BCLP. Client Intelligent

Insights

AFTER PACCAR: A NEW APPROACH TO FUNDING COLLECTIVE PROCEEDINGS IN THE CAT

Dec 06, 2023

SUMMARY

In the first certification decision since the UK Supreme Court's judgment in *PACCAR*, the CAT has held that a litigation funding agreement (LFA) revised in light of *PACCAR* was not a damages-based agreement (DBA) and it was therefore enforceable for the purposes of opt-out collective proceedings in the CAT. In its decision, the CAT found that it was permissible to include a provision in the LFA whereby the funder would be paid a percentage of awarded damages "*only to the extent enforceable and permitted by applicable law*".

In this blog, we consider the implications for litigation funding and collective proceedings in the CAT, both as a result of this decision and the government's proposed amendment (Clause 126) to the Digital Markets, Competition and Consumers Bill.

BACKGROUND

Before the summer of this year, litigation funders assumed that LFAs under which their return is calculated as a percentage of awarded damages would not count as regulated DBAs, as long as the funder did not provide "*advocacy services, litigation services or claims management services*" (see s.588AA(3) of the Courts and Legal Services Act 1990 (CLSA)). This assumption was shattered in the landmark decision of *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)* [2023] UKSC 28, in which the majority of the Supreme Court held that such LFAs are in fact DBAs. Such LFAs must therefore comply with the Damages-Based Agreements Regulations 2013, failing which they are unenforceable.

The *PACCAR* decision prompted wholesale re-negotiations of LFAs to ensure their enforceability. This included LFAs for opt-out collective proceedings in the CAT, given that, under s.47C(8) of the Competition Act 1998, DBAs are unenforceable if they relate to opt-out collective proceedings.

The decision discussed here, *Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd* [2023] CAT 73, is the first time the CAT has considered the compliance of an LFA revised in light of *PACCAR*. The question was whether it remained an unenforceable DBA, or whether some creative language in the LFA preserved the potential for a damages-based pay-out, whilst remaining complaint with the general prohibition on DBAs in collective actions under the CAT Rules.

THE CLAIM & THE REVISED LFA

In this case, the Proposed Class Representative (PCR) brought a c.£5 billion claim on behalf of a class of 8.9 million UK users of Sony PlayStation videogame consoles against three Sony Entertainment entities (Sony). The PCR alleges that Sony abused its dominant market position in the digital gaming industry by compelling publishers and developers to sell their gaming software through the PlayStation Store and charging a 30% commission on these sales.

It was common ground between the parties that the original LFA was an unenforceable DBA due to *PACCAR*. It was amended so that the funder would be paid the greater of: (i) a multiple of its total funding obligation; or (ii) a percentage of the total damages and costs recovered by the PCR "*only to the extent enforceable and permitted by appliable law*". The revised LFA also included a severance clause, which specified that the damages-based fee provision could be severed, if required, to ensure that the LFA was enforceable.

THE CAT'S DECISION

The CAT held that the conditional wording was permissible and it did not render the agreement a DBA under s.58AA CLSA. The wording expressly recognised the current position in law, as "*the use of a percentage [of damages] to calculate the Funder's Fee [would] not be employed unless it is made legally enforceable by a change in the law*". The CAT found this "*an entirely proper position to take*".

The CAT also held that, in any event, the severance clause expressly enabled the damages-based provision to be removed if this brought the agreement within the statutory definition of a DBA without causing "*a major change in the overall effect of the LFA*". Here, the CAT referred to the test for effective severance clauses.

IMPLICATIONS: OPT-OUT COLLECTIVE PROCEEDINGS

The significance of the CAT's decision is apparent when considered alongside the government's proposed amendment to the Digital Markets, Competition and Consumers Bill which it introduced, as Lord Bellamy explained, "*to mitigate the impact of [PACCAR] on [LFAs] for opt-out collective proceedings in the [CAT]*".

If passed in its current form, the Bill would effectively reverse *PACCAR* for opt-out collective proceedings in the CAT, such that LFAs under which funders earn damages-based returns would not be DBAs. The provision would also have retrospective effect; reinstating the enforceability of LFAs agreed before the Bill is made law. The Bill recently went through its second reading in the House of Lords on 5 December 2023.

Pending this, funders will be keen to incorporate similar clauses into their LFAs so they can immediately revert to damages-based returns once permissible. We therefore expect these clauses to become market standard for LFAs, particularly those backing opt-out collective proceedings in the CAT. This will trigger a second wave of re-negotiations for existing LFAs, which were revisited in the aftermath of *PACCAR*. Furthermore, following *PACCAR*, we have seen a dramatic increase in the prices demanded by funders where their returns are being calculated by reference to multiples of sums invested in pursuing the litigation, to offset their inability to seek damages-based returns (from 3x to as high as 15x multiples). If the Bill is enacted, it will be interesting to see whether the previous market rates return, or whether the higher multiples are here to stay. This will likely be informed by the CAT's willingness to certify collective claims with expensive multiples in the period between now and the Bill becoming law.

IMPLICATIONS: OTHER CLAIMS

The government also confirmed that, in tandem with the above amendment to the Bill, it is "*assessing the impact of [PACCAR] and considering options for non-CAT proceedings*". It remains to be seen whether such a carve-out will be made for LFAs supporting claims in the High Court. During the second reading of the Bill in the House of Lords on 5 December 2023, Lord Sandhurst confirmed that he had provided the government with a new, wider version of Clause 126, which seeks to reinstate the position before *PACCAR* for all claims, including those in the High Court and opt-in claims in the CAT. He argued that this is necessary to ensure that prospective litigants can obtain the requisite funding to bring (what would otherwise be too small) claims against larger entities, even if these claims do not take the form of opt-out collective proceedings in the CAT. It will be interesting to see whether Parliament approves an expanded version of the Clause. In the meantime, *PACCAR* will continue to apply for LFAs supporting High Court litigation, and they will have to comply with the regulations governing DBAs or be structured such that the funders' remuneration is a multiple of sums invested, rather than a percentage of damages recovered.

If Lord Sandhurst's proposed amendment is not approved by Parliament, we consider this will have a significant impact on claimants attempting to bring, and funders' willingness to fund, opt-in collective claims in the CAT. The Court of Appeal has confirmed that, for certification purposes, there is no presumption in favour of opt-in or opt-out actions in the CAT and opt-out claims allow claimants and funders to capture most or all claimants for a given claim, without the time consuming and expensive book-building required for an opt-in claim. If the lifting of restrictions on

funding is limited to opt-out claims, this will be yet another reason why opt-in claims look increasingly unattractive by comparison.

RELATED PRACTICE AREAS

- Antitrust
- Business & Commercial Disputes
- Class Actions & Mass Torts
- Litigation & Dispute Resolution

MEET THE TEAM

Andrew Leitch

London

andrew.leitch@bclplaw.com
+44 (0) 20 3400 4023

Anoma Rekhi

London

anoma.rekhi@bclplaw.com
+44 (0) 20 3400 4051