicitor to be subject to specific regulatory requirements to act in that party's best interest.

d) The introduction of a mandatory Code of Conduct for all funders, which should include an effective, independent complaints mechanism and means to resolve disputes between funders and those they fund.

e) The introduction of standard terms of LFAs.

f) The establishment of effective means to mitigate conflicts of interest that may otherwise arise between funders and those they fund, and the means to resolve any such conflicts.

g) Funders should be under a fiduciary duty to act in the best interests of the funded party.

h) A requirement that all users of litigation funding should receive independent legal advice, paid for by the funder, on the terms of any proposed funding agreement. Absent the provision of such advice, agreements should be unenforceable.

i) A requirement that all those in receipt of funding should be provided with a 'funding information pack', which should in clear terms explain the nature of the funding agreement, its benefits and any risks that arise from it. Such an information pack should, particularly, make clear the nature of any risk that the funded party has in respect of litigation costs. This requirement may be waived in writing by a sophisticated, commercial party if they are funded.

j) To further enhance consumer protection, funders should be subject to the FCA's Consumer Duty - thereby coming under the scope of the **Financial Ombudsman Service (FOS)** and the Financial Services Compensation Scheme to provide an effective means to resolve complaints concerning funders and funding agreements.

k) The promotion of market transparency to better enable potential users of funding to choose the most appropriate means of funding, whether litigation funding or any other form of funding (CFA, DBA, LEI etc).

l) Caps on funder returns or requirements that funded parties are provided with a guaranteed minimum recovery regarding any damages or settlement award. This was particularly seen as a means to promote consumer protection, curb excessive

profiteering from litigation, and ensure that funding was provided to secure access to justice rather than access to profit. Different levels were suggested at which a cap could or should be set. Some suggested the cap should be set at 10% of damages; others suggested 25% to 75%, depending on the type of case.

Other respondents argued with some force that there should be no provision for caps or minimum returns to claimants. It was variously said that caps or minimum returns would result in a reduction in the availability of funding. Some suggested that it would be fatal to the market.

Caps were also said to be a blunt instrument that would not be able to take account of case-sensitive factors, such as litigation risk and the time that funding would be tied up until the litigation concluded. It was noted that neither Singapore nor Hong Kong has imposed caps and that the ELI Principles (which noted that caps have not, for instance, been imposed in consumer cases in Canada, Australia or Israel[74]) did not support the imposition of caps. It was also said that there is no factual basis for the imposition of caps as there is no evidence that funders routinely (or if ever, as some suggested) make excessive profits from funding.

Other respondents argued that it is too early in the development of opt-out collective proceedings to justify the introduction of caps on funder returns. That is particularly the case as the CAT has an oversight role where settlement approval is concerned.

m) The mandatory disclosure of the fact of litigation funding and the name of the funder to the court and other parties to litigation. If funding is obtained pre-action, disclosure should be given at that time. If it is obtained later, it should be given as soon as possible after it is obtained. It was also said that there ought to be disclosure to the court of the terms of the LFA - subject to necessary redactions to protect privileged information. These requirements were said to be necessary to enable the court and defendants to challenge terms within LFAs that, for instance, breach the prohibition on champerty because they provide the funder with an appropriate level of control over the litigation. This was also said to be necessary to enable defendants to gain a proper understanding of the extent to which a funder could satisfy any adverse costs awards made against them, if such were made.

[74] ELI Principles at 70.

8.10 It was also argued that the regulatory scheme should be applied differently to commercial entities that receive litigation funding. They were not said to be in need of the same level of protection as consumers or to parties who are engaged in collective or group proceedings and would be expected to have access to sophisticated advice.

8.11 Others suggested that the drawbacks identified could be resolved through the application of the ELI Principles to litigation funders or LFAs or through greater court supervision of LFAs.

8.12 Additionally, some respondents made the point that there is also a need to improve the regulation of solicitors where litigation funding is concerned. For regulation to work effectively, there needs to be effective litigation funder and lawyer regulation.

8.13 A variety of changes to the CAT Rules and CPR were suggested as being necessary. These include:

a) The introduction in opt-out collective proceedings for a without-notice hearing for consideration and approval of funding arrangements. This should be scheduled before and separately from any certification hearing. It should be done to enable the court to consider if the funder is compliant with its regulatory obligations;

b) Enhanced court management and control of funded proceedings and their cost. This was said to be particularly necessary due to imbalances of power between funded parties, lawyers and litigation funders, such that the funder party was not able to provide effective cost control.

c) A mandatory requirement that any settlement of funded litigation is approved by the civil courts and the CAT. Alternatively, a requirement that approval is required in all collective proceedings, group litigation, and representative actions.

d) Reforms to the certification process in the CAT to ensure greater scrutiny of the basis on which funded proceedings are brought. This should operate to ensure that the proceedings were originated by the claimant and not by their legal representative and/or the litigation funder.

e) The extension of CPR r. 1.3 (the duty to assist the court in furthering the overriding objective) to litigation funders.

f) The consolidation of all rules concerning funded claims within a discrete Part of the CPR. Where funding is concerned, provision in the CPR and particularly CPR r.19.8 should be comparable to provision in the CAT Rules. Removing this disparity would, it

was said, ensure that court scrutiny of funded claims in the civil courts would be more effective than at present.[75]

8.14 Other respondents suggested that the problems associated with litigation funding could be overcome through the replacement of the current approach to funding collective proceedings. It was suggested that a class proceedings fund (either publicly funded or funded via taking a percentage of damages or any settlement that arises from collective proceedings) could be established, as is the case in Ontario, Quebec and Israel, which could be used to fund such litigation. Such a fund would obviate or, at least, reduce the need for litigation funding for collective proceedings, and hence the problems such funding creates.

Discussion and Recommendations

Choice of Regulator

8.15 The Working Party accepts the need to introduce an independent regulator of litigation funding. Such a reform will help promote greater consumer confidence in regulation. It is also a reform that is consistent with the general approach to regulation of the legal sector and those services that concern it, i.e., it mirrors the split between representative bodies and regulatory bodies in the legal sector and the independent regulation of claims management services.

8.16 The choice of regulator is, however, not as straightforward a question. There is a great deal of force in the submissions that support the appointment of the FCA as regulator. That litigation funding is a financial service and that the FCA imposes a consumer duty to secure high standards of consumer protection are two good reasons for it to take on the regulatory role. Ultimately, it may be necessary and appropriate for it to do so.

8.17 The Working Party has, however, concluded that in the first instance a lighter-touch approach, and one consistent with both Parliament's original intention for the regulation of litigation funding and the current approach to the regulation of CFAs and DBAs should be adopted. Consequently, it recommends that the Lord Chancellor regulate litigation funding through being responsible for issuing regulations prescribing the terms on which it can be carried out as a regulated activity. Such an approach will provide an effective level of

[75] Also see **Part 8** on further rule changes proposed concerning costs.

independent and impartial regulation. It will do so at low cost. It will also do so, through the nature of the regulatory requirements, by ensuring the benefits that would otherwise flow from FCA regulation are secured.

8.18 The Working Party is mindful of the fact that, given the nature of litigation funding, it may become apparent over time that regulation by the FCA is preferable. To take proper account of this possibility, it recommends that the effectiveness of regulation be monitored by the Government, working with the Standing Committee on Litigation Funding (as recommended above), for a five-year period after it is introduced. If, at the end of that period, FCA regulation is needed, the Lord Chancellor's responsibilities should be transferred to it. To facilitate this transfer, a power to transfer regulation to the FCA should be contained within the litigation funding legislation that the Working Party has separately proposed (see **Part 12**).

Elements of the Regulatory Structure

8.19 Having considered the various arguments, the Working Party has concluded that the regulatory structure for litigation funding should, as noted above, be set out in a SI. It should prescribe and regulate in the following way – in order to promote adequate consumer and defendant protection, to promote a differential approach to regulation where funded parties are sophisticated, commercial parties, while continuing to secure its availability as a means to secure access to justice.

8.20 First, LFAs, and how funding is provided, should be regulated. This approach will ensure that all LFAs are regulated. It will avoid difficulties in determining who or what is a litigation funder for the purposes of regulation. It will also facilitate differential regulation between the regulation of litigation funding provided to consumers and for collective proceedings and that provided to sophisticated, commercial entities, i.e., it will facilitate the targeted application of consumer protection. This will also ensure parity of regulatory approach with CFAs and DBAs.

8.21 Secondly, the Litigation Funding Regulations should provide that no LFA is enforceable unless the following requirements are complied with:

a) The litigation funder maintains, on a continuing basis during the lifespan of the funded litigation, a sufficient level of capital adequacy to enable it to meet financial obligations that may arise under or consequent to the funding agreement. Capital

adequacy should be determined on a case-specific basis. The litigation funder and the funded party's legal representative must, jointly, certify to the court and any other party to the funded litigation that the funder has and maintains sufficient capital adequacy. The funding agreement must make provision for the steps which a funder should take, including notice to the court and other parties, if it reasonably believes that it will be unable to satisfy the capital adequacy requirements.

b) ATE insurance with robust anti-avoidance endorsements are in place where funding is provided for a non-commercial party or for collective or group proceedings. The litigation funder and the funded party's legal representative must certify to the court and other parties that such insurance is in place.

Certification of capital adequacy and appropriate ATE insurance is required to provide adequate protection for other parties to proceedings. Such certification obviates the need for security for costs. It also obviates the need for any disclosure of the terms of an LFA to other parties to proceedings. The actual terms of an LFA, subject to the point made below concerning consumer parties or collective or group proceedings, will be purely a matter between the litigation funder and the funded party. Linked to this, the Working Party also rejects the proposal that the terms of funding agreements be disclosed to other parties in proceedings. Certification requirements obviate any justification for such disclosure.

Breach of the certification requirements by the party's legal representative should render them subject to disciplinary proceedings by their regulatory body. Failure to comply with either the capital adequacy requirements or ATE insurance requirement should result in the funder being required to give security for costs.[76] In the event that that is not possible, the LFA should be unenforceable as against the funded party, and should render the funder liable for the funded party's costs and for adverse costs. The court or CAT should also give directions to, for instance, decertify any collective proceeding, stay them or, if appropriate, strike them out.

c) The litigation funder has complied with anti-money laundering regulation. This should be achieved through the Litigation Funding Regulations extending the application of such regulation to those parties providing funding via LFAs.

[76] Also see **Recommendation 44**.

d) A prohibition on litigation funder control, either direct or indirect, of the funded litigation - including settlements and settlement negotiations. Breach of this requirement should, in addition to rendering the agreement unenforceable, result in the funder being liable for the funded party's costs and adverse costs.

e) The mandatory disclosure of the fact of litigation funding, the name of the litigation funder and the ultimate source of the funding to the court and other parties to proposed proceedings or proceedings at the earliest opportunity after the funding agreement is entered into.

f) Provision should be made for the court to waive an inadvertent breach of the Regulations where it is just and reasonable to do so on such terms as it considers fair and reasonable. However, this should only be on notice to and having heard from all parties to proceedings.

g) Provision for the prohibition and resolution of conflicts of interest. Reference should be made to Principle Six of the ELI Principles in devising such a prohibition.

h) Provision governing the circumstances when LFAs may be terminated, i.e., limitations and restraints on termination such that funders do not have a broad discretion to terminate LFAs.[77] This should include provision for the funder's continuing liabilities post-termination.

i) The establishment of an independent, binding dispute resolution process to deal with disputes between litigation funder and funded party. This could be through referral of any dispute to an independent KC. Such a process should incorporate provision for the consensual resolution of such disputes. The cost of the dispute resolution process should be borne by the funder.

8.22 The following additional regulatory requirements should apply the funded party is a party to collective proceedings, a representative action or group action or is a consumer.[78] They ought not, therefore, apply generally.

[77] See, for instance, the approach taken in the ELI Principles, Principle 11.

[78] Litigation Funding Regulations will need to specify the meaning of 'consumer' for the purpose of regulation. A starting point for developing that definition would be the Consumer Rights Act 2015, s.2, which specifies that a consumer 'means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.'

a) The funder has complied with a regulatory Consumer Duty. That duty should be specified in the Regulations and should be based on the FCA's Consumer Duty. Complaints concerning the non-compliance with the duty should be referred to the FOS.

This duty should, amongst other things, require the litigation funder to provide the recipient of funding with advance information, in clear, simple and transparent terms, about the nature of the funding, its benefits to the funded party as well as its risks to them, including adverse cost risks and the amount of return likely to be due to the funder.

b) Prior to entry into an LFA, the party to be funded should receive independent legal advice from a KC, paid for by the funder, on the terms of the proposed funding agreement. To minimise the cost of such advice, standard LFA terms should be developed and annexed to the Regulations.

c) The funded party, on a without-notice basis, should disclose the LFA fundi to the court at the commencement of proceedings. Disclosure should be subject to appropriate redactions to protect privileged or commercially sensitive information. Disclosure should be made to enable the court to consider and approve, on a without-notice-to-other-parties basis, the funding arrangements and, particularly whether the litigation funder's return on its funding is fair, just and reasonable. In considering the funder's return, the court should have the power to take an inquisitorial role in order to ensure that it can properly consider and protect the funded party and any absent class's interests.

d) The litigation funder and funded party's legal representative should certify to the court, as part of the without-notice approval process, that they did not approach the funded party, either directly or indirectly, in respect of the claim. In other words, they must certify that the party sought funding and representation for their claim rather than the funder or legal representative seeking a party for litigation that they themselves sought to pursue.[79]

8.23 The development and drafting of the above requirements should be informed by Principles 4 to 12 of the ELI Principles, in so far as they are consistent with the above.

[79] If a funder or lawyer wishes to pursue opt-out collective proceedings they ought only properly do so if they are themselves approved to be the class representative: see CAT, Guide to Proceedings (2015) at 73.

8.24 Non-compliance with the regulatory requirements concerning litigation funding should be notified to the Standing Committee on Litigation Funding. It should report, annually, to the Lord Chancellor, the total level of non-compliance, the nature of such non-compliance, and by whom it was committed. The Lord Chancellor should then, further to requirements set out in the Litigation Funding Regulations take such steps as appropriate. These could include, requiring prohibiting the funder from providing future funding.

8.25 The above requirements do not make provision for the imposition on caps on funder's returns or any provision for a prescribed minimum return to funded parties. The Working Party rejects the imposition of statutory caps or mandatory minima on the basis that they are a blunt instrument and are unable to take proper account of the variable risks of funding different claims. They are also unnecessary as a means to secure effective consumer protection. Such protection, for non-commercial parties and for claimants or class members in collective or group proceedings, is, however, provided by making provision for the court to approve that the level of return is fair, just and reasonable.

8.26 In addition to the above steps, the Working Party also recommends that the LSB and the legal services regulators be required to improve the regulation of the legal profession where funding is concerned, i.e., all forms of funding. Specific, regulatory requirements and guidance should be provided to the legal profession. These should include specific requirements to consider with their clients the various available forms of funding, their advantages and drawbacks. Disclosure of any connection between the lawyer, law firm and funder should be declared.

