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UNPACKING *PACCAR*: STATUTORY INTERPRETATION AND LITIGATION FUNDING

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ABSTRACT. *In the most important funding decision in 20 years, the UK Supreme Court has declared in* R. (PACCAR Inc. and others) v Competition Appeal Tribunal and others *[2023] UKSC 28, [2023] 1 W.L.R. 2594 that, as a matter of statutory interpretation, a third-party funder's litigation funding agreement (LFA) is a damages-based agreement (DBA) because third-party funders are offering "claims management services". This decision, which overturned both the earlier Divisional Court and the Competition Appeal Tribunal decisions, and long-held industry and judicial understanding, has had an immediate impact upon UK litigation. Many LFAs will require immediate re-negotiation, given their non-compliance with the DBA legislation; but for some, the ramifications are much more serious. This article traces the legislation, soft law and law reform activity which preceded this momentous event; it suggests that a key principle of statutory interpretation which governed the outcome might arguably be re-evaluated in future case law; it discusses the possibility of legislative reversal; and it predicts the ramifications of the PACCAR decision upon (especially consumer) litigation unless reversed.*

KEYWORDS: *third-party funding*; *litigation funding agreements*; *damages-based agreements*; *statutory interpretation*; *champerty*

I. INTRODUCTION

It is rare that one case could have the potential to derail a class action regime, disrupt commercial litigation across the UK, and damage the international brand of Legal UK plc – but the recent decision of the UK Supreme Court (UKSC) in *R. (PACCAR Inc. and others) v Competition Appeal Tribunal and*

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others ("*PACCAR*")[1] has the potential to achieve all three feats. By majority,[2] the UKSC has held that a third-party funder's litigation funding agreement (LFA) entered into with a funded claimant, and where the success fee paid to the funder is determined by reference to the amount of damages recovered in the funded litigation, is a damages-based agreement (DBA) within the meaning of that term in section 58AA of the Courts and Legal Services Act 1990 (CLSA 1990).[3]

DBAs have an array of legislatively-prescribed pre-requisites by virtue of section 58AA and its subordinate legislation, the Damages-Based Agreements Regulations 2013[4] (collectively, the "DBA legislation"). These include caps on the success fee (legislatively called the "payment"); those "items" which must be included within (or netted off against) the success fee; and to what sums the funder may be entitled over and above the success fee. The requirements are onerous and complicated[5] and, of the DBA Regulations, it has been judicially said that "nobody can pretend that [they] represent the draftsman's finest hour".[6] Most LFAs entered into up and down the country have not complied with the requirements of the DBA legislation, and nor did the LFAs at issue in *PACCAR* (that much was acknowledged by the litigants[7]), because funders and their funded clients did not realise that they had to so comply. From Courts of Appeal to law reform bodies, from Members of Parliament to litigants and their funders, stakeholders within the litigation sphere in the UK had proceeded for years on the basis that LFAs were not DBAs. That position has now changed in the

[1] [2023] UKSC 28, [2023] 1 W.L.R. 2594 (judgment delivered 26 July 2023). The appeal was heard on 16 February 2023.

[2] The majority consisted of Lord Reed, Lord Sales, Lord Leggatt and Lord Stephens; Lady Rose dissented.

[3] The appeal issue was narrowly specified: "Case Details: R (on the Application of PACCAR Inc and Others) (Appellants) v Competition Appeal Tribunal and Others (Respondents)", available at https://www.supremecourt.uk/cases/uksc-2021-0078.html (last accessed 4 February 2024). The author applied for permission to intervene as "a person … seeking to make submissions in the public interest" pursuant to Rule 26(1)(a) of the Supreme Court Rules 2009, SI 2009/1603, which permission was refused on 13 December 2022. In accordance with usual practice, no reasons were given.

[4] SI 2013/609.

