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

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

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

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

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

Your response is (public/anonymous/confidential):	Public
First name:	Malcolm
Last name:	Hitching
Location:	London
Role:	Solicitor
Job title:	Partner
Organisation:	Macfarlanes LLP
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

Information provided to the Civil Justice Council:

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

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

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

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

MACFARLANES

Macfarlanes LLP's response to the Civil Justice Council's consultation on Litigation Funding

Macfarlanes has a leading practice in the UK litigation funding and legal assets market, acting for more than 20 separate funders to the sector and for several law firms which source capital from third party investors. The team has been closely involved in developing the UK and European funding market over the past fifteen years. We have a dedicated team advising in relation to all aspects of litigation and legal assets financing including the funding of cases, the establishment of litigation funding vehicles, the raising of capital, the tax treatment applicable to the asset class, the financing of law firms, the exit from investments, the insolvency of law firms and the navigation of disputes arising from underlying funding arrangements. The transactions that we advise on typically range in scale from £10m - £100m, and usually relate directly or indirectly to proceedings (either arbitration or litigation) in England and Wales. We have also advised on transactions relating to the financing of litigation and legal assets in multiple jurisdictions within the United States of America, and in Switzerland, Liechtenstein, the Netherlands, Spain, Italy, France, Germany, the UAE and Hong Kong.

Macfarlanes does not take third party capital on to its own balance sheet to fund any litigation or work in progress, and thus our interest is not that of a "funded party" but rather that of a well-established objective advisor active in the UK litigation and legal assets funding market. In the interests of transparency, this firm has acted for claimants in relation to two separate cases in England in which such claimants were funded by third party litigation funders, and both of those matters have concluded. We have never worked for any funded claimant group in proceedings in England. Like many firms, our litigation department from time-to-time acts for defendants facing funded claims.

We welcome the opportunity to contribute to the Civil Justice Council consultation on Litigation Funding (the "**Consultation**"). We do not respond directly to every question in the CJC Interim Report (the "**CJC Interim Report**") but provide commentary based on our extensive experience of the sector and our understanding of the motivations of its various stakeholders.

1 Executive summary

We make the following key points:

1.1 We recommend an urgent legislative solution to the issues raised by PACCAR[1]. The uncertainty caused by PACCAR presents an existential threat to the funding industry in England and Wales. Although the issues arising from PACCAR are not specifically within the scope of the terms of reference of the CJC Interim Report and are not specifically within the remit of the Consultation, they are unavoidably linked to the availability of third party litigation funding and the functioning of the market. Unless the PACCAR issues are resolved promptly, there is a material and real risk that much of the international capital available to fund disputes in England and Wales will be deployed elsewhere, and that the only certain form of contingent funding available to claimants seeking access to justice in England and Wales will be pursuant to conditional fee agreements ("**CFAs**"). This would be a significant step backwards.

1.2 Universal access to justice is imperative, and litigation funding should be seen in that context. Limiting such access would be highly detrimental to the English legal sector, to the UK economy and to those with meritorious claims who are entitled to bring them in England and Wales.

1.3 The core purpose of regulation is to protect an identifiable class from harm or unfairness. In our direct experience, parties to litigation funding transactions are not subject to material harm

[1] R (PACCAR) v Competition Appeal Tribunal [2023] UKSC 28; [2023] WLR 2594

or unfairness which necessitates regulation. Although theories of alleged harm abound, the evidence in support is limited.

1.4 To the extent that harm or unfairness is considered to exist or potentially exist, we suggest that it is (and should be) limited to the interests of "consumers" (i.e. individual non-commercial parties) and not to commercial parties. "Commercial parties" include high net worth individuals ("**HNWI**")[2], limited companies, commercial enterprises, partnerships, law firms and the like.

1.5 Commercial parties should be free to contract on whichever terms they consider to be appropriate. Freedom of contract is a core tenet of English law and is one which attracts commercial parties to use the English courts. Any impingement of that principle is likely to have significant and detrimental consequences for the UK legal sector with the attendant effect on the economy.

1.6 It is noteworthy that consumers are protected from harm and unfairness when borrowing money, and the provisions of the Consumer Credit Act 1974 ("**CCA**") are well established.

1.7 Litigation funding does not fall within the ambit of the CCA. If the Consultation concludes that consumers require protection when accessing litigation funding, we make the following observations:

1.7.1 many consumer claims are brought in the Competition Appeal Tribunal (the "**CAT**"), which has reserved to itself considerable powers to consider third-party funding (including as to the robustness of arrangements and the fairness of any proposed distribution of case proceeds) from the perspective of the consumer;

1.7.2 a consumer does not enjoy the same protections in a non-CAT setting;

1.7.3 if the Consultation considers that consumers require greater protection we suggest that the risks for focus are those which might arise in a non-CAT forum and specifically:

1.7.3.1 the ability of a funder to meet its funding obligations as they fall due (including the ability to pay adverse costs if so ordered);

1.7.3.2 the ability of the claimants to understand their anticipated net returns in different scenarios; and

1.7.3.3 the extent (and thus fairness) of a funder's economic return in various scenarios.

Addressing those points would ensure that a consumer is able to (i) bring a case with confidence, safe in the knowledge that funds are available to pursue the claim to conclusion, (ii) understand from the outset what the net economic result of the claim is likely to be in various scenarios, and (iii) obtain suitable economic redress in the event that a claim is successful.