8.27 The Working Party was also very concerned about the issues raised regarding the ability of representative parties in collective proceedings to negotiate the terms of LFAs effectively and, more broadly, to manage the relationship with their legal representatives and litigation funders effectively. Strictly speaking, the approach to class representatives is a function of the collective proceedings and representative action regimes in the CAT and under the CPR and not an aspect of litigation funding. However, in so far as it has an impact on litigation funding, the Working Party considers (but does not recommend) that, as part of its proposed five-year review of litigation funding, the Government should also consider what, if any, reforms need to be made to improve the ability of class representatives to negotiate with and manage their relationship with funders as effectively as possible. It may be that, in the light of the recommendations made in this Report, no further action needs to be taken. It

may, however, be that the next five years will further demonstrate that a discrete, de facto group of ideological, i.e., consumer-focused, class representatives, has evolved. This may then suggest a need to reconsider the approach to the regulation, approval and funding of such representatives. This may, for instance, require regulation of the emergent body of quasi-professional or professional class representatives, which may in turn suggest a need to reform the approach to who may be authorised to act as a class representative. It may also suggest the imposition of requirements to formalise the current use of advisory or management bodies for class representatives.

8.28 Finally, in so far as the risk that litigation funding may promote unmeritorious or speculative litigation, the Working Party considers that the above recommendations and those it makes in **Part 8** should meet such concerns.

Rule Changes

8.29 The Working Party considers that, generally speaking, the civil courts and the CAT have sufficient costs and case management powers to manage funded litigation effectively. It does, however, consider that the following reforms could improve effective management.

a) First, the civil courts and CAT be given the power, on application, to manage the pre-action phase of funded litigation. This could particularly benefit early and effective costs budgeting and management and help to promote pre-action settlement - not least through ensuring that other forms of resolution have been considered.

b) Secondly, the introduction of a mandatory requirement that the court consider whether and if there are available consumer or regulatory redress schemes available for the resolution of proposed funded collective proceedings, representative or group actions.

c) Thirdly, CPR Pt 19 should be revised so that it mirrors the rules on collective proceedings provided for in the CAT Rules in so far as LFAs are concerned, e.g., it should be reformed to make provision for approval of funding agreements, settlement approval etc. Both sets of rules should be amended to provide additional protection to class members in opt-out collective proceedings and representative actions where the claim is funded by litigation funding. In both cases there should be a requirement that following certification, the opt-out notice, i.e., the notice that must be given to class members telling them the date by which they must opt-out of

the proceedings if they wish to do so, must state that: the litigation is being funded by litigation funding; the funder's name and details; and, the funder's approved return in the event of success. Such notice will enable a class member to make an informed decision whether to opt-out or remain in the proceedings in the light of the expected share of their potential damages that will go to the funder.

d) Fourthly, the CPRC should co-operate with the CAT to ensure that the CPR and CAT Rules adopt a consistent approach to litigation funding.

8.30 Further recommendations for rule changes are set out in **Part 8**.

9. Part Six – Portfolio Funding and Litigation Loans

Recommendation

9.1 The Working Party makes four recommendations in this Part of the Report.

RECOMMENDATION 28

Portfolio funding should be regulated. It should be regulated as a form of loan and regulated by the FCA. Regulation should, particularly, require funders to comply with anti-money laundering regulation and to have sufficient capital adequacy.

RECOMMENDATION 29

The Government should investigate the impact of portfolio funding on the legal profession. It should also consider, as part of that investigation, whether issues concerning portfolio funding require regulatory reform of the legal profession.

RECOMMENDATION 30

The LSB and SRA should consider the need for greater co-operation with the FCA concerning portfolio funding. Such consideration should include whether there is a need to introduce co-regulation by the SRA and FCA of portfolio funded law firms.

RECOMMENDATION 31

The SRA and other legal regulators should consider what steps need to be taken to ensure that there is effective guidance to lawyers for lawyers concerning the use of portfolio funding. This should include consideration of what further or additional guidance, training requirements and/or regulatory oversight is needed to ensure effective client care where portfolio funding is used to fund individual claims.

Summary of Responses

9.2 Portfolio funding raised significant concern amongst respondents, although there was also a view that it was too early in its development to see if it was posing problems such as giving rise to consumer detriment. While it was noted by some respondents to be used rarely, its use was also noted to be increasing.

9.3 Respondents who considered that it raised concerns highlighted the collapse of SSB Law, a law firm that pursued high volume claims concerning alleged defective cavity wall insulation, alleged medical malpractice, alleged personal injury, and alleged data protection breaches. The lawyers worked on a contingency basis. They were funded via portfolio funding, which enabled them to do so. When the claims were discontinued, the firm's clients were left with very significant debt due to their liability for adverse costs and the fact that the ATE insurance that had been secured for them by the law firm to cover such costs declined to pay out.[80] Similar concerns have also been raised as a result of the collapse of another law firm, Pure Legal.

9.4 Concerns were raised to the effect that the situation with SSB Law and Pure Legal is not uncommon. It was said that, on the contrary, there is a real risk that they are examples of a much wider systemic problem. That problem, put shortly, is that law firms have, through securing portfolio funding, developed high-risk and unstable business models that depend on unrealistically high levels of return.

9.5 Concerns were also raised about the ultimate source of such funding, the extent to which lawyers have carried out effective due diligence of potential claims and thus whether unmeritorious claims are pursued, whether clear explanations of the nature of the funding and ATE insurance have been given to clients, and the manner in which potential clients have been identified.

9.6 Concerns were also raised about the legal profession's ability to regulate such matters effectively. Respondents, for instance, highlighted the LSB's investigation into the SRA's regulatory approach to the collapse of Axiom Ince Limited.[81] They also noted its investigation

[80] See SRA, *Cavity wall insulation claims handled by SSB Group (SSB) and Pure Legal Limited (Pure Legal)*, which is available here, https://www.sra.org.uk/sra/news/ssb-group/.

[81] Carson McDowell LLP, *Independent Review of the Regulatory Events Leading Up To The Solicitor Regulation Authority's Intervention to Axiom Inc Limited*, which is available here, https://legalservicesboard.org.uk/wp-content/uploads/2024/10/Independent-Review-of-the-Regulatory-Events-Leading-up-to-the-SRAs-Intervention-into-Axiom-Ince-Lim.pdf.

into the SRA's regulatory approach to SSB Law.[82]It was suggested, in the circumstances, that portfolio funding needs to be regulated to protect against the risk that it poses to consumers and to minimise the prospect that it promotes the pursuit of weak and unmeritorious claims. It was also suggested that there needs to be more effective regulation of the legal profession where its use is concerned. Effective methods to protect against the problems it raised were said to be that funding could only be used to fund meritorious claims, and that funders should be required to meet capital adequacy requirements and be at risk of paying any adverse costs.

9.7 Several responses also raised concerns about litigation loans, i.e., loans provided to individuals to help them finance litigation. Such arrangements differ from litigation funding and portfolio funding as the loan is repayable (plus interest) irrespective of the outcome of the litigation financed. They are also regulated under the Consumer Credit Act 1974. It is thus a traditional loan arrangement provided for litigation funding purposes. The concerns expressed in the responses focused on certain loans financed by Novitas Loans.[83] Those loans were used to finance divorce-related litigation.

9.8 The Working Party also notes that one respondent stressed that there was a clear need for more effective regulation of the legal profession in respect to such loans, and the advice given to their clients concerning them. Such improved regulation could, it was suggested, take the form of enhanced co-operation, i.e., dual regulation, by the SRA and the FCA.

Discussion and Recommendations

9.9 The Working Party considers that portfolio funding raises significant concerns.[84] It is not the case that it is too early in its development to consider whether that is the case. The risk that the consultation responses highlight – to consumers, the legal profession and its regulation – indicate a need for intervention. That such funding lies behind regulatory investigations by the SRA and LSB further supports this conclusion.

---

[82] See, for instance, *LSB to review SRA regulatory actions in the lead-up to the collapse of SSB Group*, which is available here, https://legalservicesboard.org.uk/news/lsb-to-review-sra-regulatory-actions-in-the-lead-up-to-the-collapse-of-ssb-group.

[83] Complaints concerning such loans have been made to the FOS, some of which have been upheld, while others have not. See, for instance, https://www.financial-ombudsman.org.uk/decision/DRN5132754.pdf; https://www.financial-ombudsman.org.uk/decision/DRN0004020.pdf.

[84] Portfolio funding should be distinguished from normal business loans to law firms. See Interim Report at 2.4.

9.10 The Working Party's primary recommendation concerning portfolio funding is that it ought to be regulated as a form of litigation loan. Unlike under LFAs, which operate on the basis of funding for specific claims, portfolio funding, in substance, enables law firms to finance a range of claims. In essence it is a loan, which provides law firms with working capital to finance litigation. It should be regulated as such and regulated by the FCA. As with litigation funding, it should be subject to anti-money laundering regulation, not least given the concerns raised with the Working Party about the provenance of such funding in some instances. Again, as with litigation funding, funders providing portfolio funding should be required to maintain sufficient capital adequacy.

9.11 More broadly, the Working Party is concerned about the issue of effective regulation that portfolio funding and litigation loans have highlighted. It is particularly concerned about the regulation of the legal profession, not least if and to the extent that it is correct that cases such as SSB Law and Pure Legal are evidence of a wider, possibly systemic, problem within part of the legal profession. While the steps being taken by the LSB and SRA in this respect are noted, the Working Party makes the following recommendations:

a) The Government investigates the issues concerning portfolio funding and its impact on the legal profession and its regulation as a matter of urgency. If there is a systemic risk, it would be better if this were identified at as early a stage as possible so that the Government could consider what remedial or mitigating steps need to be taken or which it needs to take.

b) The Government considers the extent to which the issues concerning portfolio funding require regulatory reform of the legal profession.

c) The LSB considers, with the SRA, the need for greater co-operation with the FCA where law firms receive portfolio funding. In this regard, consideration should be given to the introduction of co-regulation by the SRA and FCA of portfolio funded law firms.

9.12 These recommendations have as their focus the need to ensure: that portfolio funding is made available to and utilised by law firms prudently and responsibly; that consumers, i.e., law firms' clients, are fully informed about such funding and the risks and benefits it provides to them; and that it cannot be utilised in ways that promote unmeritorious litigation such as that evidenced by the SSB Law collapse.

9.13 Concerns regarding litigation loans, and the evidence of complaints being made and, in some circumstances, upheld by the FOS, arising from litigation loans serves to reinforce the need in this area for effective financial services and legal services regulation and for steps to be taken to improve both where they have been seen to be lacking. It also highlights the need for consumers to be fully informed of the nature of such funding and the responsibility of SRA to ensure that law firms comply with effective consumer information and client care duties.

10. Part Seven – Crowdfunding and Pure Funding

Recommendation

10.1 The Working Party makes six recommendations in this Part of the Report.

RECOMMENDATION 32

All forms of crowdfunding litigation should be regulated.

RECOMMENDATION 33

Where crowdfunding litigation involves the provision of funds on the basis that funders will receive a financial reward in the event that the litigation is successful, it should be treated as a form of litigation funding and regulated as such.

RECOMMENDATION 34

Where crowdfunding is not carried out on the basis that funders will receive a financial reward, it should be subject to a separate regulatory regime, which at a minimum, should require: donated funds to be held on trust and used for the proposed litigation only; unused funds to be returned to donors or the Access to Justice Foundation, if consent is given; subject to anti-money laundering regulation; donor identity to be verified and disclosed to the court, if ordered; an independent lawyer's opinion on the merits to be obtained; the provision to prospective donors of clear and transparent information about the litigation, the independent lawyer's opinion, potential costs liability, and any deductions from donations made by the individual or organisation organising the crowdfunding.

RECOMMENDATION 35

Sections 85 and 86 of the Criminal Justice and Courts Act 2015 should be brought into force so as to apply to crowdfunding judicial review proceedings. The CPRC should be given the

power to make rules of court that extend the effect of those provisions to other categories of civil litigation in so far as crowdfunding is concerned.

RECOMMENDATION 36

The approach to pure funding set out in *Hamilton v Al Fayed* [2002] EWCA Civ 665; [2003] QB 1175, *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* (No 2) [2004] UKPC 39; [2004] 1 WLR 2807, and *Germany v Flatman* [2013] EWCA Civ 27; [2013] 1 WLR 2676 should be codified within the CPR.

Summary of Responses

10.2 Few consultation responses commented on crowdfunding and pure funding. Where the former was concerned, it was suggested that it is a niche funding method with little to no application to commercial disputes or as a substitute for litigation funding. It was noted that the ELI Principles also concluded that it was of limited application.[85] To the contrary, it was suggested that it may have utility to fund high risk claims, where other forms of funding were not available. Reference was also made to the fact that a large number of judicial review proceedings had been crowdfunded, and to it having an important role to play in funding claims that were pursued in the public interest. Concerns were also raised that crowdfunding could be used as a means to enable money laundering or as a means to defraud those who donate to crowdfunding campaigns or websites. In that regard, reference was made to His Majesty's Treasury and the Home Office's conclusion to that effect in 2020.[86] It was also suggested to be an area that called for further study and that no changes to court rules was currently necessary.

10.3 Further responses concerning crowdfunding highlighted the potential for it to be abused. Concerns were raised about the lack of transparency about the operation of crowdfunding platforms and the lack of accountability to funders. Concerns were also raised about the potential for the expectations raised by public crowdfunding campaigns to affect the funded

[85] ELI Principles at 80-83.

[86] His Majesty's Treasury and The Home Office, *National risk assessment of money laundering and terrorist financing 2020*, (December 2020) at 10.11, '*[Legal Services Providers] often use client accounts to hold and move money on behalf of their clients for related legal services. Money may move through these accounts rapidly and in large sums to third parties. It is also possible that criminals are using new forms of payments such as cryptoassets or crowdfunding to obscure the origins of funds.*'

party's litigation strategy, i.e., leading to increased adversarial conduct. Concerns were also raised about the possibility that some funders could raise money to fund claims that lacked legal merit, which could put defendants to unjustifiable expense.

10.4 Those responses that commented on pure funding ranged from considering that current approach to such funding needs no reform to those that considered that, if regulation of litigation funding were necessary, care would need to be taken to ensure that it did not apply to pure funding. They also included a proposal that philanthropic forms of funding, and particularly such funding of public interest litigation, should be understood to be pure funding.

Discussion and Recommendations

Crowdfunding

10.5 Crowdfunding could be used as a means to raise litigation finance on the basis that, if the funded claim succeeded, those who had contributed to the funding would receive a share of the damages or settlement (financial reward-based crowdfunding). In this type of situation, the individual or organisation responsible for running the crowdfunding campaign would be operating in an equivalent manner to a litigation funder. It could also be used as a means to raise litigation finance on the basis that the funder receives either nothing or a non-monetary benefit (non-financial reward-based crowdfunding).[87]

10.6 Crowdfunding has also been noted to be facilitated in a range of ways: through specific crowdfunding platforms which act as a conduit for individuals or organisations to seek funding for litigation they wish to pursue; by organisations who seek to use litigation to pursue their broader aims; by charities and similar bodies.[88] Academic literature demonstrates that crowdfunding is established as a means to finance judicial review proceedings: 413 such proceedings are reported to have been crowdfunded by 2023.[89] It is reported to be the case that there is a degree of crowdfunding taking place that is not readily visible to scrutiny and that there are anecdotal accounts of it being used

[87] R. Perry, *Crowdfunding Civil Justice*, (2018) 59 Boston College Law Review 1357; J. Tomlinson, *Crowdfunding public interest judicial reviews: a risky new resource and the case for a practical ethics*, [2019] Public Law 166; ELI Principles at 81.

[88] J. Tomlinson, ibid; S. Guy, *Mobilising the Market: An Empirical Analysis of Crowdfunding for Judicial Review Litigation*, (2023) Vol. 86.