[5] The author examined the complexities of this legislation in detail, as chair and principal author of the Civil Justice Council Working Party's report: Civil Justice Working Party, "The Damages-Based Agreements Reform Project: Drafting and Policy Issues" (2015), available at https://www.judiciary.uk/wp-content/uploads/2015/09/dba-reform-project-cjc-aug-2015.pdf (last accessed 13 January 2024). The author subsequently revisited the complexities with a view to reform, as government-appointed reviewer (with Nicholas Bacon K.C.) of the DBA Regulations 2013, leading to the report and redrafting exercise: R. Mulheron and N. Bacon, "The 2019 DBA Reform Project: Explanatory Memorandum" (2019), available at: https://www.qmul.ac.uk/law/media/law/docs/research/Doc-3—Explanatory-Memorandum-(13-Oct-2019).pdf (last accessed 13 January 2024).

[6] *Lexlaw Ltd. v Zuberi (Bar Council intervening)* [2021] EWCA Civ 16, [2021] 1 W.L.R. 2729, at [74] (Coulson L.J.).

[7] In *PACCAR*, the funders' remuneration was calculated in both actions by reference to a share of the damages ultimately recovered in the litigation, and each LFA would be unenforceable if it truly fell within the definition of a DBA in section 58AA(3) of the CLSA 1990: *Paccar Inc. and others v Road Haulage Association Ltd. and another (Association of Litigation Funders of England & Wales Intervening); R. (Paccar Inc. and others) v Competition Appeal Tribunal (Association of Litigation Funders of England & Wales intervening)* [2021] EWCA Civ 299, [2021] 1 W.L.R. 3648, at [11], [19] (Henderson L.J.) (affd. [2023] UKSC 28, at [29] (Lord Sales)).

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light of *PACCAR*. Where LFAs that are based upon a percentage-of-recovery success fee do not comply with the DBA legislative requirements, they are now unenforceable funding agreements.

In the face of such an outcome, the ramifications were always likely to be both profound and immediate. Within the first 48 hours of the judgment, one funder received two requests from their clients to "retrade" their LFAs – one to challenge the right of that funder to retain the success fee paid by the client in a matter that had concluded; and the other involved a client seeking to renegotiate the success fee downwards in a "live" ongoing matter.[8] Quite apart from requests to renegotiate the contractual terms of the funding agreement, it is not hard to envisage other more potent outcomes. In accordance with an analogy used in *Lexlaw Ltd. v Zuberi*,[9] the legislative provisions governing DBAs are "statutory islands" of safety – and if non-compliance with section 58AA means that the islands of safety are not reached, then the funding agreement falls within the surrounding choppy champertous seas under which any such funding agreement "is to be treated as contrary to public policy or otherwise illegal".[10] As examined elsewhere,[11] there are many and various potential ramifications of a champertous agreement. These include restitutionary claims (by either the funded claimant or the funder) alleging either, or both, a failure of basis (consideration) or monies paid under a mistake of law; widespread applications for summary judgment or strike-out by defendants to actions which are being funded via an unenforceable LFA; and requests for non-party costs orders against funders. In that context alone, it is not difficult to imagine a litigious landscape rife with disputes in the wake of *PACCAR*. It could all get very messy, very quickly.

More pertinent to the *PACCAR* appeal, that litigation came up to the UKSC via the vehicle of the collective proceedings regime for competition law grievances, which took effect on 1 October 2015,[12] and over which the Competition Appeal Tribunal (CAT) has exclusive jurisdiction. It is for that regime that the decision has *particularly* significant consequences. This is because of the prohibition contained in section 47C(8) of the Competition Act 1998 (CA 1998) which absolutely bars the use of DBAs for opt-out collective proceedings. The litigation in the CAT which gave rise to this appeal were two sets of road haulage collective proceedings in *UK Trucks Claim Ltd. v Fiat Chrysler Automobiles NV*, which followed on from a decision of the European

[8] These details were orally communicated to the author by a funder, whose identity must remain anonymous.
[9] [2021] EWCA Civ 16, at [26] (Lewison L.J.).
[10] Criminal Law Act 1967, s. 14(2).
[11] See R. Mulheron, *The Modern Doctrines of Champerty and Maintenance* (Oxford 2023), ch. 4.
[12] The new regime was contained in Schedule 8 to the Consumer Rights Act 2015. The principal provisions of the regime are contained in Chapter IV of the Competition Act 1998. A new set of rules ("Collective Proceedings and Collective Settlements") was inserted in the Competition Appeal Tribunal Rules 2015, SI 2015/1648 ("CAT Rules 2015"), rr. 73–98.