1.8 To the extent that the Consultation concludes that consumers do require such protections, it could be that:

1.8.1 non-CAT courts are encouraged to consider funding terms on behalf of claimants in a manner akin to that exercised by the CAT;

[2] We refer to the high-net worth individual exemption from the definition of "consumer" in Article 60H(1) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 as amended. All future references to "consumer" in this response should be understood in this way and references to "commercial parties" should be deemed to include HNWIs.

1.8.2 funders of consumers should maintain mandatory membership of the Association of Litigation Funders ("**ALF**") or an alternative independent regulatory body if that is preferred ("**TPLF Regulator**");

1.8.3 the ALF code of conduct could be further enhanced to better reflect the protections felt to be necessary (or a suitable code of the TPLF Regulator could be established); and

1.8.4 ALF (or the TPLF Regulator) could be granted the powers needed to police and enforce the enhanced code.

1.9 The funding of commercial (i.e. non-consumer) claims should not be the subject of formal regulation or oversight. Commercial disputes which are heard in the English courts are often funded by international capital which is capable of deployment without restriction in very many parts of the globe. Seeking to regulate formally the terms of commercial investments made between sophisticated parties is likely to result in a flow of capital away from the English forum to the detriment of the UK economy and the reputation of the English Courts as the leading centre for international dispute resolution.

1.10 A law firm should be free to raise capital from whichever source it chooses. Those law firms which act for consumers might reasonably be expected to confirm the robustness of their finances on a regular basis, and the Solicitors Regulation Authority ("**SRA**") would naturally have oversight. If the current regulatory framework of the SRA is not considered sufficient to protect consumers in the context of funded claims, the SRA Code of Conduct could be strengthened to ensure that consumer-facing law firms provide regular evidence of their ability to meet costs as they fall due, and the SRA could be given additional powers to police compliance with the Code if necessary.

We expand upon these points below.

2 PACCAR

2.1 The government has indicated that it does not intend in the near term to reintroduce the Litigation Funding Agreements (Enforceability) Bill 2024 to address the considerable uncertainty caused by the Supreme Court's judgment in PACCAR.

2.2 In our experience such uncertainty is so significant that legislative intervention is justified at the earliest opportunity. Very considerable disruption has been caused to the third party funding market, and access to justice in England & Wales has been affected accordingly.

2.3 We suggest that legislative action to address the uncertainties caused by PACCAR should not be dependent on the Consultation, or on publication of the CJC's advice to the Lord Chancellor and subsequent consideration of that advice by government. Rather, we encourage an immediate de-coupling of the PACCAR issues from the broader Consultation.

2.4 The market for third party funding in England and Wales has been impacted in a profound way since the PACCAR judgment was handed down. In our direct experience:

2.4.1 new instructions for Macfarlanes to act on funded cases in England and Wales are down by c.75% when compared to the period prior to PACCAR;

2.4.2 independent statistics (including those published by Solomonic[3]) show that activity in the Commercial Court is suppressed, and that new claims are at their lowest for more than ten years. Similarly, new group actions remain subdued when compared with previous years;

[3] Solomonic, 2024 snapshot: Commercial Court claims at a decade low - https://www.solomonic.co.uk/news-insights/commercial-court-claims-at-a-decade-low

2.4.3 several material funders have confirmed to us that they can no longer invest in cases heard by English courts since they consider the risks and disruption caused by PACCAR to be too great to justify the risks;

2.4.4 transactions which (pre-PACCAR) would have been governed by English law funding documents are now being written under non-English laws, notably those of New York, Switzerland and the Netherlands. This adds considerable cost and complexity to funding transactions (not least due to the need to instruct deal lawyers from multiple jurisdictions when, previously, a single English firm would have sufficed) and is thus impacting access to justice. The trend is affecting English law's preeminent status as law of choice for contractual counterparties and will result in future disputes migrating to foreign courts and arbitration forums;[4]

2.4.5 almost all funders are themselves dependent on raising capital from third parties (in other words, funders do not hold permanent capital reserves akin to banks but rather rely on the commitments of third party investors to provide capital when required, akin to (e.g.) private equity funds). Fund raising across the sector for proceedings in England and Wales has almost come to a halt, and very many funders are now unable to provide funds to claimants for new cases, or to provide additional funds in relation to cases which require follow-on capital. Third party investors are citing the uncertainties caused by PACCAR as a material factor when refusing capital raising opportunities;

2.4.6 post PACCAR, funders now typically calculate their returns by reference to a multiple of invested capital rather than to a percentage of damages in an effort to ensure that their funding arrangements do not fall within the ambit of the DBA Regulations. This formulation is not suitable to all cases or to all stages of a case, and results in funders rejecting investment opportunities which would have been accepted pre-PACCAR, thus limiting access to justice. This return methodolgy also risks more disproportionate outcomes than does a percentage based formula, which is by definition always proportionate; and

2.4.7 PACCAR has resulted in a considerable number of disputes as to the validity of existing funding arrangements and a great deal of time and cost has been spent in seeking to resolve them. Unfortunately, most of these disputes are referred to confidential arbitration (the preferred forum in our experience for disputes between funders and funded claimants), with the result that it is impossible to gauge accurately the scale of the problem. In 2024, we acted for multiple funders in two separate high value LCIA arbitrations directly resulting from the decision in PACCAR, and have advised in relation to several other similar disputes which were ultimately resolved. We have heard of other law firms dealing with similar PACCAR-related disputes in arbitration. Additionally, post-PACCAR we have acted in relation to more than ten amendment processes, whereby funders have been obliged to rewrite existing funding arrangements to ensure compliance with (or separation from) the DBA Regulations. The uncertainty and cost inherent in these disputes and complicated amendment processes involving new payment