[89] S. Guy, ibid.

inappropriately.[90] Consultation responses suggested that its utility for commercial litigation is limited. It would also appear to be a reasonable conclusion that, given the amount of financing necessary to fund group or collective proceedings, its utility as a means of funding such litigation is, at best, equally limited.

10.7 Concerns about crowdfunding are apparent. First, financial reward-based crowdfunding, if the funded claim is successful, raises the same issues as those that arise for TPF. Such crowdfunding is, in reality, simply a further form of litigation funding.

10.8 Secondly, where non-financial reward-based crowdfunding is concerned, there are concerns that funding will be provided for unmeritorious or vexatious claims, which will be contrary to the funders' interests, the defendant's interests in having to expend time and resources in responding to such claims, and the public interest as the courts will have to expend their limited resources (to the detriment of other litigants) on such claims. In this regard, the Independent Review of Administrative Law noted similar concerns. As it put it,

> *'… we are concerned about the increasing practice of crowdfunding applications for judicial review. This was a topic that a number of respondents touched on. The fact that crowdfunding platforms are unregulated led some respondents to express concern that funders of a particular judicial review might be misled as to the nature, or prospects, of that review. The Public Law Project expressed concern that crowdfunding might result in the government having to waste time and resources fending off unmeritorious, but popular, claims for judicial review. We also note Dr Joe Tomlinson's concern that crowdfunding judicial review claims lacks a proper ethical basis and requires regulation.'*[91]

10.9 Thirdly, and linked to the second concern, there are concerns about the lack of transparency in that crowdfunding may not make clear to potential funders the merits, benefits or risks of funding. There is, for instance, a risk that potential funders are not provided with sufficient information about any potential risk they may have of being held liable for adverse costs. This risk is likely to be compounded where, as Perry puts it, '*funders to not pursue financial gain*'. In those circumstances, '*their decision to fund will be based more on intuitions and*

[90] J. Tomlinson, ibid at 174.
[91] Lord Faulks, *The Independent Review of Administrative Law*, (CP 407; March 2021) at 4.160.

emotions, and less on solid data and cost-benefit analysis.'[92] And, in those situations, potential funders are perhaps more likely to be swayed by emotive or over-stated claims.

10.10 Fourthly, risks also arise concerning the ability of crowdfunded litigants to pay any adverse costs. This risk arises both from there being insufficient funds to pay any costs order but also the practical difficulty of enforcing any costs award against individuals who had donated to the fund. We note that this risk will increase should sections 85 and 86 of the Criminal Justice and Courts Act 2015 be brought into force. These provisions relate to information concerning the financial backers of judicial review proceedings being given to the court and may result in liability for adverse costs being fixed on such backers, i.e., on individuals who donate to crowdfund judicial review proceedings.[93] We consider that in so far as crowdfunding is concerned, these provisions should be brought into force. To provide equivalent protection where non-judicial review proceedings are concerned, the CPRC ought to be given the power to make equivalent provision for other categories of civil litigation.

10.11 Fifthly, there are arguments that, where crowdfunding is not provided on the basis that the funder may obtain a financial reward in the event of success, there are poor incentives to resolve the dispute through settlement. This arises in two ways. Unlike with litigation financing or potential with reward-based crowdfunding, it is suggested that there is nothing to '*signal the quality of the claim*'; that is to say, the market reputation of the funder and their need to maintain their reputation as funding meritorious litigation is absent from non-reward funding. Hence, that the claim is being pursued does not provide a signal to the defendant to consider settlement.

10.12 Finally, account must be taken of the concerns raised regarding crowdfunding by His Majesty's Treasury and the Home Office., i.e., that it could be a vehicle for money laundering.[94] As the ELI Principles also noted, crowdfunding could be misused to hide the fact that funds have been provided by a single individual, or organisation, behind a 'crowd'.[95] Consideration also needs to be given to the fact that crowdfunding via online platforms for investment purposes is subject to regulation. Since 2014, further to section 22 of the Financial Services and Markets Act 2000, the FCA has regulated both loan-based

[92] R. Perry, ibid at 1384.
[93] As noted in J. Tomlinson, ibid at 178.
[94] His Majesty's Treasury and The Home Office (December 2020) at 10.11.
[95] ELI Principles at 81.

crowdfunding and investment-based crowdfunding.[96] It is regulated to protect investors, particularly consumers, who are considering investing in such schemes.

10.13 The Working Party makes two recommendations concerning crowdfunding.

10.14 First, where crowdfunding involves the provision of funds on the basis that the funders receive a financial reward in the event that the crowdfunded litigation succeeds, it should be understood to be a form of litigation funding. It should therefore be subject to the same regulatory regime as litigation funding, particularly that which applies to consumer or collective proceedings given the need to protect the interests of the individual subscribers to crowdfunding.

10.15 Secondly, where crowdfunding does not involve financial reward in the event of success, it too should be subject to regulation, albeit a different regulatory approach should be taken. It should be subject to regulation so as to: mitigate the risk that it is used as a vehicle for money laundering or other forms of criminality; protect funders from abuse by unethical or unscrupulous individuals or organisations, not least where crowdfunding is being used a means to promote unmeritorious litigation; to ensure that funders are provided with clear and transparent information about the nature of the claim to be funded, its prospects of success, and any potential liability they may become exposed to as a consequence of providing funding.

10.16 Regulation of non-financial reward-based crowdfunding should include, at a minimum, a requirement that the individual or organisation organising the crowdfunding: holds any funds donated to it on trust, can use it only for the purposes of the proposed litigation for which it was provided, and is required to return any unused funds on a pro rata basis to those who provided the funding or, if the donor indicated their consent at the time they provided the funding, to the Access to Justice Foundation;[97] is to be subject the anti-money laundering legislation; is required to verify the identity of individuals and organisations donating to crowdfund litigation and can disclose that information to the court, if ordered to do so; is under an obligation to obtain an opinion from an independent lawyer on the merits of the claim that is to be crowdfunded; is under an obligation to provide clear and transparent information to potential donors concerning the nature of the proposed litigation, confirmation that they have obtained a favourable opinion from an independent

[96] See FCA, *Crowdfunding*, which is available here: https://www.fca.org.uk/consumers/crowdfunding.
[97] On this, see the approach taken by Crowdjustice, as noted by J. Tomlinson, ibid at 173-174.

lawyer concerning the merits of the proposed litigation, any potential liability they may have for any adverse costs; further to the previous point, and any charges or fees that they may deduct from money donated. Such steps ought to help minimise the risk that crowdfunding litigation may, as suggested in 2020, be the next '*mis-selling scandal*'.[98]

10.17 We also consider that complaints concerning crowdfunding ought to be capable of being brought to the FOS.

Pure Funding

10.18 Pure funding is the provision of litigation funding for an altruistic purpose. A pure funder does not control the funded litigation, nor do they have an interest in the outcome of the litigation or fund it in the course of their business or crowdfunding. A pure funder also does not stand to benefit from it. Where pure funding is concerned, the Working Party did not receive sufficient information to draw the conclusion that any substantive reform is required. In so far as the question raised with it concerning the status of philanthropic funding, it appears that, in principle, that can be classified as pure funding (except and in so far as the funding is not raised via crowdfunding, as discussed earlier). That appears to be clear from the principal authority on pure funding, *Hamilton v Al Fayed* (2002), which clearly states that,

> *'… in my judgment the pure funding of litigation (whether of claims or defences) ought generally to be regarded as being in the public interest providing only and always that its essential motivation is to enable the party funded to litigate what the funders perceive to be a genuine case. This approach ought not to be confined merely to relatives moved by natural affection but rather should extend to anyone - not least those responding to a fund-raising campaign - whose contribution (whether described as charitable, philanthropic, altruistic or merely sympathetic) is animated by a wish to ensure that a genuine dispute is not lost by default (or, as concerned Lord Portsmouth here, inadequately contested).'*[99]

Inevitably, applying this approach will require satisfaction of the 'motivation test', i.e., whether the funding is motivated to enable a party to litigate what the funders perceive to

[98] J. Maugham KC cited in ELI Principles at 81.
[99] *Hamilton v Al Fayed* [2002] EWCA Civ 665; [2003] QB 1175 at [47].

be a genuine case. That will, however, only be capable of being determined on a case-by-case basis. Given this, the Working Party do not see a case for revising the *Hamilton v Al-Fayed* approach.

10.19 Where pure funding is concerned, as with all aspects of litigation funding there needs to be greater clarity. In line with that, the Working Party makes one recommendation. To promote greater clarity, and transparency, in the approach to pure funding, the approach to it, i.e., that set out in *Hamilton v Al-Fayed*, *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* (2004), and *Germany v Flatman* (2013),[100] which was summarised in the Interim Report,[101] ought to be codified within the CPR.

10.20 Finally, and consistently, with the need to ensure that there is effective monitoring of litigation funding and its regulation, data concerning claims funded via crowdfunding and pure funding ought to be collected by HMCTS further to **Recommendation 3**, above.

[100] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* (No 2) [2004] UKPC 39; [2004] 1 WLR 2807 at [23]-[25]; *Germany v Flatman* [2013] EWCA Civ 27; [2013] 1 WLR 2676 at [48].

[101] CJC, Interim Report at 7.30-7.32.

11. Part Eight – Costs and Funding

Recommendation

11.1 The Working Party makes eight recommendations in this Part of the Report.

RECOMMENDATION 37

Consideration should be given to the development of a PAP for Mass Claims applicable in both civil proceedings and proceedings in the CAT.

RECOMMENDATION 38

Costs budgeting and costs management should be mandatory for all funded collective proceedings, representative actions and group actions. In other funded claims, that the claim is funded should be a factor to be considered in deciding whether to order costs budgeting under CPR PD3D. Legislation should be introduced to make provision for the civil courts and the CAT to carry out, on the application of a party to prospective litigation, pre-action costs budgeting and costs management.

RECOMMENDATION 39

Better practice guidance on costs budgeting and management of funded claims should be developed jointly by the CPRC and CAT Rule Committee.

RECOMMENDATION 40

Only specially authorised (ticketed) judges should, as a general rule, be allocated to manage funded claims. Authorisation should only be given upon completion of specific training in costs budgeting and costs management.

RECOMMENDATION 41

Recoverability of litigation funding costs should be permitted in exceptional circumstances. The CPR and CAT Rules should be amended to provide such a discretion.

RECOMMENDATION 42

The post-*Chapelgate* (see the definition of ***Arkin cap***) approach to the ***Arkin Cap*** should be codified in the CPR and CAT Rules.

RECOMMENDATION 43

There should be no presumption of security for costs to be ordered against a litigation funder or funded party. Security for costs should not be available against a litigation funder or funded party where the funder has complied with regulatory requirements concerning capital adequacy, and they have in place a suitable and adequate ATE insurance policy with effective anti-avoidance endorsements.

RECOMMENDATION 44

The CPR and CAT Rules should be amended to provide for security for costs to be required of litigation funders where, through no fault of the funded party, the funder fails to comply with the requirements specified in **Recommendation 10.** In such circumstances, court rules should also provide that the funder should be liable for paying the costs of providing security. They should also clarify that the court has a discretion to require a cross-undertaking in damages from the defendant seeking the security for costs order. Where security is required by reason of a funder's failure to comply with **Recommendation 10** the provision of such a cross-undertaking would be unfair. Accordingly, the ability of the court to require cross-undertakings in cases of security for costs against funders should be limited to exceptional circumstances.

Summary of Responses

11.2 Four specific issues were considered regarding litigation funding and costs: first, the relationship between them; secondly, the recoverability of funding costs; thirdly, the ***Arkin* Cap**; and finally, security for costs.

Litigation Funding and Costs

11.3 The Interim Report sought views on the impact that litigation funding had on the level of litigation costs. All responses accepted that the two were linked. They did, however, also recognise different links between the two and placed differential emphasis on those links.

11.4 Some respondents noted how the level of litigation costs had grown over time, and that such growth was particularly apparent in complex litigation. It was equally said that the general complexity of litigation had itself increased. The greater the complexity, the higher legal fees were likely to be, and as a necessary corollary the greater the likelihood that litigants would require some form of financial assistance to secure access to the court. Litigation funding was thus a solution to high costs. It was suggested that other solutions would be reducing costs and/or the expansion of the CPR's fixed recoverable cost regime.

11.5 The introduction and development of litigation funding was thus one response to the increased necessity for such financial assistance. It was also said that one consequence of increased availability of litigation funding was an increase in the amount of litigation, as greater access to the court was secured by individuals and businesses who would not otherwise be able to gain such access. It was also noted that, as the amount of litigation funding increased, new funders would be encouraged to enter the funder market. Such competition would then reduce the cost of funding through increasing choice in the market.

11.6 It was also suggested that the high cost of legal services, and litigation generally, in England and Wales, increased the attractiveness of litigation funding as a means to finance litigation. This was said to be particularly the case where opt-out collective proceedings were concerned, particularly given the possibility in such cases of funders securing significant financial reward from funding. It was, additionally, submitted that litigation funding resulted in prolonged legal disputes and escalating costs to the detriment of the parties, and particularly that of defendants who were unable to engage in economically active behaviour as they had to divert their resources away from their core business to pay for litigation. This, it was submitted, was detrimental to economic growth, innovation, and society in general. Litigation was said to be prolonged in this way as funded parties were said to have less incentive to settle quickly.

11.7 Similarly, some respondents identified litigation funding as causative of an increase in litigation costs. Comments identified the provision of funding as underpinning what was said to be an increased propensity for funded parties to try to litigate all points that could arise in

proceedings. It was suggested that this occurred except where there were financial constraints that promoted their consideration of settlement. It was further suggested that the availability of funding also leads to increasing numbers of claims being brought in the first instance, including those that could be construed as lacking in merit or as being speculative.

11.8 It was also submitted that litigation funding was causative of increased litigation cost as its availability enabled funded parties to instruct more experienced and expert legal advisers, who would therefore be more expensive than those who might otherwise have been instructed.

11.9 Other respondents expressed differing views. Some made the point that funders have little incentive to drive up litigation costs. Given the inherent risk in litigation, by doing so they ran the risk of ever greater losses should the funded party's claim fail. There was thus an incentive on the part of funders to try to keep costs down. It was also stressed that the proper application of the CPR's overriding objective and effective case management, combined with regulatory obligations placed on solicitors and barristers, were also all in place to ensure that unreasonable, disproportionate litigation costs were not run up.

11.10 Some respondents also identified a pro-active role for funders where cost control was concerned. This was due to the role that funders had in providing input into, and oversight over, legal budgets and spending. The funder provides an independent, additional form of review of expenditure, in so far as that was consistent with them not exercising control over the litigation. The experience of some respondents was that litigation funding thus helped maintain budget discipline. This was because funders allocate capital to cases and are incentivised to ensure that costs are justified and stay within the funding commitment. It was, further, said that funders had an incentive to ensure that budgets were not exceeded to mitigate the impact of possible low settlement outcomes on returns. Notwithstanding this, it was noted by some respondents that budgets were exceeded in as often as one third of cases.

11.11 Respondents also pointed out that the CPR and CAT Rules provide sufficient powers for the effective control of litigation costs through case and costs management. It was, on that basis, submitted, that there was no need to provide additional powers. What was, however, needed was more effective and consistent use of those powers to ensure that costs were kept to a minimum and, as a consequence, became more certain. This could be achieved

through mandatory costs management for all funded claims. Greater use of cost capping orders was also suggested as a means to effectively manage litigation costs. It was also said that fixed costs ought to be introduced.