Commission dated 19 July 2016. The Commission found that five major European truck manufacturing groups, including PACCAR, infringed competition law by exchanging information on their future gross prices over a 14-year period between 1997–2011.[13] One of the follow-on collective proceedings was being pursued on either an opt-out or an opt-in basis (depending upon the CAT's decision at certification) by the entity, UK Trucks Claims Ltd. ("the UKTC action"), and, in the other, the collective action was being pursued solely as an opt-in action by the Road Haulage Association ("the RHA action"). Both UKTC and the RHA, as representative claimants of their respective actions, had entered into LFAs with different litigation funders.

Not only did the *PACCAR* decision render the LFA between UKTC and its funder, Yarcombe Ltd., unenforceable in respect of UKTC's opt-out claim, but *all* other opt-out class actions which have been commenced under the regime, and which have all similarly depended upon third-party funding to date, are (unless renegotiated) at risk of having been funded by unenforceable funding agreements. The future viability of the competition law collective proceedings regime itself is under attack because, in reality, there is no other viable source of funding these actions in the UK other than third-party funding. As Henderson L.J. noted in the *PACCAR* Divisional Court,[14] in the event that percentage-of-recovery LFAs were DBAs, then LFAs which were at risk of unenforceability could at least be renegotiated (if the parties were willing to do so) in order to ensure that they complied with the relevant DBA legislation. However, that would not be an option for LFAs that were supporting opt-out class actions because of section 47C(8), which bars their use in opt-out proceedings altogether.[15] Absent any legislative reversal of the *PACCAR* decision, it is distinctly possible that the regime could wither (or at least struggle) on the vine.

The attempt to show that LFAs are DBAs was not necessarily an idea from "left field". It had been discussed as a (remote) possibility for more than a decade. Indeed, in 2014, this journal published an article in which it was argued that, for reasons of statutory interpretation, LFAs were not DBAs.[16] Subsequently, in two law reform projects, recommendations were made to government to seek to put paid to any such possibility by legislative amendment.[17] Those recommendations were not followed. It was not a particular surprise, then, that the point was put to the test by

[13] Noted in *UK Trucks Claim Ltd. v Fiat Chrysler Automobiles NV* [2019] CAT 26, at [1] (Roth J.).
[14] *PACCAR v Road Haulage Association* [2021] EWCA Civ 299, at [2].
[15] Ibid., at [19] (Henderson L.J.).
[16] R. Mulheron, "England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments" [2014] C.L.J. 570, 590–96.
[17] Civil Justice Council, "Damages-Based Agreements Reform Project", 33–35; Mulheron and Bacon, "Explanatory Memorandum", 6, Regulation 1(4)(c). The redrafted DBA Regulations 2019 were presented to the Ministry of Justice in October 2019, but were not taken forward due to resourcing and other issues at the time.

the defendants in the high-stakes litigation that collective proceedings entails.

In the *PACCAR* litigation, the lower courts which heard the point – the Divisional Court on 5 March 2021[18] and, earlier, the CAT on 28 October 2019[19] – held that LFAs between a funder and its funded client, and where the success fee was determined by reference to the amount of damages recovered, were not DBAs within the meaning of that term in section 58AA of the CLSA 1990. In the UKSC itself, Lady Rose delivered a lengthy and powerful dissenting judgment in which she upheld the principal reasoning of those lower courts.[20] The majority of the Supreme Court, however, saw the answer differently. This was an issue of statutory interpretation upon which eminent judicial opinion could, and did, differ. As a result, *PACCAR* is the most important funding decision in this jurisdiction in 20 years.[21] Its outcome will have huge ramifications for litigation of all sorts and for those who are in the business of funding it.[22]