[4] We act for (A) a European hedge fund which decided to provide funding to European claimants bringing claims in European courts against European counterparties under New York law because of risks which it perceived to arise from PACCAR. Such funding was anticipated to be governed by English law but was switched mid-deal due to PACCAR; (B) an English headquartered law firm seeking portfolio funding from a US-based funder and such funder insists on the funding arrangements being New York law governed due to perceived PACCAR risk; (C) a European funder which is no longer pursuing English law funding opportunities post-PACCAR; (D) two separate US-headquartered alternative asset investors, both of which have cited PACCAR uncertainty as their primary reason for not pursuing funding opportunities in the UK; and (E) a London based credit fund which has entered a joint venture partnership with a litigation funder, but has insisted that the strategy of such JV should be focused on non-English opportunities due to PACCAR risk.

mechanics is problematic for funders when evaluating the current value of their investment portfolios and is thus harmful to their ability to fundraise.

2.5 We strongly suggest that legislative action to resolve PACCAR is dealt with separately from the Consultation, and that such legislation should be implemented as soon as possible. If it is not, we expect to see a prolonged and very material withdrawal of capital from the English litigation funding market and a concerted move to document funding deals under a governing law other than England & Wales. Funding for new cases is already at a low ebb, and we anticipate that the availability of capital will become ever more constrained in the absence of clear legislative action. In these circumstances, access to justice – the importance of which cannot be overstated - will be severely restricted. We have described in the next section the fundamental role that funders play in making the courts and tribunals in England and Wales accessible to all.

3 Access to justice & the evolution of funding

3.1 In his Final Report of the Costs of Civil Litigation published in December 2009, Lord Justice Jackson made recommendations as to how to promote access to justice at proportionate cost. It was recognised that in certain areas litigation costs in England and Wales were excessive and the major driver of disproportionate costs was Conditional Fee Agreements ("**CFAs**")[5]. Specifically, analysis showed an overall picture[6] that:

3.1.1 Claimant costs were substantially higher than defendant costs; and

3.1.2 Claimant costs in CFA cases which were analysed were significantly higher as a proportion of damages awarded when contrasted with Claimant costs in non-CFA cases. The evidence showed that CFAs at that time did not promote access to justice at proportionate cost.

3.2 To address the problem, Sir Rupert Jackson (as he then was) made several recommendations and observations, including that:

3.2.1 lawyers should be able to enter into contingency fee arrangements with clients, with the terms of such arrangements to be regulated to safeguard the interests of clients. An arrangement that allowed a lawyer to be paid a contingent fee calculated as a percentage of damages would by definition always be proportionate; and

3.2.2 third party funding was beneficial and provided access to justice, although it was most readily obtained for high value cases with good prospects of success[7]. A draft voluntary code was sufficient to address the potential harms of third-party litigation funding whilst the industry was still nascent, but this may change as use expands[8].

3.3 Fourteen years on, the situation in 2025 with regards to overall litigation costs and the use of contingency arrangements is as follows:

3.3.1 whether or not litigation costs are excessive or disproportionate, such costs are significantly higher in 2025 than they were in 2009 due to the increased costs of those providing relevant legal services. To give an extreme example, in the Pan NOx Emissions Litigations[9], the Claimants' costs budget was £208 million and the Defendants' (who comprised over a dozen separately represented car manufacturers) budget was £114 million. These budgets were reduced by the Court to £52 million and £114 million respectively, but the figures remain

[5] Paragraph 2.1, Executive Summary of the Review of Civil Litigation Costs, Final Report, December 2009
[6] Paragraph 2.20, Chapter 2 of the Review of Civil Litigation Costs, Final Report, December 2009
[7] Paragraph 1.5, Chapter 11 of the Review of Civil Litigation Costs, Final Report, December 2009
[8] Paragraph 2.4, Chapter 11 of the Review of Civil Litigation Costs, Final Report, December 2009
[9] Pan NOx Emissions Litigations, Re [2024] EWHC 1728 (KB)

extremely high and significantly more than any case being litigated in 2009. Promoting access to justice in 2025 is more challenging because the costs of litigating are much higher than before.

3.3.2 The Damages Based Agreement Regulations (2013) (the "**DBA Regulations**") came into force in April 2013 but have been criticised ever since as being insufficiently clear as to meaning and have not proved to be a solid base from which parties can contract with confidence. The result is that use of such arrangements on a stand-alone basis in commercial litigation in 2025 is, in our experience, very low. This is consistent with the findings of the government in a Ministry of Justice Report from as long ago as 2019 which looked at the effectiveness of the DBA Regulations and reported:

> "[a]*lmost all respondents, across the spectrum, agreed that DBAs are rarely used and that the current DBA regulations are not effective. There was unanimous support amongst respondents that the regulations would benefit from reform and redrafting to ensure DBAs are a more viable funding method for a greater number of cases*."[10]

3.3.3 In our direct experience, where DBA arrangements are used they are supported by a litigation funding arrangement which provides financial means to enable the law firm to meet the costs of fees and disbursements that must be borne during the life of the case, in return for a share of case proceeds for the funder in the event of success. The existence of this solution was recognised by the government in its 2019 report on the effectiveness of the changes made to civil litigation costs pursuant to the Jackson Reforms: "*It was argued that a vibrant, sophisticated third-party funding market has developed in this jurisdiction which provides direct funding to both clients and lawyers and, as such, there was no need to introduce hybrid DBAs*".[11] As detailed in section 2 above, post PACCAR, this sophisticated solution has in effect been removed, stifling yet further the use of DBAs in commercial litigation in England & Wales.