11.12 Two further, linked, reform suggestions were made, the aim of which was to promote the more effective management of funded litigation. First, that a specific PAP should be introduced for collective or group proceedings (or mass claims). Secondly, that the CPR (and CAT Rules) should be amended to provide the court with greater case management powers at the pre-action stage of litigation.

The Recoverability of Funding Costs

11.13 In considering the relationship between costs and litigation funding, the Interim Report sought views as to whether the costs of litigation funding should be recoverable as a litigation cost in court proceedings and, if so, the reasons for supporting recovery and, if not, the reasons for not introducing recovery.

11.14 Overall, the majority of respondents were in favour of extending the definition of costs to enable funding costs to be recovered in exceptional circumstances to meet the justice of the case. Those in favour of allowing recovery of funding costs in litigation broadly advanced the same argument, which was variously described as straightforward or as being necessary to secure effective access to justice. It was that litigation funding enables claimants who lack the means to pursue meritorious claims to access justice. They submitted that, if successful, claimants should be able to recover not only their legal costs but also the costs associated with securing the funding needed to bring the claim. Without this, a funded claimant's recovery is significantly reduced by the funder's success fee, which would have to be paid for by the funded party. It was suggested that permitting recoverability would have no impact on the manner in which funders approached the economics of particular cases, except in a very clear case.

11.15 The consequence of this was said to be an inevitable and substantial reduction in the claimant's damages, as they would need to be used to pay for the funding costs. This would render the litigation pointless from the perspective of securing satisfactory compensatory relief for the claimant or, in collective proceedings, the claimant class. This, in turn, discourages claimants from bringing claims, as the net benefit after funding costs may be insufficient to justify the risks involved.

11.16 All respondents did, however, also point out the obvious unfairness that would arise for a losing defendant to be liable for all of a funder's fees in every case. All respondents who were in favour of recovery were also in favour of the level or amount of recovery to be rules-based and dependent on the facts.

11.17 Various suggestions were put forward concerning the circumstances in which recovery could be permitted. These included limiting recovery to exceptional cases or where there were exceptional circumstances. It was submitted, for instance, that *Bates v The Post Office* was a paradigmatic example of the type of case where recoverability should be allowed. In that case, the claimants had no way of bringing proceedings other than through securing litigation funding. In many cases, their impecuniosity was a consequence of the defendant's prior conduct. It was suggested that the defendant's behaviour, i.e., their approach to the conduct of the litigation, was not just unreasonable but resulted in the claimant's costs and funding costs increasing unnecessarily.

11.18 This type of defendant behaviour, it was suggested, demonstrated the need for the court to have a discretion to order a defendant to bear some or all of the funding costs. Such a discretion would serve to a deter defendants from engaging in meretricious tactical procedural litigation. As one respondent put it, recoverability in exceptional circumstances would discourage defendants from running a 'strategy of attrition' under which they deliberately pursued an unmeritorious defence and/or made repeated procedural applications the true aim of which was to artificially drive up the claimant's costs.

11.19 This type of defendant conduct, it was said, had an adverse impact on the economies of the case for the claimants. It did so because one consequence of such conduct was to increase claimants' funding costs, which would consequently reduce the potential amount of damages available to the claimant in the event of success. This, in turn, could lead to claimants having to accept a sub-optimal offer to settle in order to ensure that they managed to secure some form of compensatory relief. Thus, it was submitted, exceptional recoverability was necessary to enable justice to be done in certain cases. Separately, it was also suggested that potential defendant liability for costs could promote defendant participation in early use of ADR.

11.20 That recoverability should be limited to exceptional circumstances was supported by some respondents on the basis that the introduction of a general rule would reintroduce the unfair burden on defendants that was accepted to have arisen when unsuccessful

defendants were required to pay the success fee on CFAs prior to the Jackson Costs reforms. General recoverability of funding costs would, it was suggested, create even greater undue pressure on defendants to settle claims than was apparent under the pre-2013 CFA costs regime.

11.21 Conversely, amongst the responses in favour of recoverability, it was also suggested that the recoverability of success fees and ATE insurance premiums should also be permitted in exceptional cases, much for the same reasons as supporting the recovery of litigation funding costs generally.

11.22 Some respondents suggested that any recoverability of costs from defendants ought to be capped. Suggested means to achieve this included via capping recoverability by reference to a percentage of the funder's return in the event of claimant success. It was also suggested that differential caps could be applied to different types of case or by reference to claim value.

11.23 A range of submissions were also made against the introduction of recoverability. As a matter of principle, it was submitted that funder costs should be irrecoverable as to permit recoverability would incentivise the pursuit of unmeritorious, speculative or high-risk litigation. Recoverability thus carried with it the potential to increase frivolous litigation to the detriment of defendant access to justice and the sound operation of the civil justice system. It was also submitted that recoverability would incentivise the bringing of claims for funder profit rather than in pursuit of access to justice.

11.24 Additionally, it was said that it would lead to an increase in 'blackmail settlements', as defendants would be pushed into settling claims that could properly be defended due to the risk that their conduct of the litigation could be construed as meeting the threshold to trigger recoverability. Similarly, and drawing on the Jackson Cost reforms, it was submitted that for the same reason they resulted in CFA success fees and ATE insurance premiums no longer being recoverable, i.e., because recoverability placed an excessive and often disproportionate costs burden on opposing parties, that the recovery of litigation funding costs could drive defendants to settle at an early stage despite having good prospects of successfully defending the claim. The post-Jackson abolition of CFA success fee and ATE premium recoverability was intended to secure greater procedural fairness between claimants and defendants, securing effective access to justice for both. It would thus, it was submitted, be a backward step to allow funding cost recoverability.

11.25 It was also submitted that, just as with recoverability of CFA success fees and ATE premiums, permitting funding recoverability would increase litigation costs. The abolition of recoverability had, in those cases, reduced costs. Thus, the present position should be maintained where recoverability of funding costs was concerned. To permit recoverability would thus also be anomalous given that other forms of funding, such as CFAs, DBAs, and ATE insurance premiums are a matter for the party who obtains such funding.

11.26 Furthermore, it was said, just as a defendant has no control over whether a claimant commences proceedings, they have no control over how they choose to finance them. The cost of whichever funding method is chosen should thus be a matter for the claimant and not the defendant.

11.27 Another argument against permitting recoverability that was raised was that it would disincentive claimants from seeking to secure the best possible funding terms, as they would no longer have any real interest in the cost of funding. This would, at a general level, have an adverse impact on the development of an efficient funding market.

11.28 Finally, it was also suggested that the common fund orders should be introduced.[102] Given the Court of Appeal's decision in *Gutmann v Apple Inc* (2025)[103] the Working Party consider that that issue is no longer a live one.

The Arkin Cap

11.29 There was a broad consensus amongst most respondents that litigation funders should continue to remain exposed to paying the costs of proceedings that they fund. They supported the retention of the ***Arkin Cap*** as it now operates post-*Chapelgate Credit Opportunity Master Fund Ltd v Money* (2020), i.e., with the court making an appropriate decision concerning litigation funder liability for adverse costs on a case-by-case basis.[104]

11.30 It was also noted by some respondents that there was no evidence to suggest that the post-*Chapelgate* approach had had any materially adverse effect on the availability of funding, not least as funders can purchase ATE insurance to cover any risk of their being held liable

[102] See Interim Report at 5.6.

[103] *Gutmann v Apple Inc* [2025] EWCA Civ 459.

[104] *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655; [2005] 1 WLR 3055 at [39]-[43]; *Chapelgate Credit Opportunity Master Fund Ltd v Money* [2020] EWCA Civ 246 at [38].

for adverse costs. A minority of respondents did, however, suggest that the ***Arkin Cap*** should be abolished, with litigation funders being exposed to liability for all adverse costs.

Security for Costs

11.31 In *Rowe v Ingenious Media Holdings* (2021),[105] the Court of Appeal suggested that litigation funders should be structured and operated in such a way so that there is no doubt they could meet an adverse costs order made against them. The Interim Report raised the question of whether the costs of putting up security by funders is a costs liability that should be borne by the claimant or the litigation funder personally. A range of views were set out in responses on this, including the question of whether and how funders should be ordered to provide security for costs.

11.32 Responses explained that all the costs of litigation funding ultimately are met from the proceeds, and so fall on the claimant when it wins. There is no capital pool that can simply or freely be sequestered for the purposes of adverse costs. It was submitted that if there is a cost to funders (and their capital sources) that would be reflected in the price and availability of funding. If it is not a direct cost on the claimant in a case, because it loses the case, it will be a cost on future claimants who must bear the impact of increased prices for funding.

11.33 It was also said that at present funders and claimants can agree what is the most efficient way to meet the adverse costs risk and, as insurance capacity is typically cheaper than funder capital, typically using ATE insurance will be cheaper than funders allocating capital to the risk.

11.34 It was said that requiring funders to be structured in such a way as to be able to bear the costs liability would have the effect of restricting the ability of the market to adopt the most efficient structure to address the risk (or potentially to run the funder's business). Furthermore, it was said that, absent improper conduct such as seeking to control the litigation, the mere provision of litigation funding should not itself cause a funder to be directly liable for adverse costs or for providing security for costs, save where they have contractually accepted such liability.

[105] *Rowe v Ingenious Media Holdings* [2021] EWCA Civ 29; [2021] 1 WLR 3189.

11.35 It was also submitted that it should rarely be the case in practice for a funder, which is properly regulated, to be required to provide security for costs. They ought to be capitalised properly. That would seem to be the consequence of the decision in *Rowe*. Where, for instance, funders are regulated, regulation contains capital adequacy requirements, and they have an effective ATE insurance policy with an anti-avoidance endorsement, security for costs should rarely be necessary. In such circumstances, the defendant's interests ought to be protected effectively.

11.36 Other respondents suggested that there should be either a presumption in favour of funders providing security for adverse costs or a mandatory requirement that security is given. Others suggested that *Rowe* should be reversed.

Discussion and Recommendations

Litigation Funding and Costs

11.37 Drawing the threads together, it is apparent that there is a direct relationship between the incidence of costs and litigation funding. It is apparent that, while funding will, by definition, result in an incidence of costs that would not otherwise be incurred but for the funding, it can also be said with some force that litigation funders have an incentive to increase costs for their own benefit.

11.38 That being said, it is also right to acknowledge that the risks of losing claims that funders choose to fund imposes some discipline on legal spends, and can incentivise funders to pass that budgeted discipline down to the lawyers acting for the funded party. Costs discipline can often be achieved through funding agreements requiring adherence to agreed budgets or project spends.

11.39 The key to securing effective control over recoverable legal costs, focused on reasonableness and proportionality, is effective costs and case management. This can be achieved in several ways, including effective use of detailed assessment procedures available under the CPR both on an inter partes and a solicitor-client basis. The primary methods by which costs can be controlled, however, must be prospective. The Working Party makes the following recommendations concerning effective prospective management.

11.40 The Working Party sees some merit in, and recommends, the development of a PAP for Mass Claims applicable in both civil proceedings and proceedings in the CAT. Such a PAP for civil

proceedings had previously been recommended by the High Court Masters in response to the CJC's PAP Review.[106] Such a PAP is likely to be of greater practicality for potential opt-in collective proceedings, for representative actions, or where a group litigation order is likely to be made. It is likely to be difficult to operate where potential opt-out collective proceedings are concerned given the potential for carriage disputes to arise prior to certification. That being said, there is potential benefit in opt-out proceedings where a carriage dispute is unlikely to occur. In so far as the introduction of such a PAP may lead to increased use of the, so far significantly under-utilised, collective settlement procedure contained in section 49B of the Competition Act 1998, its introduction could promote early and cost-effective settlement.

11.41 The Working Party also accepts that consistent and effective prospective cost and case management is essential for the control of the costs of funded litigation, whether those claims are commercial claims or collective or group proceedings. As such, it recommends the introduction of mandatory costs budgeting and costs management for all funded collective proceedings, representative actions and group actions. For other funded claims, it recommends that CPR PD3 is amended to insert the fact that a party is in receipt of litigation funding as a factor to be considered by the court in assessing whether the proceedings should be subject to costs budgeting.[107] It also recommends that a costs and case management hearing should take place at the earliest practicable point in proceedings to ensure that the benefits of such management can be put in place.

11.42 To help promote such effective management, the Working Party also recommends that the court, via legislative reform, be given the power to make pre-action costs budgeting and case management orders to assist the parties, including any prospective class representative in collective or representative proceedings, to put in place early effective costs and case management measures, including costs budgeting. Such a power should be exercisable on the application of a prospective party to proceedings.

11.43 A concern that was raised with the Working Party was the approach courts take to costs and case management. It was said that there was a lack of consistency in approach. More strongly, it was suggested that the courts did not carry out such management effectively. This was said to be due to a lack of familiarity with costs management and costs budgeting.

[106] CJC, *Review of Pre-Action Protocols – Phase Two Report (Final)*, (November 2024) at 3.46.
[107] See **Appendix A** for a draft amendment.

It is unclear the extent to which this is borne out in practice. That said, the benefits of a consistent, expert approach to costs budgeting and management is self-evident. To facilitate this, first, better practice guidance on costs budgeting and costs management for funded claims (and specifically for those funded claims that are to be subject to costs budgeting further to para. 257, above) should be developed by the CPRC and the CAT, working with the Commercial Court, Technology and Construction Court, Chancery Division and CAT User Groups and Committees; and secondly, a ticketing system for designated judges[108] (in both the civil courts and the CAT) for the management of funded claims should be established, such that as a general rule only such judges may be allocated to manage such claims. It should be a requirement that such judges are given specific training in costs budgeting and management prior to being ticketed, and such training should be focused specifically on the budgeting and management of complex, multi-party and collective proceedings.

11.44 The Working Party rejects the suggestion that a fixed costs regime should be introduced for funded claims. It does so not because it rejects the notion that fixed costs, specifically fixed recoverable cost regimes, are not beneficial. It accepts that they are beneficial and are an effective means of controlling litigation costs prospectively. It does so for two reasons. First, the extension of fixed recoverability has only recently come into force for claims allocated to the new CPR intermediate track. It is thus too early to say how and to what extent such claims have worked on that track, i.e., on claims the value and complexity of which are generally lower – and in some cases very significantly lower – than funded claims. It is also too early to say what unanticipated and possibly adverse consequences may arise from their introduction. As such their expansion to funded claims appears premature. Secondly, and linked to the first reason, it is apparent that in jurisdictions where fixed recoverability operates well, e.g., Germany (the jurisdiction that formed the basis for consideration of fixed recoverability's introduction in England and Wales), parties typically are responsible for paying their legal representatives sums in excess of the sum that they can recover from the opposing party.

11.45 Where funded claims are concerned, such an approach may leave a funded party in a worse position than they would otherwise be where effective costs budgeting and management is in place. That is because they may have to expend sums on the litigation, which due to

[108] It may be necessary for budgeting to be carried out by specialist costs judges or, where appropriate, by High Court judges managing cases with the assistance of a specialist costs judge.

irrecoverability must then be taken out of their damages. Fixed recoverability, in short, could result in worse compensatory outcomes for funded claimants.

11.46 Given these two points, the Working Party suggests that the question of fixed recoverability be revisited once the fixed recoverability scheme on the CPR's intermediate track has been seen to work effectively. It further suggests that at that time consideration be given to developing a pilot fixed recoverability scheme for funded claims.