The purpose of this article is multifarious. First, *PACCAR* represents a cautionary tale about the dangers of enacting layers of legislation, soft law, and reform activity in any field of law (in this case, funding), without legislative drafters taking careful steps to examine whether later enactments are truly consistent with the earlier statutes in the same area. That tale bears setting out in Section II, for it has potential lessons for legislative drafting in general. *PACCAR* will always stand as an historical testament to the dangers of piece-meal legislative drafting and disregarded law reform recommendations. Second, in any task of statutory interpretation, legislation should be judicially interpreted so as to avoid an absurd result. This presumption against adversity was duly considered, and weighed, by the UKSC in *PACCAR*.[23] However, it is argued (in Section III) that, regarding the very 2015 statute under which the *PACCAR* litigation arose, Hansard discussion demonstrates that the result in *PACCAR* was unintended by some of those who considered and enacted the collective proceedings regime. The decision raises a question as to whether one particular principle which governs the exercise of statutory interpretation should be reconsidered for future cases, at least for the unusual scenario which unfolded in this case. Section IV then

[18] *PACCAR v Road Haulage Association* [2021] EWCA Civ 299 (consisting of Lord Justice Henderson, Lord Justice Singh and Lady Justice Carr). The Court of Appeal held that it had no jurisdiction to hear an appeal from the CAT on the statutory interpretation point and hence constituted itself as a Divisional Court of the Queen's Bench Division for the purposes of judicially reviewing the CAT's decision.

[19] *UK Trucks Claim v Fiat Chrysler Automobiles* [2019] CAT 26.

[20] *R. (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28, at [101]–[255].

[21] Certainly the most important since *Arkin v Borchard Lines Ltd. and Others (Zim Israel Navigation Co. Ltd. and Others, Part 20 Defendants) (Nos. 2 and 3)* [2005] EWCA Civ 655, [2005] 1 W.L.R. 3055.

[22] *PACCAR v Road Haulage Association* [2021] EWCA Civ 299, at [1] (Henderson L.J.).

[23] See e.g. *R. (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28, at [43] (Lord Sales) and the authorities cited therein.

considers the possibility of legislatively reversing *PACCAR*, and how precisely that might occur. Section V concludes.

II. The Jigsaw of Legislative Pieces

The *PACCAR* appeal arose precisely because the legislation that governs funding in England and Wales – whether it be third-party funding, DBA funding or claims management funding – is the product of a piece-meal jigsaw puzzle which had been more than three decades in the making. It became a fairly haphazard legislative landscape over that time, which this appeal threw into sharp relief.

A. The 10 Pieces of Legislative, "Soft Law" and Law Reform Activity

To truly understand the messy conundrum which the *PACCAR* appeal involved, it is necessary to explain the relevant provisions, enactments and soft law instruments – the 10 pieces of the jigsaw – in chronological order, layer upon layer.

The *first* piece is section 58B of the CLSA 1990. In July 1999, Parliament enacted this section to enable the Secretary of State to regulate funders who entered into LFAs, and to prescribe the necessary content of an LFA.[24] However, the section was never brought into force. It was enacted as being prospective only, and that remains the case to the present day – enacted, but not in force. Section 58B(2) defined an LFA in these terms:

> (2) ... a litigation funding agreement is an agreement under which –
>
> (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.

It is immediately apparent that nowhere in this definition does the term, "claims management services", appear. Rather, the funder agreed to fund the provision of advocacy or litigation services provided by someone else. Those services are defined in the CLSA 1990[25] to cover those who exercise a right of audience before a court or tribunal, or who have a right to conduct litigation, respectively. Funders are not authorised or regulated to provide those services themselves; they fund those that do. Had that been the end of it, it is difficult to see how the *PACCAR* appeal could have arisen. But that is decidedly not where the legislative jigsaw ended! What happened next was really at the kernel of the *PACCAR* appeal.

The *second* piece concerned the Compensation Act 2006, which was enacted in December 2006. Parliament decided to regulate those who

[24] Inserted by the Access to Justice Act 1999 and passed into legislation on 27 July 1999.
[25] Courts and Legal Services Act 1990, s. 119(1).