3.4 With the use of each of DBAs, third party funding of proceedings and third party funding of law firms all in decline in England and Wales as a result of PACCAR, CFAs seem to be the only viable funding option in relation to which all parties can have any certainty.

4 Alleged harms

4.1 The Consultation[12] identifies various potential harms caused by or attributable to third party funding, some of which are interlinked. We comment briefly in relation to certain of them, but before doing so make a general observation on this topic.

4.2 The CJC has very clearly called for *evidence* of harm. In our experience of acting for clients active in this industry, we do not generally see the potential harms identified by the Consultation arising in practice, but the difficulty we face in conveying this point is the usual challenge of seeking to prove a negative. This is not to say that the potential harms do not (or could not) exist in principle, but great care needs to be taken when pointing to evidence of harm to ensure that it is valid, accurate and impartial. Objectively, we would anticipate that such evidence would be based chiefly on the testimony of claimants.

4.3 The Consultation identifies the Post Office litigation as an example of a case outcome which might justify the consideration of a cap on funder returns, on the basis that the financial recovery per claimant was low when compared objectively to the financial return of the funder. However, this demonstrates the pitfalls around "evidence" very neatly:

[10] Paragraph 116, page 27, Report of the Ministry of Justice: Post Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LAPSO)
[11] Paragraph 121, page 28, Report of the Ministry of Justice: Post Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LAPSO)
[12] Section 2.17 of the Consultation

4.3.1 The Consultation states in paragraph 2.20 that: "*if the settlement figure in litigation such as the Post Office litigation is considered, once the funding and the funder's profit is deducted from the settlement, a different picture needs to be considered*." However, the Consultation does not identify the quantum of the funder's profit, as distinct from any and all other costs that were deducted from the proceeds which would otherwise have flowed to the claimants.

4.3.2 We are familiar with the detailed figures relevant to the case, including the quantum of the funding and funder's profit return as a proportion of the whole, but are obliged to treat such information in strict confidence. However, we can say with confidence that the funder's "profit" was not anywhere close to that inferred by the "facts" which were presented by certain commentators.

4.3.3 If the argument for a cap on funder returns is to be based on empirical evidence of harm the Post Office case is not a wholly compelling source. There was no complaint from Alan Bates about the level of compensation received by the claimants, nor any suggestion that a cap on funder returns would be fair. He confirmed that the postmasters knew the basis of the funding deal and its likely outcomes from the outset. Mr Bates himself wrote in the Guardian[13]:

> "*The arrangement worked very well for us. In fact, there would have been no justice for subpostmasters without it, given the exorbitant costs of the legal system in England and Wales. But there is now a concerted effort by big business to constrain access to litigation funding… I've been reading claims that the subpostmasters were, in fact, "exploited" – and that the funders who bankrolled our case "hijacked the spoils" of the settlement. It has also been claimed that funders "severely limited the justice achieved". Based on our experience, those claims are absolute nonsense. It seems to be nonsense promoted by an outfit calling itself "Fair Civil Justice", affiliated to the US Chamber of Commerce, an organisation that represents the interests of big business. It also seems that corporate interests have tried to paint us as the victims of a "secret financing" deal. Again, not true. We knew exactly what we were entering into; it was the only option we had left to expose the truth that the Post Office were determined to keep from us.*
>
> *The terms of the deal were clearly explained by our lawyers. Our funders, the litigation financing firm Therium, extended our credit on a number of occasions when the Post Office cynically drove up our legal costs. Therium, and our legal teams, even took a haircut on their returns to ensure the victims group received some return as they went on to pursue the truth through further court cases, enabling convictions to be overturned and real financial redress to be sought*."

4.4 We make two further points in relation to the weight that might be attached to "evidence" of alleged harm:

4.4.1 argument and theory put forward by observers and non-participants in the market needs to be very carefully distinguished from evidence provided by direct participants in funded cases, namely claimants, funders, defendants and their respective professional advisors; and

4.4.2 "evidence" should not be viewed solely in hindsight and ought to be considered in every case at two distinct points in time: firstly, when the funding arrangement

[13] The Guardian, Alan Bates: Our Post Office victory is being twisted by those who don't want to see its like again - https://www.theguardian.com/commentisfree/article/2024/may/10/post-office-litigation-funders-subpostmasters-corporate-interests

is entered into; and secondly, once the relevant case has settled or has otherwise been determined. In our experience, every funded claimant has been represented by lawyers when agreeing funding documentation and has willingly entered into arrangements following extensive negotiation. No such claimant alleged harm (actual or prospective) when entering into documentation.