The Recoverability of Funding Costs

11.47 There is some precedent for the recovery of litigation funding costs in arbitration proceedings under section 59(1)(c) of the Arbitration Act 1996, as evident from *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* (2016).[109] Costs were awarded on the unusual facts of the case and, in particular, given the respondent's '*reprehensible conduct going far beyond technical breaches of contract*'.[110] Essar had '*set out to cripple Norscot financially'*,[111] effectively forcing Norscot to resort to litigation funding.

11.48 Recoverability of costs in arbitration proceedings was also permitted in *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* (2021).[112] In that case the Commercial Court again upheld an **International Chamber of Commerce (ICC)** award of funding costs. In contrast to *Essar*, there was no suggestion that either party had behaved improperly. Instead, the tribunal's focus was on whether the costs were 'reasonable', first as to the principle of the claimant having sought funding and secondly as to the amount. On the first issue, the tribunal held that there was no need for the claimant's financial difficulties to be caused exclusively by the respondent; the fact that it needed funding to pursue its claim was sufficient. As to the second issue, a return of one times the claimant's costs of US$1.3m plus a variable fee of c.US$214,000 was held to be reasonable.

11.49 Recoverability has also been addressed, albeit briefly, by arbitral institutions and other bodies. For example, it is clear from the ICC Commission's 2015 Report on Decisions on Costs in International Arbitration that the ICC considers that there may be circumstances where it

[109] *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm).
[110] Ibid at [69].
[111] Ibid at [21].
[112] *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* [2021] EWHC 3301 (Comm).

would be reasonable for the successful funded party to recover the costs of funding.[113] Additionally, Principle C3 of the 2018 final report of the **International Council for Commercial Arbitration (ICCA)** Queen Mary Taskforce on TPF provided that the question of recoverability '*will depend on the definition of recoverable costs in the applicable national legislation and/or procedural rules, but generally should be subject to the test of reasonableness and disclosure of details of such funding costs from the outset of or during the arbitration so that the other party can assess its exposure*'.[114]

11.50 As things stand under English law therefore, a divergence has emerged between court proceedings, where litigation funding costs are not recoverable, and English-seated arbitrations, where these costs have been held to fall within the ambit of recoverable costs under the Arbitration Act 1996. It is difficult to see an obvious, or principled, reason for this difference. If a claimant who successfully arbitrates a dispute can recover its funding costs, it is unclear why a litigant in the courts should be treated differently. That this can be the case creates an uneven playing field where claimants with arbitration agreements may be better positioned than those who have no choice but to litigate in court. Such an approach runs counter to principles of fairness and access to justice.

11.51 Historically, the recovery of funding costs has not been permitted as a 'cost' under section 51 of the Senior Courts Act 1981. The common law has developed a well-established general rule, perhaps most clearly considered in *Hunt v Douglas Roofing* (1987) 132 Sol Jo 935, that the cost of funding litigation, in the sense of interest paid on the money borrowed to pay solicitors' bills submitted in connection with litigation, was not recoverable under the old rules relating to costs, i.e., those under Rules of the Supreme Court Order 62. In *Motto v Trafigura Ltd* (2011),[115] the Court of Appeal held that this principle applied equally under the CPR, although the case recognised that the CPR now provided an express right to interest on costs incurred. The general reasoning for the rule against recovery was that interest on sums borrowed to pay litigation costs '*is not money payable to solicitors for work done for the ultimate benefit of the client*'[116] and is therefore not a cost. Subsequent cases have, however, recognised that allowing interest, via the court's discretion to award pre-judgment

[113] The Report is available here: https://iccwbo.org/wp-content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf.

[114] ICCA QMU Final Report at 15, which is available here: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf.

[115] *Motto v Trafigura Ltd* [2011] EWCA Civ 1150; [2012] 1 WLR 657.

[116] Ibid at [105]-[106].

interest under the CPR, to ameliorate interest charged on loans to fund litigation is in the interests of access to justice; see, for instance, *Jones v Secretary of State for the Department of Energy and Climate Change* (2014).[117]

11.52 Permitting the recoverability of funding costs would reflect the fact that litigation funding is a part of the reasonable, and indeed often necessary, costs of pursuing a claim. By being able to treat funding costs as recoverable, the courts would be able to ensure a fairer allocation of financial burdens of disputes, consistent with the general principle that costs should follow the event. If litigation funding costs were recoverable, this is likely to promote access to justice for claimants who would not otherwise be able to seek rights-vindication before the courts. It is also likely to promote earlier settlement, saving court time, and to prevent frivolous interlocutory applications and unnecessary legal expenditure.

11.53 In the circumstances, the Working Party recommends that litigation funding costs should be brought within the scope of the court's wide discretion to make costs orders such that, in cases where it is just and proper to do so, a claimant's funding costs can be recovered from the defendant. The discretion should, however, only be exercised in exceptional cases. This would allow judges to assess whether such costs should be recovered in such cases, taking into account factors such as the defendant's conduct, the claimant's financial position, and the necessity of litigation funding in that case. Recoverability should not be the norm. The CPR and CAT Rules should be amended accordingly to provide a discretion to permit recoverability in exceptional circumstances.

11.54 The Working Party does not consider that this approach would properly raise the same concerns regarding recoverability that the European Court of Human Rights considered in *Coventry v United Kingdom* (2022).[118] Unlike the situation considered in that case to have given rise to a breach of the defendant's article 6 right to a fair trial, i.e., general recoverability of CFA success fees and ATE premium, the present recommendation only provides for recoverability in exceptional circumstances where the defendant's improper behaviour justifies it, i.e., it applies not as a matter of course but only where justified where the defendant has, through its conduct, adversely effected the claimant's ability to secure effective access to justice.

[117] *Jones v Secretary of State for the Department of Energy and Climate Change* [2014] EWCA Civ 363; [2014] 3 All ER 956.

[118] *Coventry v United Kingdom* [2022] ECHR 816.

The Arkin Cap

11.55 The post-*Chapelgate* approach to the ***Arkin Cap*** provides an important check on litigation funders and prevents them from financing clearly unmeritorious cases, with the concomitant burden that such cases place on defendants and the court system as a whole. It also a means by which the court can ensure that funders are liable for the costs of pursuing claims that are clearly for their benefit rather than that of promoting access to justice for the claimant. The Working Party agrees that it should be maintained.

11.56 It is also apparent that, in practice, litigation funders make provision for an adverse costs indemnity to the funded party within their LFA, and that they are able to purchase an adverse costs insurance policy covering the risk (with the funder as the insured party). Funders are often particularly well-placed to access the insurance market in this respect on commercially attractive terms.

11.57 Given this, the Working party recommends that the post-*Chapelgate* approach to the ***Arkin Cap*** is maintained. Additionally, and consistently with its general approach to the promotion of transparency and accessibility, it recommends that that approach be codified in the CPR and CAT Rules.

Security for Costs

11.58 The Working Party considers that the approach to be taken to security for costs ought to be one that balances the interests of claimants and defendants, while minimising the risk of procedural litigation and its adverse effect on litigation costs and the effective administration of justice. Accordingly, all litigation funders should be structured and operated in such a way so that there is no doubt that they could meet an adverse costs order made against them if so ordered.

11.59 One operational method of securing this end is to require, in all cases funded by litigation funders, the inception of suitable and adequate ATE insurance with watertight anti-avoidance endorsements sitting alongside the policies. Taken together with effective case-by-case capital adequacy requirements (as provided for in the above Recommendations), the need for a presumption in favour of security for costs would be removed.

11.60 In cases where security for costs is required to be provided by a litigation funder (for example where the funder fails to comply with the proposed requirements, discussed above), through no fault of the claimant, the court should require the costs of providing the

security to fall on the funder. In cases where the additional costs of providing security fall on the claimant the need for a cross undertaking in damages will fall away if the recommendations made in paragraph 174(b) are adopted. This is because in the event that the claimant succeeds and secures a costs order, the court will have discretion, to be exercised only in exceptional circumstances, to require the defendant to pay the claimant's funding costs which necessarily may include the additional costs associated with the provision of security, subject always to the overarching discretion of the court. For the factors the court will take into account in deciding whether to make such an order, see Draft CPR X.3 in **Appendix A**.

11.61 This approach respects the approach of the Court of Appeal in *Rowe* (where it held cross undertakings in damages should be limited to rare and exceptional cases),[119] but is also consistent with proposed reforms enabling the court to order the recovery of funding costs in exceptional circumstances.

[119] For a discussion of the facts of *Rowe*, see The Interim Report at 3.12-3.13.

12. Part Nine – Reform of Conditional Fee Agreements and Damages-Based Agreements

Recommendation

12.1 The Working Party makes eleven recommendations in this Part of the Report.

RECOMMENDATION 45

The current CFA and DBA legislation should be replaced by a single, simplified legislative contingency fee regime.

RECOMMENDATION 46

The provision of claims management services ought not to come within the scope of the contingency fee regime or any reformed DBA regime. They ought to be regulated as a form of LFA.

RECOMMENDATION 47

The indemnity principle should be abrogated legislatively where contingency fee agreements and LFAs are concerned.

RECOMMENDATION 48

Provision should be made to provide the court with a discretion, similar to that provided by section 127 of the Consumer Credit Act 1974, to enable non-compliant contingency fee agreements (or CFAs and DBAs) to be enforceable.

RECOMMENDATION 49

Responsibility for CFAs, DBAs or any new single contingency fee regulations should be transferred from the Ministry of Justice to the CPRC. The Lord Chancellor should be given the power to direct the Rule Committee to make regulation for specified purposes comparable to the power the Lord Chancellor retains in this respect concerning the making of CPR.

RECOMMENDATION 50

The Government should review the current CFA success fee levels, particularly where mesothelioma claims are concerned, to ascertain if they require uprating for inflation.

RECOMMENDATION 51

The Government should consider adopting, in commercial cases, the approach to damage-related caps on success fees taken in section 2(3) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020.

RECOMMENDATION 52

Legislation should clarify that hybrid funding arrangements are lawful.

RECOMMENDATION 53

The DBA Regulations ought to be reformed as a matter of urgency. The basis of reform should be the Mulheron-Bacon 2019 reform proposals with necessary adjustments to reflect the other Recommendations in this Report.

RECOMMENDATION 54

DBAs should be permitted in opt-out collective proceedings in the CAT. Such DBAs should not be subject to any cap, but the return to the legal representative under them should be subject to approval by the CAT on the same basis as the return to a funder under LFAs is subject to approval. Entry into such agreements should be subject to the same notification requirements as apply to LFAs.

RECOMMENDATION 55

CFAs and DBAs entered into by commercial parties should not be subject to any cap on the legal representative's return.

Summary Of Responses

A simplified CFA/DBA Regime

12.2 The Interim Report canvassed views on whether it might be beneficial to replace the current dual CFA and DBA regulatory regime with a simplified, single regime. While the majority of respondents focused on suggested improvements to various aspects of those regimes, a number of respondents considered this specific issue. Notwithstanding those points, it was generally noted that neither CFAs nor DBAs were capable of providing a viable alternative to litigation funding where there was a need for significant upfront funding for claimants.

12.3 The majority of those respondents who dealt with this issue took the view that a simple, single regulatory regime covering all forms of contingency fee funding for lawyers would be beneficial. Some noted that it would be an attractive development that would bring much needed clarity and certainty to the operation of contingency fees, reducing the risk of unintended consequences and satellite litigation regarding validity of agreements made under it.

12.4 It was also noted that the current regimes were complex and difficult to understand, particularly for lay clients. A simpler regime would thus, it was said, help promote greater access to justice as it would better enable claimants to make informed decisions on which form of funding arrangement, if any, best suited their needs. As a necessary corollary of this point, greater simplicity would also lead to claimants better understanding the downside of such arrangements, as much as their potential benefits.

12.5 Some thought the creation of a single regulatory regime would be difficult to achieve, and questioned the need for such a reform. Others suggested that a single regime would make it difficult to differentiate between different markets or would be less flexible than the current approach. It was also suggested that there had been too much reform of both CFAs and DBAs over the last twenty years and, consequently, that there ought to be no more reform.

12.6 Were reform of this kind to be embarked upon, it was suggested that it would best be achieved by replacing the current regulations, the statutory provisions in the Courts and Legal Services Act 1990, and reforming the approach to contingency fee agreements

contained in the Solicitors Act 1974. Reform of interim statute bills in this context was also highlighted as an area that needed urgent attention.[120]

CFAs

12.7 A broad range of responses were submitted concerning CFAs. These ranged from those that supported the view that there was no need to reform them to those that supported different types of reform. Those that supported reform fell into four categories.

12.8 First, several responses argued for reforms that reintroduced some form of recoverability of success fees and ATE premiums. Suggestions included permitting recovery of 50% of success fees and ATE premiums. They also included a suggestion that the current caps on success fees be reviewed, not least to take into account inflationary changes that have occurred since the caps were first set. This was particularly noted in regard to the success fee cap where mesothelioma claims were concerned. It was also suggested that where a meritorious claim would otherwise not be funded, consideration should be given to permitting some recovery of success fees.

12.9 It was also argued that the reintroduction of any form of CFA success fee recoverability would undermine the success of the Jackson Costs reforms. All that was needed was more effective guidance on their operation, particularly for consumers. In this regard there was a need for clear guidance on the relationship between CFAs and the Consumer Contracts (Information, etc) Regulations 2013. The need for clear guidance generally was stressed on the basis that members of the public very often neither read nor, if they do, understand the terms of a CFA. As they were therefore dependent upon advice given to them by their lawyers, particularly concerning risks and potential liability for any shortfall in costs, there was not only a need for greater simplicity and clarity in CFAs but also clearer, standard, guidance for the public and for the legal profession. There was thus a need for more effective legal services regulation in this area to ensure a consistent approach to the provision of information to the public.

12.10 It was also suggested that further consumer protection could also be provided by requiring solicitors to take out effective, properly regulated, ATE insurance when a CFA is entered into by their client. This, it was said, should be a mandatory regulatory requirement, subject to

[120] This area is currently being considered by the CJC Working Party on the Solicitors Act. See, https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/solicitors-act/.

the ability of the client to opt out of the requirement. Any such opt-out, however, should be effective only if recorded in a statutory declaration. Similarly, it was said that there was no need for CFA reform as CFAs were generally working well.

12.11 Secondly, some respondents argued for the CFA success fee caps to be disapplied for some types of claim or to be capable of being lifted on a discretionary basis. In respect of the former, it was suggested that there should be no caps for complex or high-risk claims. In the latter case, it was suggested that, in some particularly meritorious situations, the cap on success fees should be a 'soft cap', i.e., capable of being lifted so that a higher success fee could be charged to a successful claimant. It was also suggested that the maximum uplift cap should be increased to 150%, and that this would help promote greater use of CFAs. Linked to this, it was suggested that, where lawyers entered into CFAs with such a cap, they should become liable for adverse costs to the level of their potential benefit.

12.12 Thirdly, it was suggested that the approach to success fees adopted in Scotland could be adopted in England and Wales. It was noted that damage-related caps on success fees in Scotland did not rest on drawing a distinction between past and future losses. This was said to deal better with the situation where claims settle in complex injury claims, where it is particularly difficult to distinguish between past and future losses. It was also noted that the approach taken in Scotland is to provide for staged caps.[121] Additionally, it was submitted that the current caps on success fees for personal injury claims fails to enable law firms to recoup what was said to be a significant cost to them of financing disbursements over the lifetime of a claim. This provides an economic disincentive to use CFAs.