4.5 *Third party funding promotes the pursuit of unmeritorious or vexatious litigation.*

4.5.1 Funders are seeking to make a return for their investors and are therefore incentivised to support claims that have a strong chance of success. Funders will undertake detailed due diligence to determine the merits of any claim, and only a small proportion of claims presented for funding receive funder support. In our direct experience commercial funders do not support unmeritorious or vexatious claims as to do so would be at odds with their investment mandates.

4.5.2 Funders usually rely on the advice of the claimant's leading counsel as to the merits of any claim put forward for funding. Less frequently, we have seen funders obtain an independent view of merits from leading counsel appointed by them, or from their own internal legal teams. We have never seen an opinion from counsel in a funded case exceeding 70% prospects of success, which means that if the case was run ten times, even with those high prospects, it would still fail on three of those occasions. More commonly prospects of success are expressed by the Claimant's leading counsel to be around 60%, reflecting the reasonably significant litigation risk that applies in all commercial cases. This is important, and is illustrative of the fact that losing a case is not unusual. The loss of a case does not mean that it is unmeritorious or vexatious.

4.5.3 The courts have established processes that must be complied with before claims can be validly progressed, and a court has the power to strike out what it considers to be unmeritorious or vexatious proceedings. It may also of its own volition or on the application of a party declare a case as "totally without merit". We are not aware that such an order has been made in a funded case. Regulatory duties on solicitors and barristers also act as a restraint on lawyers whose clients are intent on pursuing unmeritorious or vexatious cases. It is not the case that a funder alone can decide that an unmeritorious or vexatious case should be pursued.

4.5.4 Access to justice must be protected. If a claimant has a valid claim which can be heard in the English courts, such claimant should have the right to take that claim forward irrespective of the manner in which such claim is to be funded. If a claim is entirely without merit a court can strike it out, and otherwise a defendant can defend itself and benefit from the additional comfort of an adverse costs regime in the event of a successful defence. That regime includes the power under s.51 of the Senior Courts Act 1981 to seek an order for costs against a non-party, including a funder.

4.6 *Third party funding reduces the prospect that claims will settle because its presence in a system where there is adverse cost shifting means that there is little incentive to settle.*

4.6.1 Lawyers acting for a funded claimant are under professional duties to act in the claimant's best interest, which includes advising the claimant as to whether settlement would be appropriate having regard to all relevant circumstances. The laws of champerty and maintenance preclude a funder from exerting undue control over settlement discussions and in our direct experience funders go to considerable lengths to comply with the spirit and letter of such laws. Whilst a settlement offer will usually not be made or dismissed without proper discussion between the funder, the lawyers and the claimant, it is the claimant who retains the right to accept or reject a settlement.

4.6.2 In our experience a funder is often pleased to see early resolution of a funded case. Settlement (by definition) obviates the need to go to trial, and thus reduces the funder's risk accordingly.

4.6.3 The Consultation notes that third party funding could promote settlement at an under value, presumably on the basis that funders can encourage claimants to settle early for commercial reasons. This suggestion does not appear to be supported by evidence and we are not aware of any funder which has advocated for a settlement at an under value or procured such an outcome to the Claimant's detriment. As stated above, it will be important to assess what evidence comes directly from Claimants on this issue.

4.7 *Potential litigants may not be in a position to enter into third party arrangements on a properly informed and advised basis.*

4.7.1 As indicated in the Consultation, this is most likely to be relevant to consumers, and not to commercial parties, who in our experience are always legally represented in relation to funding arrangements and who should be free to enter in to contracts on terms which they consider to be appropriate in the circumstances.

4.7.2 We provide more detailed comments in relation to the funding of consumer claims, and possible ways to mitigate uncertainty, below.

4.8 *Third party funders could exercise control over the litigation and, hence, funders may do so for their own benefit rather than that of the funded party.*

4.8.1 The risk that a funder may seek to control litigation to the detriment of the claimant is effectively controlled by the rules of champerty and maintenance, which serve to inform and regulate the relationship between the funder and the funded party. If a funding agreement is (or the actions of a funder are) deemed to fall foul of the rules on champerty and maintenance, funding arrangements can be deemed void and unenforceable. The enforceability of the funding agreement is of paramount importance to the funder to ensure that it is contractually entitled to its agreed return and in our experience funders are extremely careful to ensure that control of the claim is at all times retained by the claimant and its counsel. We are not aware of any complaints from any claimants on matters on which we have acted as advisers to the funder that the funder has sought to control the litigation and this principle is clearly reflected in funding documents in our experience.

4.8.2 This practice is reflected in the ALF Code of Conduct, which prohibits any member from seeking to influence a funded party or it's solicitor or barrister to cede control or conduct of the dispute to the funder.

4.9 *Claimants may be under-compensated since a funder's return is taken from case proceeds.*

4.9.1 In our direct experience, commercial claimants invariably seek funding terms from more than one potential funder before settling upon an agreed funding package. The market thus determines those terms which are agreed and serves to dictate the level of financial return that a funder can expect to receive upon the successful conclusion of the relevant case. A commercial claimant is not under-compensated if, by choice, it seeks and agrees commercial funding terms which award a given portion of case proceeds to the funder. Rather, the claimant is at liberty to reject all funding terms offered to it if those terms are insufficiently compelling and is able to (and typically does) optimise terms by comparing various funding offers and driving the best deal it can.

4.9.2 A funder is duty bound to seek a financial reward commensurate to the risk that it takes. A funder is not a source of legal aid and is not in business to make losses. Rather, a funder will price a given opportunity on its merits and other

relevant facts, and a claimant is then at liberty to accept, reject, or seek to further negotiate those offered terms.

4.9.3 It is vital to draw a distinction between (a) a commercial claimant, who should be able to agree funding terms on whichever basis it chooses under the principles of freedom of contract, and (b) a consumer, who may be less able to protect itself when engaging with a sophisticated funding counterparty, especially in a group action context. A funder must still be able to make a financial return commensurate with the risk that it takes, but it is arguable that a relatively unsophisticated consumer should be given comfort that in agreeing a funding package it is giving up only a "reasonable" portion of case proceeds on success and that it has clarity as to the robustness of the funder and the likely economic outcomes so that it is able to enter into the funding arrangements with confidence. See further section 6 below.

5 Commercial claims

5.1 The core purpose of regulation is to protect a class from prejudice, harm or unfairness. Formal regulation should be considered only where the level of risk, in terms of severity and likelihood of occurrence of harm, is high and regulation should be targeted at those most at risk of harm. In our experience commercial parties are not at risk of harm from litigation funding, and they do not need protection through regulation.

5.2 Commercial parties are invariably represented by sophisticated legal advisors who will consider the terms of financing offered by funders in accordance with their professional duties and market experience. In our experience, third party funding arrangements obtained by commercial parties are entered into on a properly informed basis.

5.3 Freedom of contract is a fundamental doctrine of English law, and it is imperative that commercial parties are free to contract without fetter (subject to general principles of law). If a corporate litigant or HNWI wishes to use third party funding to pursue proceedings, it should be free to agree and enter into such terms with a funder as it thinks appropriate. Likewise, if a law firm decides that an injection of third party funding is appropriate for its business it should be for the law firm to decide whether the available terms of such funding are appropriate.

5.4 In the comparable context of the debt finance market, while consumers benefit from certain regulatory protections (such as the Consumer Credit Act 1974 and the Consumer Rights Act 2015), regulation does not seek to interfere with the relationship between a non-consumer borrower and a commercial third party debt provider.

5.5 To regulate further[14] the relationship between commercial parties and funders in a litigation funding context would undermine the fundamental principle of freedom of contract and would further erode English law and England's status as, respectively, a governing law and jurisdiction of choice for contractual counterparties. Regulation of commercial arrangements could be expected to add further complication and cost to the funding market, and (based on commentary provided to us by several sources of international capital involved in the litigation funding market) would result in many funders choosing to exit the English market in search of more attractive opportunities elsewhere. There is evidence of precisely this happening in Australia where in 2020 legislation was introduced requiring litigation funders to hold an Australian Financial Services Licence and for their funding schemes to comply with the requirements for managed investment schemes. The available data, with respect to the number and percentage of funded class actions filed in the 2021 and 2022 calendar years, shows that:

5.5.1 in 2021 twenty-three funded class actions were filed, from a total of fifty seven class actions (both funded and unfunded) which were filed in Australia in 2021;

[14] Beyond the existing forms of voluntary self-regulation and Court rules

5.5.2 in 2022 fourteen funded class actions were filed, from a total of thirty three class actions (both funded and unfunded) which were filed in Australia in 2022; and

5.5.3 thus, thirty seven funded class actions were filed during this "regulated" period, from a total of ninety class actions (both funded and unfunded), meaning that funding applied to 41.1% of all class actions filed.

5.6 The data from this "regulated period" contrasts with the data from[15]:

5.6.1 2014 and 2015 combined, where a total of 40 funded class actions were filed (55.5% of all class actions);

5.6.2 2016 and 2017 combined, where a total of 55 funded class actions were filed (69.4% of all class actions); and

5.6.3 2018 and 2019 combined, where a total of 74 funded class actions were filed (61% of all class actions).

5.7 Whilst further factors may be relevant it appears to be widely accepted (including by certain funders who are active in both the London and Australian markets), that the regulatory changes introduced in Australia in 2020 plainly resulted in a steep decline in filed, funded class actions.

5.8 A law firm must be free to capitalise itself with whichever sources of funding are most appropriate on the facts. A typical law firm may use a mix of funding sources, including partner capital, bank debt and (in some instances) non-recourse litigation funding which serves to cover the costs of specific cases. Commercial clients are able to instruct a law firm of their choice, and if so minded can satisfy themselves as to the financial robustness of a law firm before instructing it on a given matter. In our direct experience acting for both law firms and for funders of law firms (banks, credit funds and litigation funders), it is not the terms of a given funding package which cause stress or distress in a law firm, but rather the quality of the management teams and business models of certain firms which have caused problems. In our experience, if a law firm adheres to its professional and regulatory obligations in both letter and spirit, and runs its business in a sensibly prudent way, no concerns arise in a commercial setting.

6 Consumer claims

6.1 Protections already afforded to consumers

6.1.1 *Direct exposure to litigation funders*

6.1.1.1 A consumer which agrees non-recourse litigation funding arrangements (either directly or, through a class representative, indirectly) is in a unique position as it enters into a contract with a commercial counterparty (i.e. the funder) but with the benefit of independent legal counsel and with no risk of personal financial loss.