12.13 Fourthly, reform was said to be necessary to make clear that hybrid funding arrangements, including the use of partial CFAs, are permissible. It was noted that many solicitors' firms were keen to offer a combination of fixed fee and CFA arrangements, as well as to provide partially discounted rates to clients. Certainty about the legality of such arrangements was, it was suggested, needed.

DBAs

12.14 There was significant critical comment concerning DBAs in consultation responses. Its main focus was that the regulations governing them were complex, unclear, poorly drafted and

[121] See the approach taken in section 2(3) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020.

overly restrictive. This has been the case since their introduction and has been well-known to be the case. The problem makes it particularly difficult for lawyers to explain to their clients, and difficult to apply in the event of success. The paucity in the DBA drafting was also said to have led to wider problematic consequences, such as the *PACCAR* decision.

12.15 Moreover, there have been efforts to introduce revised regulations that would have remedied those problems, notably the Mulheron-Bacon Proposals in 2019,[122] which were not implemented. Reform, and particularly simplification, was needed urgently to enable DBAs to work effectively. At present, however, they were unattractive and under-utilised due to the poor quality of the regulations, and the risk that was posed to law firms, not least in high value claims, of any particular DBA entered into ultimately being held to be unenforceable.

12.16 Suggested proposed reforms were various. The main reform focus was to introduce the proposals set out by Mulheron and Bacon in 2019 as well as to codify some of the case law developments that have been made since then, such as those set out in *Zuberi v Lexlaw Ltd* (2021).[123] This would include moving away from the 'Ontario model', which the current regulations adopt, to a 'success fee model' (so that recoverable costs would be payable to the lawyer on top of the DBA percentage payment). It would also require provision for the use of hybrid DBAs enabling the lawyer to receive a payment or some proportion of their fees in the event that their client's claim failed. Several respondents noted, following *Zuberi v Lexlaw Ltd* (2021), that it was apparent that some forms of hybrid DBA were permissible but there was a lack of clarity over the boundaries of permissibility.

12.17 Where hybrid DBAs are concerned, it was also argued that what were referred to as **Sequential Hybrid Damages Based Agreements (SHDBAs)** and **Concurrent Hybrid Damages Based Agreements (CHDBAs)** should be permitted. A SHDBA is one where an alternative fee agreement is followed by a DBA. This may arise where there needs to be seed funding to establish if a solicitor will agree to a DBA. A CHDBA is an agreement whereby the solicitor agrees to a DBA on condition that a fixed fee or lower rate is paid on their normal fees. It

[122] CJC, DBA Reform Project Report 2015, which is available here: https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/previous-work/civil-justice-council-cjc-to-look-at-damages-based-agreements-revisions/. DBA Reform Project (2019), which is available here: https://www.qmul.ac.uk/law/research/research-impact//dbarp/. Specifically see the draft replacement DBA statutory instrument, which is available here: https://www.qmul.ac.uk/law/media/law/docs/research/DBA-Regs-2019-(NB-and-RM,-13-Oct-2019),-20.30.pdf.

[123] *Zuberi v Lexlaw Ltd* [2021] EWCA Civ 16; [2021] 1 WLR 2729.

was said that it is still unclear if such agreements are permitted. It was further pointed out that such agreements were permitted in the Unified Tribunals. They were said to be particularly commonplace in tax appeals in the Tribunals, where law firms were able to offer their clients fixed fees to cover their basic costs and disbursements with a contingency fee. That such agreements were permitted in the Tribunals was an accident of history as such matters were not defined as 'contentious business' within the Solicitors Act 1974, even though such matters may result in appeals from the Tribunal decisions being heard in the High Court.[124]

12.18 It was also suggested that reforms to increase clarity and certainty would help promote the use of DBAs, particularly if they overcome the current problem that their complexity creates concerning their enforceability: if a DBA is inadvertently not fully compliant with the DBA regulations, the entire agreement can be unenforceable.[125] Effective promotion of the use of DBAs would then provide, in some cases, an effective alternative to litigation funding.

12.19 Further, substantive, reforms were also identified. It was suggested that DBAs be permitted in opt-out collective proceedings in the CAT. This, it was said, could help promote greater competition in funding in such proceedings and, as a consequence, make litigation funding more competitive in terms of its pricing. Such availability could also promote access to justice for lower value collective claims, i.e., those that were meritorious but could not attract litigation funding. This would align proceedings in the CAT with representative actions brought under CPR r.19.8, where DBAs were permitted. Conversely, it was said that the prohibition on DBA use in opt-out collective proceedings ought to be maintained as their availability would increase speculative, i.e., unmeritorious litigation. It was also suggested that the caps on DBAs were set at too low a level. Increasing the caps would, thus, help promote greater uptake of DBAs. It was also suggested that where DBAs were used in non-consumer cases, there should be no success fee caps. It was also argued by some respondents that DBAs should not be subject to caps where they were used in respect of commercial claims.

12.20 Finally, the Working Party also notes the suggestion that law firms should be placed under a duty to report the outcome of claims funded by CFAs and DBAs, including their success fees and overall costs to funded parties. Such data collection could then, it was suggested, be

[124] See Solicitors Act 1974, section 56.
[125] Ibid.

used to monitor the effectiveness of CFAs and DBAs as well as inform potential future regulatory reform.[126]

Discussion and Recommendations

A simplified CFA/DBA Regime

12.21 The current dual approach to CFAs and DBAs is a product of the gradualist introduction of contingency fee agreements in England and Wales. There is no principled rationale for its existence or maintenance. That being said, given that it has been in existence now since the introduction of DBAs, there is an argument to maintain it, i.e., familiarity with the distinction between CFAs and DBAs and the need to minimise reform, which can itself be disruptive and lead to unintended consequences.

12.22 Having considered the arguments, the Working Party recommends the replacement of the current approach with a single regulatory regime that covers all forms of contingency fee funding. While the existing CFA regime is working well, the current DBA regime is not. Moreover, it is desirable that a single piece of legislation should be introduced to replace the cumbersome sections 58, 58A, 58AA, and 58B Courts and Legal Services Act 1990 to accommodate the future operation of both CFAs and DBAs. A simplified statutory regime would promote clarity and simplicity and help reduce satellite litigation. **Appendix A** provides indicative drafting of an approach that could be taken to implementing this recommendation, along with indicative rules of court.

12.23 This could be achieved in either of two ways. It could maintain the distinction between CFAs and DBAs in primary legislation, while setting out the detailed regulation of them in a single SI. That SI could then contain common regulation for both forms of contingency fee agreement, with separate sections providing specific rules concerning each of the two forms, as relevant. Alternatively, CFAs and DBAs could be replaced by a single, contingency fee agreement regime provided for in primary legislation, which makes provision for all the various ways in which lawyers can be remunerated. A single SI could then flesh out, in simple and clear terms, the exact requirements of the new regulatory requirements.

12.24 Either approach should be accompanied with the development of clear guidance by the SRA and Government and template contingency fee agreements. The aim of such guidance, and

[126] See para. 127, above.

of the legislative drafting, should be to improve consumer protection and consistency in the provision of information to the public by the legal profession concerning such agreements

12.25 The Working Party also recommends that the indemnity principle is abrogated where contingency fee agreements are concerned. This should be done irrespective of whether a new, single, regulatory regime is introduced. It notes that this was intended to be carried out following the Access to Justice Act 1999 reforms to CFAs, as a consequence of the introduction of section 31 of that Act.[127] Its abolition was again recommended by the Jackson Costs Review as being necessary for the effective introduction of DBAs.[128] That Review noted views that highlighted the continued existence of the principle as lying behind technical challenges to the enforceability of CFAs, causing more problems than it solved.[129] Sir Rupert Jackson did, however, consider that the Mulheron-Bacon reforms to DBAs, i.e., the replacement of its 'Ontario model' with a 'success fee model', would ameliorate the consequences of a failure to abrogate the indemnity principle.[130]

12.26 Section 58 of the 1990 Act currently operates on the basis that any CFA or DBA which does not meet the requirements of the statutory regime, including the subordinate regulations and orders, is to be treated as unenforceable. This is despite the fact that the parties to the agreement may consider the agreement to have served its purpose to good ends and do not themselves call for any finding of unenforceability. Findings of unenforceability lead to legal representatives going unpaid for work they have done and providing refunds to clients who have benefited from the work undertaken. Considerable unfairness can arise often to the benefit, in the final analysis, of the paying party who caused the loss which is the subject of the claim, for which purpose the CFA (or DBA) would have been incepted to enable the claim to be pursued.

12.27 The Working Party considers that a different approach is now called for. CFAs and DBAs should be subject to clear statutory and regulatory requirements. However, greater flexibility should be afforded to failures to comply with the requirements much in the same way that discretion is afforded to the court to enforce non-compliant consumer credit agreements under section 127 of Consumer Credit Act 1974. Permission of the court should

[127] Explanatory Memorandum to the 1999 Act noted in R. Jackson (December 2009) at 53-54.
[128] R. Jackson (December 2009) at 56-58.
[129] Ibid at 54-56.
[130] Sir Rupert Jackson (1 March 2019), which is available here: https://www.qmul.ac.uk/law/media/law/docs/research/Sir-Rupert-Jackson-letter,-1-Mar-2019.pdf.

be sought in any case where a party seeks to enforce a CFA or DBA which does not meet the statutory requirements underpinning them. Enforcement applications could be the subject of Part 8 claims.

12.28 The abrogation of the indemnity principle is a necessary step to take to ensure that the right balance is achieved between ensuring compliance with the CFA/DBA legislation and respecting the degree of default and reasons for it may be reasonably excusable on the facts and in the circumstances of the case, such that a judge should have the ability to permit enforcement of the agreement.

12.29 The Working Party thus agrees with the approach taken in the Jackson Costs Review and, before that, the Access to Justice Act 1999: the indemnity principle should be abrogated where CFAs and DBAs are concerned. The same approach should be taken to LFAs. This should be done to minimise the potential for technical, procedural challenges to any form of contingency fee agreement. It should also be done to minimise such challenges to LFAs: the validity of funding arrangements ought properly to be a matter between the parties who enter into the funding arrangement.

12.30 The Jackson Costs Review also recommended that, if the principle was abrogated, the introduction of an amendment to the CPR to protect the paying party was required.[131] The Working Party also endorses that approach.

12.31 The Working Party also sees force in the suggestion that there needs to be clarity concerning the use of hybrid funding arrangements. There is no principled reason why a party should not utilise any combination of funding arrangements available to them to support the vindication of their rights through litigation or, for that matter, to seek to resolve a dispute consensually. Equally, as such arrangements can promote the effective promote of access to justice, there is good reason to clarify that they are permissible. Thus, the Working Party recommends the introduction of legislation to clarify that they are permissible.

12.32 Finally, the Working Party recommends that responsibility for drafting and issuing (subject to Parliamentary approval as a SI) the CFA and DBA regulations or, if replaced by a single, contingency fee regime, the regulations that make provision for it, should be transferred

[131] R. Jackson (December 2009) at 57. The proposed amendment to CPR r.44.1 was the insertion of the following: '*When assessing the amounts of recoverable costs, the court will, subject to the following provisions of this rule, allow reasonable amounts in respect of work actually and reasonably done and services actually and reasonably supplied for the benefit of the receiving party. The court will assess those amounts on either the standard basis or the indemnity basis.*'

from the Ministry of Justice to the CPRC. It does so for two reasons: first, to ensure that the longstanding problem concerning the DBA regulations and the absence of remedial measures is not repeated in the future. Transfer to the Rule Committee will ensure that any future remedial measures can be carried out in a timely manner; and, secondly, to ensure that any future reforms, such as inflation-based uprating of caps, are carried out appropriately.

12.33 In effecting such a transfer, it is noted that the Lord Chancellor should retain the power, if necessary, to direct the CPRC to make rules to achieve specific purposes concerning such regulation should that be necessary to give effect to Government policy concerning the regulations.[132]

12.34 Finally, consistently with the distinction that this Report makes between LFAs and contingency fee agreements (including CFAs and DBAs), contingency fee agreements should only apply to funding agreements between lawyers and their clients. They should not apply to individuals providing claims management services. The funding of claims management services is the provision of litigation funding, and ought to be regulated as such.

CFAs and DBAs

12.35 The Working Party considers that the existing CFA regime is, generally, working well. As such, it does not need substantive amendment. There is, moreover, no reason to step back from the Jackson reforms to CFAs, so as to reintroduce some form of recoverability for success fees or ATE premiums.

12.36 There is, however, force in several suggestions put to the Working Party: first, that the current caps on success fees should be reviewed to take account of inflation (the Working Party particularly notes the potential importance of this where mesothelioma claims are concerned); and, secondly, that the Government could beneficially consider adopting the Scottish approach to staged damage-related caps on success fees. The Working Party recommends consideration be given to both suggestions as a means to improve the ability of CFAs to deliver access to justice effectively.

[132] As is currently the case where the making of Civil Procedure Rule is concerned under Civil Procedure Act 1997, section 3A.

12.37 There is, evidently, widespread support for the DBA regulations to be amended or replaced to make them easier to follow and more consistent with the demands of users including both clients and legal representatives.

12.38 The Working Party accepts that reform to DBA regulation is necessary and long-overdue. It can see no good reason for the failure either to introduce workable regulations when DBAs were introduced originally nor for the continuing failure to remedy those defects since then. Effective DBAs were one strand of the Jackson Reforms and, having accepted the justification put forward for their introduction, it was incumbent on the Government to ensure that they operated effectively. The Working Party therefore recommends that the current regulations be reformed as a matter of urgency.

12.39 The DBA regulations ought to be amended to permit much more flexibility in their application, but always subject to the overriding supervision of the courts and regulators. They should be more readily available so as to promote access to justice. The basis of those reforms ought to be the Mulheron-Bacon proposals from 2019. This includes permitting them to be used in cases where the relief is not just monetary. They should be permitted for defendants as well as claimants. The distinction between 'opt-in' and 'opt-out' is also no longer justified and any concerns as to excessive remuneration can be met by court and regulatory control. Almost all respondents advancing responses called for greater flexibility in the terms of DBAs, and in particular for hybrid DBAs to permit some payments win or lose, in addition to the DBA payment. The Working Party agrees. A move to the Ontario success fee model is justified.

12.40 The Working Party also considers that there is much force in permitting DBAs to be used in opt-out collective proceedings in the CAT. DBAs are permitted to support opt-out representative proceedings under CPR r.19.8 in the civil courts. There can be no principled rationale for not also permitting them in comparable proceedings in the CAT. In so far as it is said that permitting their use in such proceedings in the CAT would prejudice claimant parties through reducing the amount of damages awarded or any settlement given the application of a DBA success fee, however calculated, that again is difficult to justify as a reason not to permit them. The same argument could equally be made against permitting the use of litigation funding to support opt-out collective proceedings. Yet, litigation funding is permitted. Moreover, the argument that DBA use could promote speculative or unmeritorious litigation is also an argument that can be levelled against the use of litigation

funding. Similarly, it can be guarded against through the application of similar measures, as noted and recommended earlier, concerning such funding.

12.41 There are also good reasons to permit the use of DBAs to support opt-out collective proceedings in the CAT. First, they are likely to enable the funding of lower value, less complex, collective proceedings that are not capable of being supported by litigation funding. Their availability is thus likely to increase access to justice. Secondly, their availability may, in some cases, increase competition with litigation funding. This is likely both to enable claimants to choose from a wider range of funding options and thus secure an option which best suits their needs, and to result in more competitive pricing of funding and lower success fees. In the circumstances, the Working Party recommends the removal of the prohibition on the use of DBAs in opt-out collective proceedings in the CAT.