6.1.1.2 Consumers do not typically seek advice from legal counsel as a matter of course when entering into contracts with commercial parties under general public policy in England and Wales, but the ALF Code of Conduct requires a funder to take reasonable steps to ensure that any funded party has received independent legal advice (or has had the opportunity to do so) prior to signing a funding agreement (ALF Code paragraph 9.1). This is achieved in practice by the lawyers acting for the claimant in relation to the funded claim advising on the funding

[15] Vicki Waye, Nikki Chamberlain and Vince Morabito in their article 'How to Address The Regulation of Third-Party Litigation Funding of Class Actions?' published in the Law Quarterly Review, at page 147

arrangements or (less frequently) by separate lawyers advising on the funding arrangements in isolation.

6.1.1.3 It is notable that such element of the ALF Code is invariably adhered to, whether or not the funder in question is a member of ALF.[16] Many non-ALF funders are regulated by the Securities & Exchange Commission (or the equivalent in other jurisdictions) and adhere to strict standards of behaviour. They are aware of the ALF Code, and in our direct experience are willing to adhere to its terms (and to confirm their intention to do so as may be required).

6.1.1.4 It is important to contrast litigation funding agreements, which are non-recourse in nature, with loans that are provided to consumers by commercial lenders on a recourse basis. If a funded claim is unsuccessful a funder cannot recoup the capital it has deployed in pursuit of the case and the claimant is not liable to pay anything to the funder. This contrasts with a consumer loan, which will always be repayable and the consumer borrower is liable to pay all outstanding amounts (which could include principal, interest and fees) regardless of any contingent circumstances. As a matter of policy, a consumer who borrows a consumer loan benefits from statutory protections such as the Consumer Credit Act 1974. This statutory protection exists because there is a clear risk of harm since the consumer could suffer a significant financial loss. In contrast, litigation funding agreements with consumers are structured such that any payment due to the funder is contingent on a successful outcome of the claim and thus the consumer is not at risk of direct financial loss (ie if it loses the case, no payment is due to the funder and thus the consumer is not out of pocket). If the funded claim is not successful, the funder loses its capital and has no recourse against the consumer.

6.1.2 *Indirect exposure to litigation funders*

Where consumers are exposed indirectly to third party funding through portfolio funding of law firms, adequate consumer protection should be achieved through effective regulation of the provision of legal services. Whilst the regulation of the funding of law firms *per se* is unnecessary (see paragraph 5.8 above) it should be the case that the SRA takes a careful interest in the capitalisation and financial stability of law firms which act for consumers to guard against undue harm or prejudice.[17]

6.2 **Further protections required for consumers?**

If a consumer chooses to accept litigation funding, notwithstanding the protections described at paragraph 6.1 above certain risks remain:

6.2.1 *Capital adequacy considerations – the risk that a funder might be unable to meet its funding obligations such that the claim can no longer proceed unless the consumer can find other sources of funding*

[16] In our direct experience we have not encountered a consumer who lacks for legal representation when considering proposed funding arrangements, regardless of the identity of the funder.

[17] We have acted in relation to several law firm collapses and are aware of details which relate to a number of others. In our experience the law firms in question suffered from poor management and weak financial disciplines but were not the victims of unduly harsh financing terms provided by the market. It is notable that the distressed law firms had in some instances sourced capital from a wide range of sources on a wide range of terms, and that “litigation funders” were not heavily exposed to such firms.

6.2.1.1 We are not aware of any consumer case directly funded by a funder being discontinued as a result of a lack of capital on the part of the funder.

6.2.1.2 The ALF Code of Conduct (paragraph 9.4) requires members to maintain a minimum amount of £5,000,000 of capital and the funder must also maintain access to adequate financial resources to meet its funding obligations. For all funders (whether members of ALF or not), there are significant reputational repercussions if funded parties and their advisers become aware that a funder has been unable to meet its funding obligations in funded cases, and a funder is open to challenge if it fails to perform its contractual obligations.

6.2.1.3 We are aware of some funded parties seeking assurances as to a non-ALF funder's capital adequacy, and concerns are typically allayed by the provision of relevant financial information.

6.2.1.4 Collective proceedings brought in the CAT explicitly address the issue of whether adequate funding arrangements are in place in support of consumer claimants. The Competition Act 2015 (s. 47B), requires that an applicant seeking to bring a collective action must be granted a collective proceedings order (CPO) by the CAT, and as part of this process the CAT will decide whether to authorise the applicant as the "proposed class representative" of the group of claimants. An important part of that process involves the CAT's assessment of the applicant's ability to demonstrate adequate funding arrangements to meet the costs of the litigation and any adverse costs ordered against it. As part of this assessment, the CAT has directly endorsed the capital adequacy requirements of the ALF Code of Conduct in a claim funded by a non-ALF member and was prepared to grant the CPO on the condition that the funder agreed to voluntarily comply with those requirements[18]. Accordingly, there is a recognised and judicially approved capital adequacy framework in place and the possibility of harm being done to consumer claimants due to funders' capital inadequacy is already being considered and controlled by the supervisory jurisdiction of the CAT.

6.2.1.5 In our direct experience capital adequacy concerns have not materialised in the direct funding market. Consumers benefit from the capital adequacy requirements of the ALF Code of Conduct (in the case of ALF members) and the protections of the courts (including the CAT). A funder is disincentivised by market forces to renege on its funding commitments.