12.42 Additionally, and again consistently with the approach taken to LFAs, where CFAs and DBAs are used in opt-out collective proceedings, they should not be subject to a cap. Any such cap would be unprincipled given that the two forms of funding are being applied to the same types of proceedings. Equally, differential approaches to caps across the funding methods would increase unnecessary complexity. To ensure that proper scrutiny is given to CFAs and DBAs in such proceedings, they should be subject to the same controls as LFAs in opt-out proceedings, i.e., they should be subject to court scrutiny and approval to determine if the amount of any return to the lawyer is fair, just and reasonable. Defendants should be notified of the fact that such agreements have been entered into on the same basis as they would be notified of a LFA.

12.43 Finally, where DBAs and CFAs are entered into by commercial parties, they should not be subject to caps on the lawyer's return. As with LFAs, the imposition of caps is a means to effect consumer protection. It can properly be assumed that commercial parties will not be in need of such protection, as they will be fully capable of negotiating entry into such agreements on an informed basis.[133]

[133] It is noted that this approach is the one taken to CFAs in Singapore, see Legal Profession (Conditional Fee Agreement) Regulations 2022 (Singapore).

13. Part Ten – Legal Expenses Insurance

Recommendation

13.1 The Working Party makes one recommendation in this Part of the Report.

RECOMMENDATION 56

The recommendations made in the Jackson Costs Review to promote the use of home insurance and revision of regulation 6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 should be implemented. The Government should engage with the insurance industry to consider how greater uptake of BTE insurance policies to employees can be effected. These steps should be part of a more general approach by Government to promote the uptake, utility and use of LEI.

Summary of Responses

13.2 Four themes arose from the consultation responses that considered the promotion of LEI.

13.3 First, BTE LEI is not capable of being developed or deployed to fund the types of disputes that are funded through LFAs, and particularly those disputes that are resolved via group or collective proceedings. Such funding's greatest utility arises in respect of low or lower value claims that are litigated on an individual basis. Some potential utility was, however, noted in respect of opt-in group actions.

13.4 Secondly, there needs to be greater, targeted, promotion of the use of existing LEI. This includes increasing awareness amongst individuals and businesses who have such insurance. Its increased take-up could also be facilitated through the further development of the CPR's fixed recoverable costs regime. Reduction in litigation costs may facilitate a reduction in the cost of LEI, making it more accessible as is the case in Germany.

13.5 Thirdly, mandatory LEI would be difficult to establish. A public scheme would require considerable funding. It was also suggested that to require individuals to pay premiums for such insurance would not be viable during a cost of living crisis. It was also suggested that

the introduction of such a scheme would increase litigation, albeit that it would still not be capable of applying to the types of case that litigation funding funds. Consideration should, however, be given to Government promotion of the use of LEI.

13.6 Fourthly, LEI policies tend to restrict the insured's ability to choose their own legal representation (the Jackson Costs Review had recommended that this restriction be alleviated), and there are also restrictions so that LEI does not cover all types of disputes.

13.7 Additionally, it was observed at one of the two public consultation meetings that in Sweden LEI uptake had increased because the government had required it to be an add-on to home insurance.

13.8 It was further suggested that there may be a basis for Government discussion with insurers about the possibility of extending LEI cover through it being provided by employers as a benefit-in-kind to their employees in a manner akin to the provision by employers of private health insurance. Such a development could build on existing schemes through which employers and insurers provide access to legal helplines

Discussion and Recommendations

13.9 It is apparent to the Working Party that the use of LEI, specifically BTE LEI, remains an under-developed and under-utilised form of litigation funding. This is despite recommendations made by the Jackson Costs Review, which, had they been implemented, would have had the potential to increase its utility. Those recommendations focused on encouraging the take-up of BTE insurance provided in home insurance policies and take-up by small and medium-sized enterprises. It was also recommended that there be further consideration of reform to regulation 6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 in order to promote freedom of choice for the insured in terms of their legal representative.[134]

13.10 It is apparent that consideration of the utility of mandatory LEI schemes remains as it was at the time of the Jackson Costs Review. Given that, the Working Party takes the view that there is merit in the Government considering with the insurance industry what steps can be taken towards increasing the take-up of BTE insurance and, more importantly, the use of it by those who already have it (albeit that they might not know that they have it) when needed. Implementation of the Jackson recommendations would form a good starting point

[134] R. Jackson (December 2009), Chap. 8.

in that regard, particularly where home insurance policies and choice of lawyer are concerned.

13.11 Equally, given that the proposal made to the Working Party concerning the promotion of BTE insurance as a benefit-in-kind to employees, which is tax-deductible, is consistent with the Jackson recommendations, it appears sensible for the Government to consider with the insurance industry the extent to which this is achievable and what the scope of such insurance might be, e.g., non-application to fund legal proceedings that the employee pursues against the employer.

13.12 It was suggested to the Working Party that there might well be problems in promoting such an approach as there is at present only a limited market in BTE insurance. While that may well be true, the real question is whether a framework can be put in place to promote and develop such a market.

13.13 More generally, the Working Party considers that there is merit in the Government taking steps to increase the uptake, utility and use of LEI. In this regard, it considers that work could be done by Government with legal regulators, the insurance industry, employers, trade unions, and consumer organisations to achieve this. Such work could particularly focus on ensuring that such products are capable of delivering effective early legal advice and funding for ADR as much as funding for litigation.

14. Part Eleven – Supplementary Legal Aid Scheme and Contingency Legal Aid Fund or an Access to Justice Fund

Recommendation

14.1 The Working Party makes one recommendation in this Part of the Report.

RECOMMENDATION 57

The Government should consider whether to introduce an Access to Justice Fund, which requires payment of a small percentage of the profits from litigation funding and CFAs and DBAs to be made available for the purposes of a new and supplemental aspect of civil legal funding. Any money paid to the Access to Justice Fund should be dedicated to fund the provision of early legal advice and alternative forms of dispute resolution. This requirement should be specified in legislation.

Summary of Responses

14.2 Civil legal aid is outside the scope of the Working Party's Terms of Reference. One respondent did note, however, that the most apt form of funding to complement the use of litigation funding is legal aid. Separately, it was also suggested that there could be an increase in pro bono work, with such work undertaken by litigation funders to increase access to justice. It was also suggested that the availability of exemplary damages should be increased and that a percentage of such damages could be applied to fund civil legal aid. No respondents commented on **contingency legal aid funds (CLAFs).**

Discussion

14.3 The viability of both a **supplementary legal aid scheme (SLAS)** and a CLAF has been considered in the past by, amongst others, the CJC and the Jackson Costs Review. The former concluded in 2007 that a SLAS could potentially be introduced. Such schemes work in, for instance, Hong Kong. Their creation had also been considered by the CJC in 2007.[135] The CJC had also that year considered that a CLAF was unlikely to be viable not least because of the competition such a scheme would encounter from the CFA regime.[136]

14.4 Both a SLAS and a CLAF were also considered by the Jackson Costs Review.[137] It concluded that financial modelling needed to be undertaken to determine the viability of either such scheme. No evidence was submitted to the Working Party to demonstrate that such modelling has taken place, nor is it otherwise aware of any. Nor was any detailed evidence submitted that would otherwise suggest that such schemes might be able to work in England and Wales.

14.5 In such circumstances, the Working Party cannot recommend that further work be carried out to consider the viability of either a SLAS or a CLAF. Consideration of their viability does not appear to have developed at all since 2009. Furthermore, where a CLAF is concerned, that now would need to compete with a CFA, DBA and LFA market. This would appear to only strengthen the view the CJC took in 2007 that such a scheme would lack viability. More significantly, that no positive case for the creation and viability of such schemes was submitted is itself suggestive of the conclusion that they are not realistic possibilities.

14.6 The Working Party also does not recommend the introduction of a requirement that litigation funders be required to carry out or provide some form of pro bono work to facilitate access to justice. Pro bono work ought, properly, to be something that is carried out voluntarily rather than mandated. It is apparent that some funders do already carry out pro bono work. The Working Party considers, however, that there is both force and attraction in the principle that underpins the proposal: that access to justice should be promoted by those who profit from litigation.

14.7 One way to promote access to justice would be to draw on the idea underpinning that of a SLAS. The Working Party therefore recommends the Government consider whether to

[135] CJC, *The Future Funding of Litigation - Alternative Funding Structures*, (2007), Part 2.
[136] Ibid.
[137] R. Jackson (May 2009) Vol. 1 at 178-182.

impose a requirement that a small percentage of the profit that litigation funders recover from funded parties and legal representatives recover from entering into CFAs and DBAs should be paid to a dedicated Access to Justice Fund, which should be a new and supplemental aspect of funding in respect of civil legal aid.

14.8 The Working Party, mindful that access to justice is too often wrongly conflated with access to the court system, also recommends that any sums paid from the Access to Justice Fund be dedicated to the promotion of early legal advice and alternative forms of dispute resolution. It should thereby help prevent disputes arising where that is possible and their early and effective resolution outside of litigation where they do arise. In that way, it is to be hoped that access to justice can be furthered more effectively. We recommend that this requirement be specified in legislation.

14.9 In developing an Access to Justice Fund, the Government will no doubt need to consider how to bring it within scope of legal aid provision. It will also need to consider how such funds can be dedicated to the provision of early legal advice and alternative forms of dispute resolution for all types of civil dispute, not least low value claims, such that such provision is made available in an effective, user-friendly, and easily accessible way. The Government may well be assisted in the development, particularly the technical development, of such a new and supplement process through engagement with relevant stakeholders, particularly those in the legal advice sector and ADR providers as well as further engagement with the CJC.

15. Part Twelve – Legislative Reform

15.1 The Working Party makes one recommendation in this Part of the Report. It is focused on the means by which the recommendations in this Report should be implemented, other than **Recommendation 1**, ought to be implemented.

RECOMMENDATION 58

15.2 All legislation, in so far as primary legislation is necessary to implement **Recommendations 2 to 57**, should be contained in a single statute. Existing legislation should therefore be repealed and new and comprehensive legislation concerning civil litigation funding should be contained in a *Litigation Funding, Courts and Redress Act*.

Discussion and Recommendation

15.3 Various recommendations contained in this Report require legislative reform. That could be effected through amending existing legislation, such as sections 58A, 58AA and 58B of the 1990 Act (further legislative reform, to the Solicitors Act 1974, may also be necessary where contingency fees, for instance, are concerned). The recommendations, however, go beyond reform of the CFA, DBA and LFA regimes. They also include the introduction of legislation to create an Access to Justice Fund, to provide the CPRC with responsibility for future contingency funding regulation, and to make provision for crowdfunding etc. Rather than insert such provisions into the 1990 Act or amend the Civil Procedure Act 1997, the Working Party considers that the better approach would be to introduce a dedicated statute focused on litigation funding.

15.4 A single *Litigation Funding, Courts and Redress Act*, which draws together all relevant primary legislation concerning civil litigation funding provision, would be clearer and more accessible than a multi-statute approach. It would be more transparent for the public, lawyers, courts and funders. It would require and help promote a more holistic approach to litigation funding than has been the case in the past. All means of funding should be considered together to ensure that both public and private funding approaches complement

each other properly. We consider that this will be achieved more effectively through consolidation into a single Act. Such an Act need not be extensive, as a significant number of the reforms recommended in this Report can and should be introduced via secondary legislation, e.g., the proposed Litigation Funding Regulations and the reformed CFA and DBA regulations.

15.5 Whilst outside our terms of reference, we note that this recommendation would, as a necessary corollary, require existing statutory provision for civil legal aid to be consolidated in the new legislation.

Table of abbreviations and acronyms

Abbreviation or acronym	Meaning
ADR	Alternative dispute resolution
ALF	Association of Litigation Funders of England & Wales
Arkin Cap	The rule that provides that a litigation funder's potential liability for adverse costs should be limited by reference to the amount of funding they had provided to the funded party. The rule was established in Arkin v Borchard Lines Ltd [2005] EWCA Civ 655; [2005] 1 WLR 3055 at [39]-[43]. Following Chapelgate Credit Opportunity Master Fund Ltd v Money [2020] EWCA Civ 246 at [38], it is now clear that the Arkin Cap is no longer an absolute rule and that a funder's potential liability is not necessarily limited in this way.
ATE	After-the-event (insurance)
BTE	Before-the-event (insurance)
CAT	UK Competition Appeal Tribunal
CFA	Conditional fee agreement
CHDBA	Concurrent Hybrid Damages Based Agreement
CJC	Civil Justice Council
CLAF	Contingency Legal Aid Fund
CPR	Civil Procedure Rules
CPRC	Civil Procedure Rule Committee
DBA	Damages-based agreement
ELI	The European Law Institute
ELI Principles	The European Law Institute's *Principles Governing the Third Party Funding of Litigation*, published August 2024
FCA	Financial Conduct Authority

Abbreviation or acronym	Meaning
FOS	Financial Ombudsman Service
HMCTS	His Majesty's Courts and Tribunals Service
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
KC	King's Counsel
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
Legal Representative	An individual who is authorised to provide legal services by, for instance, the Solicitors Regulation Authority or the Bar Standards Board.
LEI	Legal expenses insurance
LSB	Legal Services Board
LFA	Litigation funding agreement
Litigation Funder	An individual or organisation who is neither a party to dispute nor the legal representative of a party to a dispute and which provides funding for litigation.
PACCAR	R (PACCAR) v Competition Appeal Tribunal [2023] UKSC 28; [2023] WLR 2594
PAP	Pre-action protocol
SHDBA	Sequential Hybrid Damages Based Agreements
SI	Statutory instrument
SLAS	Supplementary Legal Aid Scheme
SRA	Solicitors Regulation Authority
TPF	Third party funding

Appendix A – Indicative Legislation and Court Rules

LITIGATION FUNDING, COURTS AND REDRESS ACT 2025

Part A

s.1 Contingency fee agreements

(1) A contingency fee agreement is an agreement with a person providing specified services and the recipient of those services which provides that

(a) fees and expenses, or any part of them, to be payable to the person providing the services only in specified circumstances, or

(b) the recipient is to make a payment to the person providing the services

(i) if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and

(ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained.

(2) In this section[138] –

"specified services" are advocacy services or litigation services;

"payment" means that part of the financial benefit obtained in respect of the claim or proceedings that the recipient of the services agrees to pay to the person providing the services to which the agreement relates;

"financial benefit" –

[138] This adopts the wording proposed by Mulheron and Bacon in the DBA Reform Project, available at https://www.qmul.ac.uk/law/research/research-impact/dbarp/.

(a) means money or money's worth; and

(b) excludes any sum awarded in respect of costs which are paid or payable by another party to the proceedings;

"money or money's worth" means any money, assets, security, tangible or intangible property, services, and any other consideration reducible to a monetary value;

"claims management services" has the same meaning as in the Financial Services and Markets Act 2000 (see section 419A of that Act).

(3) A contingency fee agreement provides for a success fee if it provides for the amount of any fees to which it applies under subsection 1(1)(a) to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances.

(4) References to a success fee, in relation to a contingency fee agreement, is to the amount of the increase referred to in subsection 1(3).

(5) In the exercise of powers conferred by this section, and section 3A of the Civil Procedure Act 1997, the Lord Chancellor may prescribe requirements applicable to contingency fee agreements, in accordance with the procedure provided for in subsection 6(1).

(6) Subject to requirements prescribed pursuant to subsection (1)4, nothing in this section is intended to prevent a contingency fee agreement made pursuant to subsection 1(1)(b) from requiring an amount to be paid by the recipient in respect of some of the services to which the agreement relates, whether or not the recipient obtains a specified financial benefit in relation to those services.

(7) An agreement is not a contingency agreement if or to the extent that it is a litigation funding agreement within the meaning of subsection 2(1).

s.2 Litigation Funding Agreements[139]

(1) A litigation funding agreement is an agreement under which—

[139] This introduces a new proposed definition of LFAs. It does so by adopting the wording of the existing Courts and Legal Services Act 1990, section 58B and supplementing it.

(a) a person ("the funder") agrees to fund (in whole or in part) the provision of advocacy or litigation services (by someone other than the funder) to another person ("the litigant"); and

(b) the litigant agrees to pay a sum to the funder in specified circumstances.

(2) The sum to be paid by the litigant may be-

(a) an amount calculated by reference to a multiple (if any) of the amount of the funding provided by the funder, or

(b) an amount calculated by reference to a percentage (if any) of any specified financial benefit obtained by the litigant in connection with the matter in relation to which the funding is provided, or

(c) an amount calculated by reference to a rate of interest, or

(d) such sum, or method of calculation, as is prescribed by the Lord Chancellor pursuant to subsection (3),

provided that in respect of the sum to be paid, howsoever calculated, it must not exceed such sum as may be prescribed by the by the Lord Chancellor pursuant to subsection (3).[140]

(3) In the exercise of powers conferred by this section, and section 3A of the Civil Procedure Act 1997, the Lord Chancellor may prescribe requirements applicable to litigation funding agreements in accordance with the procedure provided for subsection 6(1).

(4) The provision of funding pursuant to a litigation funding agreement falling within subsection 2(1) and (2) does not amount to the provision of claims management services.[141]

s.3 Requirements of Contingency Fee Agreements and Litigation Funding Agreements[142]

[140] This is intended to create a comprehensive regulatory scheme for LFAs irrespective of how or on what basis the funder's return is calculated. It also makes provision should it be considered necessary for the introduction of caps on a funder's return.

[141] This section confirms that LFAs are not DBAs through excluding LFAs from being claims management services.

[142] This adopts and consolidates the existing Courts and Legal Services Act 1990, sections 58 and 58 AA. All other requirements can be dealt with by prescribed regulation and rules of court.

(1) The following conditions are applicable to every contingency fee agreement and litigation funding agreement —

(a) it must be in writing;

(b) it must not relate to exempted proceedings falling with section 7 or to proceedings of a description prescribed by the Lord Chancellor pursuant to subsection 6(1).

(c) It must comply with such requirements (if any) as may be prescribed by the Lord Chancellor pursuant to subsection 6(1).

(2) In this Part, and this section, (and in the definitions of "advocacy services" and "litigation services" as they apply for their purposes) "proceedings" includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.[143]

s.4 Enforcement[144]

(1) Where an agreement to which this Part applies does not comply with the requirements of subsection 3(1), or any of the requirements prescribed by the Lord Chancellor pursuant to subsection 6(1), the agreement shall be enforceable on an order of the court only.

(2) In the case of application for an enforcement order under subsection 4(1) the court shall dismiss[145] the application if, but only if, it considers it just to do so after having regard to all of the circumstances including —

(a) prejudice caused to any person by the contravention in question;

(b) the degree of culpability for the contravention;

(c) the level, extent and value of the work undertaken pursuant to the agreement, and

(d) the consequences of a finding of unenforceability.

[143] This adopts the current wording of Courts and Legal Services Act 1990, sections 58A(4) and 58AA(7A).

[144] This adopts part of the legislative technique and approach taken to the enforcement of Consumer Credit Act regulated agreements: Consumer Credit Act 1974, sections 65 and 127. If this approach is adopted there is no need to introduce legislative changes abolishing or expressly ameliorating the indemnity principle where contingency fees are concerned.

[145] This is intended to create what would effectively be a presumption against enforceability to ensure compliance.

(3) In exercising its powers under subsection 4(2) the court may impose conditions on the doing of specified acts by any party to the agreement, including suspending the operation of any obligation under the agreement either -

(a) until such time as the court subsequently directs, or

(b) until the occurrence of a specified act or omission.

(4) On the application of any person affected by a provision included under subsection 5(3), the court may vary the provision.

s.5 Power to vary agreements

(1) The court may in an order made by it under subsection 4(2) include such provision as it considers just for amending any agreement in consequence of a term of the order.

s.6 Powers of Lord Chancellor to prescribe requirements[146]

(1) In the exercise of powers conferred by this Part, and section 3A of the Civil Procedure Act 1997, where the Lord Chancellor prescribes requirements applicable to contingency fee agreements, and litigation funding agreements, he shall do so by giving written notice to the Civil Procedure Rule Committee that he considers it expedient for Civil Procedure Rules to include provision that would achieve a purpose specified in the notice.

(2) Section 3A of the Civil Procedure Act 1997 shall apply to any notice served pursuant to subsection 1(1)(5), of this Act such that the Civil Procedure Rule Committee must make such Rules as it considers necessary to achieve the specified purpose.

(3) Prior to giving written notice pursuant to subsection 6(1), the Lord Chancellor must consult:

(a) the designated judges,

(b) the General Council of the Bar,

(c) the Law Society, and

[146] New section to deal with the rule-making process anticipated by this Report.

(d) such other bodies as the Lord Chancellor considers appropriate.

(4) Section 3 of the Civil Procedure Act 1997 shall apply.

(5) The requirements which the Lord Chancellor may prescribe under subsection 7(1)[147] –

(a) include requirements for the person providing advocacy or litigation services or claims management services, to have provided prescribed information before the agreement is made; and

(b) may be different for contingency fee agreements and litigation funding agreements, and

(c) may be different for different forms of contingency fee agreements (such as those which provide for a success fee and those which provide for a payment), and different forms of litigation funding agreements (such as those which provide for the funder to receive a multiple of the amount of the funding provided by the funder rather than an amount calculated by reference to a percentage (if any) of any specified financial benefit obtained by the litigant).

s.7 Exempted Proceedings[148]

(1) The proceedings which cannot be the subject of a contingency fee agreement or litigation funding agreement are—

(a) criminal proceedings, apart from proceedings under section 82 of the Environmental Protection Act 1990; and

(b) family proceedings.

(2) In subsection (1) "family proceedings" means proceedings under any one or more of the following—

(a) the Matrimonial Causes Act 1973;

b) the Adoption and Children Act 2002;

[147] This replicates the current Courts and Legal Services Act 1990, section 58A(3) and merges it with section 58AA(4)'s requirements for DBAs.

[148] This replicates the current Courts and Legal Services Act 1990, section 58A (1) and (2) but does so by way of 'exempt proceedings'.

(c) the Domestic Proceedings and Magistrates' Courts Act 1978;

(d) Part III of the Matrimonial and Family Proceedings Act 1984;

(e) Parts I, II and IV of the Children Act 1989;

(f) Parts 4 and 4A of the Family Law Act 1996;

(g) Part 1 of Schedule 2 to the Female Genital Mutilation Act 2003;

(h) Chapter 2 of Part 2 of the Civil Partnership Act 2004 (proceedings for dissolution etc. of civil partnership);

(i) Schedule 5 to the 2004 Act (financial relief in the High Court or a county court etc.);

(j) Schedule 6 to the 2004 Act (financial relief in magistrates' courts etc.);

(k) Schedule 7 to the 2004 Act (financial relief in England and Wales after overseas dissolution etc. of a civil partnership);

(l) proceedings under Part 3 of the Domestic Abuse Act 2021 (proceedings for domestic abuse protection order), where the proceedings are in the family court or the Family Division of the High Court; and

(m) the inherent jurisdiction of the High Court in relation to children.

s.8 Recovery of funding costs

(1) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment by one party of all or part of any sum paid or payable by another party in respect of liabilities incurred under a litigation funding agreement falling within section 2(2).[149]

(2) Subsection 8(1) does not apply to a litigation funding agreement entered into before the day on which that subsection comes into force.

[149] Namely the funder's return. Provisions will be made to retain the status quo on the irrecoverability of CFA success fees and ATE premiums subject to the existing exceptions.

(3) For the purposes of this section, “funding costs” means costs ordered pursuant to subsection 8(1).

(4) Rules of court may make provision with respect to the assessment of any funding costs in proceedings where a party in whose favour a costs order is made has entered into a litigation funding agreement, in connection with the proceedings.

(5) Rules of court may make provision for the abrogation of the common law indemnity principle with respect to contingency fee agreements or litigation funding agreements.

INDICATIVE NEW COURT RULES/REGULATIONS PRESCRIBED PURSUANT TO SUBSECTION 6(1)

CPR X.1

Requirements of Contingency Fee Agreements

1. These rules may be cited as the Contingency Fee Agreements Rules 2025 and come into force on [*date to be inserted*]

[Insert here proposed rules governing conditional fee agreements.]

[We would recommend lifting the requirements of sections 58(4) and (4A) and 4(b) of the Courts and Legal Services Act 1990 and replicating them as Rules here.

We would also recommend lifting the requirements currently in the Conditional Fee Agreements Order 2013 and replicating them as Rules here.]

[Insert here proposed rules governing damages-based agreements.]

CPR X.2

Requirements for Litigation Funding Agreements

1. These rules may be cited as the Litigation Funding Agreements Rules 2025 and come into force on [*date to be inserted*].

[Insert here proposed rules governing litigation funding agreements.]

CPR X.3

Recovery of Funding Costs as costs (s.8 of the Act)

(1) In this Part, "funding costs" has the meaning given in s.8(7) of the Litigation Funding, Courts and Redress Act 2025.

(2) In any proceedings to which this Part applies, the court may order a party to recover all or part of any funding costs by way of costs but only where the court is satisfied that there are exceptional circumstances which justify such an order being made.

(3) In deciding whether the circumstances are sufficiently exceptional to make the order within the meaning of rule X(2) the court will have regard to the following factors:

(a) the conduct of the parties, and in particular the conduct of the paying party, whether before or during or after the proceedings, and

(b) the conduct of the funder, whether before or during the proceedings, and

(c) the extent to which the funding costs were incurred by reason of the conduct of the paying party, and

(d) the amount of the funding costs and whether the funding costs were reasonably incurred, and

(e) whether the proceedings could have been pursued by the receiving party without incurring the funding costs, and

(f) the financial consequences of making the order from the perspective of both the receiving party and the paying party, and

(g) notwithstanding the exceptional nature of the order, it is in the interests of justice to make the order.

(4) Any order made under rule X(2) for the payment of any funding costs, shall be subject to detailed assessment.

(5) The proceedings to which this Part applies excludes:

(a) Personal injury proceedings[150]

(b) *[insert other exceptions]*

INDICATIVE CPR PD 3D, with proposed amendment in bold

A. Production of Costs Budgets

[150] This is provided for because QOCs applies etc, and claimants are not liable to pay adverse costs to defendants absent fundamental dishonesty. NB: the Report does **not** recommend the reintroduction of recoverable success fees and ATE premiums into the personal injury market.

(1) In cases where the Claimant has a limited or severely impaired life expectation (5 years or less remaining) the court will ordinarily disapply cost management under Section II of Part 3.

(2) An order for the provision of costs budgets with a view to a costs management order being made may be particularly appropriate in the following cases—

(a) unfair prejudice petitions under section 994 of the Companies Act 2006;

(b) disqualification proceedings pursuant to the Company Directors Disqualification Act 1986;

(c) applications under the Trusts of Land and Appointment of Trustees Act 1996;

(d) claims pursuant to the Inheritance (Provision for Family and Dependants) Act 1975;

(e) any Part 8 or other claims or applications involving a substantial dispute of fact and/or likely to require oral evidence and/or extensive disclosure;

(f) personal injury and clinical negligence cases where the value of the claim is £10 million or more; **and**

(g) where the claim is funded by a litigation funder.

Appendix B – Terms of Reference for CJC Review of Litigation Funding

The CJC will look to provide an interim report by summer 2024, and a full report by Summer 2025.

The Review will be based on the CJC's function to make civil justice more accessible, fair and efficient.

The reports will be published.

The reports will provide advice to the Lord Chancellor and, where considered appropriate by the CJC, will make recommendations for change.

The interim report will facilitate an opportunity for wider engagement with the CJC, and this review, either through consultation, provision of evidence, or otherwise.

The scope of the review at its outset is as follows (but may be subject to necessary variation):

(1) To set out the current position of Third Party Funding (TPF)

TPF is currently subject to self-regulation. The review will consider:

- The background to TPF's development in England and Wales, with particular reference to the development of the current self-regulatory approach and the effect of the Jackson Costs Review (2009);
- The current position concerning self-regulation;
- Approaches to the regulation of TPF in other jurisdictions;
- How TPF is located within the broader context of funding options.

(2) To consider access to justice, effectiveness, regulatory options

This work will explore whether the current arrangements for TPF deliver effective access to justice and identify possible alternatives and limitations.

(3) To make recommendations

Set out clear recommendations for reform. This will include consideration of:

- 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.

Appendix C – Membership of CJC Working Party and Consultation Group

Working Party

Mr Justice Simon Picken (CJC member) – Co-Chair

Dr John Sorabji (CJC member) – Co-Chair

Mrs Justice Sara Cockerill

Professor Christopher Hodges OBE (Regulatory Horizons Council)

Lucy Castledine (Financial Conduct Authority)

Nicholas Bacon KC

Wider Consultation Group

Alistair Kinley (Director of Policy & Government Affairs, Clyde & Co)

Professor Andrew Higgins (CJC member; Professor of Civil Justice Systems, University of Oxford)

Dr Mark Friston (Barrister, Hailsham Chambers; Bar Council Representative)

Helen Brannigan (Head of Civil Litigation Costs and Funding, Ministry of Justice)

Harriet Gamper (Director of Consumer Policy and Engagement, Solicitors Regulation Authority)

Jamie Molloy (Head of ATE, Ignite Speciality Risk)

Jennifer Morrissey (Partner, Harcus Parker; Law Society Representative)

Julian Chamberlayne (Partner, Stewarts)

Kenny Henderson (Legal Adviser, Fair Civil Justice; Partner, CMS Cameron McKenna Nabarro)

Lucy Anderson (Senior Lawyer, The Consumers' Association (Which?))

Neil Purslow (Chair of the Executive Committee, International Legal Finance Association; UK CIO, Therium Litigation Funding)

Professor Neil Rickman (Professor of Economics, University of Surrey)

Nicola Critchley (CJC member; Partner, DWF)

Professor Rachael Mulheron KC (Hon) (Professor of Tort Law and Civil Justice, Queen Mary University of London)

Ray Koh (Legal Counsel, Lloyd's Market Association)

Rhea Gupta (Legal and Policy Research Consultant, Class Representatives Network)

Síona Moloney (Senior Legal Researcher, Law Reform Commission of Ireland) – Observer

Stephen Wisking (Partner, Herbert Smith Freehills)

Suganya Suriyakumaran (Legal Services Board)

Susan Dunn (Director, Association of Litigation Funders; Head of Litigation Funding

Harbour Litigation Funding)

Tom Steindler (Managing Director, Exton Advisors)

CJC Secretariat

Sam Allan

Amy Shaw

Freya Prentice