6.2.1.6 If the Consultation concludes that consumers require greater protection against a lack of capital it would be logical to consider whether membership of ALF (or the TPLF Regulator if preferred) should be mandatory for funders of consumer claims, resulting in the ALF Code (or a TPLF Code if preferred) thus applying to such funders.

6.2.1.7 If so, consideration would need to be given to the nature and powers of ALF (or the TPLF Regulator), and how its oversight (and enforcement) would operate in practice.

[18] BSV Claims Limited v Bittylicious Limited and others [2024] CAT [48]

6.2.2 *Economic outcomes – the risk that the funder's economic return, determined in accordance with the funding agreement, excessively reduces the economic return for the consumer following a successful claim*

6.2.2.1 Any return to the funder is conditional on the success of the claim, and the funder loses its capital in the event that a case is lost. Litigation funders are investment houses established with the aim of making a return on the capital that they invest, and they do not invest on a not-for-profit basis. Accordingly, a funding agreement must reflect the risk assumed by the funder. In our direct experience claimants consider it fair and proportionate that the funder should be well rewarded when a case successfully concludes since a case cannot be brought without the funder taking binary risk on the outcome. Claimants are not obliged to accept the terms that a funder presents and are professionally advised during the negotiation process. A typical claimant will seek offers from a number of potential funders and will optimise terms in the process. The market to provide funding is competitive, and numerous brokers and advisers operate in the market who specialise in seeking competitive terms for clients.

6.2.2.2 Notwithstanding the existence of a mature market which operates to protect consumers by optimising funding terms as a function of competition among funders, if the Consultation concludes that consumers require greater protection against excessive funder returns it would be logical to consider whether the limitation of funder economic rewards would be appropriate to consumer cases.

6.2.2.3 If so, proportionality might be ensured by linking funder returns to a given percentage of case proceeds which, by definition, would be proportionate to the whole. Many different approaches could be taken, and this paper does not seek to address what the "correct" percentage might be, not least as a funder's return must be proportionate to its risk and in our experience risk is bespoke to each case and is specific to the facts. However, any introduction of a percentage fee cap would only work if the uncertainty caused by PACCAR is remedied.

6.2.2.4 We note that an over-prescriptive approach to funder returns is likely to serve only to limit the number of funders willing to provide funding to consumers and would thus be to the detriment of justice. Careful thought is needed before any "cap" is applied to returns since regulation at that level of specificity might in fact have the opposite outcome to that intended.

6.2.2.5 For the avoidance of doubt, it does not seem to us that restrictions on funding returns are appropriate in the non-consumer context, where freedom of contract must be permitted.

6.2.3 *Suitably qualified funders*

6.2.3.1 To the extent that the Consultation concludes that consumers require greater protection than that afforded at present, and that a funder of consumer claims should (for example) be a member of a suitably empowered ALF or TPLF Regulator, it would be logical to consider whether those individuals acting as funders (i.e. the officers and staff of funders) should be qualified or

licenced in some way. In addition to a funder being a member of the regulatory body, it could be that a consumer might be better protected by a relevant individual acting for the funder being "ALF qualified" (or similar) to ensure that a suitable level of experience and expertise is applied to consumer claims.

6.2.3.2 For the avoidance of doubt, it does not seem to us that such strictures are necessary in the non-consumer context, where freedom of contract must be permitted.

6.3 **If regulation is preferred, how might it operate?**

6.3.1 We do not repeat the various points made above, but if the Consultation concludes that consumers require greater protection than afforded to them at present and seeks to provide it via regulation, a workable model might include:

6.3.1.1 litigation funding provided to a consumer (i.e. a non-commercial party, which logically would be defined as a person who would fall within the ambit of the CCA if a loan was to be made) would fall within scope (a "**Consumer Funding**");

6.3.1.2 a provider of Consumer Funding must be a member of ALF (or the TPLF Regulator if preferred);

6.3.1.3 the officer or employee of such funder leading on the transaction in question must be ALF qualified or licenced (or the equivalent, meaning that certain experience and expertise must be demonstrated);

6.3.1.4 the ALF Code (or the TPLF Code if preferred) as it relates to Consumer Funding (only) might be strengthened to include suitable provisions as to capital adequacy, funder returns and other matters that the Consultation deems necessary. By way of example, funders might be obliged to provide to claimants worked examples of costs and net funder returns applicable to a number of different case outcome scenarios to ensure clarity for all parties, in a manner similar to that required when a regulated financial institution offers a mortgage loan or other financial accommodation within the ambit of the CCA;

6.3.1.5 ALF (or the TPLF Regulator if preferred) might be given suitable powers to police the ALF Code (or equivalent), to investigate breaches and to take enforcement action where necessary; and

6.3.1.6 ALF (or the TPLF Regulator if preferred) might be funded by way of annual membership subscriptions.

6.3.2 In addition:

6.3.2.1 courts might reserve the right to investigate the suitability and efficacy of funding arrangements (noting that the CAT already does so);

6.3.2.2 the ALF Code (or equivalent) could be reviewed and improved insofar as it applies to commercial (non-consumer) parties (including as to the provision of illustrative financial outcomes, as described in section 6.3.1.4 above); and

6.3.2.3 the SRA might accept responsibility for overseeing the funding arrangements of law firms which act for consumers and developing new rules specifically for that situation.

If you would like to discuss any part of our response, please do contact us.

Malcolm Hitching, Partner

[redacted]

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[redacted]

Macfarlanes LLP

31 January 2025