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provided claims management services. At the time, widespread concern about the activities of claims management companies (CMCs) existed. There was considerable negative publicity and widespread disquiet about CMC practices, from aggressive marketing techniques to dropping claims where they were not financially lucrative.[26] Hence, to regulate the sector, Parliament enacted the Compensation Act 2006, and Part 2 of that Act related to "claims management services". That phrase was defined in sections 4(2)(b) and 4(3) as follows:

> (2) In this Part –
>
> . . .
>
> (b) "claims management services" means advice or other services in relation to the making of a claim,
>
> . . .
>
> (3) For the purposes of this section –
>
> (a) a reference to the provision of services includes, in particular, a reference to –
>
> (i) the provision of financial services or assistance,
>
> (ii) the provision of services by way of or in relation to legal representation,
>
> (iii) referring or introducing one person to another, and
>
> (iv) making inquiries, and
>
> (b) a person does not provide claims management services by reason only of giving, or preparing to give, evidence (whether or not expert evidence).

Sections 4(2)(b) and 4(3) were central to the *PACCAR* appeal because the defendants submitted that third-party funders provide "claims management services" (as defined) and that they provide "financial services or assistance" at the very least. If that was true, then it had to follow that third-party funders had *always* provided claims management services (as defined) since the enactment of these provisions in 2006. In reality, third-party funders never sought, nor were required to seek, regulation under the Compensation Act 2006, courtesy of an order made by the Secretary of State. From April 2007, regulation of CMCs was provided by the Claims Management Regulation Unit (CMRU), an in-house department of the Ministry of Justice (MoJ). The Compensation (Claims Management Services) Regulations 2006[27] were enacted under the 2006 Act to provide a framework for that governance. Regulation by the

[26] C. Brady, *Independent Review of Claims Management Regulation* (London 2016), at [2.12] (discussed further in Mulheron, *Modern Doctrines*, 33–34).
[27] SI 2006/3322.

CMRU covered six claims sectors in which CMCs could operate. Those CMCs were required to be licensed;[28] and a set of Rules stipulated the parameters of permitted and non-permitted conduct.[29] Third-party funders were not so regulated. Funders and regulated CMCs truly travelled different paths in practice, following the enactment of the Compensation Act 2006.

As the *third* piece of the jigsaw, section 58AA of the CLSA 1990 was enacted in November 2009. Parliament decided to permit and to regulate – explicitly – percentage contingency fees, a.k.a. "damages-based agreements" (DBAs), via this provision.[30] In reality, DBAs were *already* lawful (and used) for non-contentious business up to that point. It was the Law Society's position back then that a tribunal was not a court; that proceedings before tribunals were (generally, but with some exceptions) non-contentious; and that a DBA for non-contentious business was lawful.[31] Hence, DBAs had operated in an entirely unregulated way prior to 2009, but in 2009, section 58AA specifically regulated the use of DBAs in *employment* disputes, viz. re "a matter that is, or could become, the subject of proceedings before an employment tribunal".[32] Subordinate legislation was duly enacted under section 58AA,[33] which also only related to DBAs used in employment matters. The most important provision in the 2009 version of section 58AA was the definition of a DBA in section 58AA(3)(a) – which continues to this day:

> (a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that –
>
> (i) the recipient is to make a payment to the person providing the services 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.[34]

Furthermore, in section 58AA(7), the term, "claims management services", was defined as follows: "'claims management services' has the

[28] Ibid., at Regulation 8(1).
[29] Ministry of Justice, "Conduct Management Services Regulation: Conduct of Authorised Persons Rules 2014" (Revised 2018), available at https://assets.publishing.service.gov.uk/media/5a7d9ac340f0b60e77c70093/CMR_Conduct_of_Authorised_Persons_Rules_Oct14a.pdf (last accessed 13 January 2024).
[30] Inserted by the Coroners and Justice Act 2009, ss. 154(2), 182(1)(e).
[31] *Tel-Ka Talk Ltd. v Revenue and Customs Commissioners (Law Society intervening)* [2010] EWHC 90175 (Costs), [2011] S.T.C. 497, at [21] (Hurst J.).
[32] Courts and Legal Services Act 1990, s. 58AA(3)(b). Employment disputes were considered to be a form of non-contentious business (ironically, given their often bitter nature).
[33] Viz. the DBA Regulations 2010.
[34] This amendment took effect on 12 November 2009: see "Courts and Legal Services Act 1990", available at https://www.legislation.gov.uk/ukpga/1990/41/section/58AA/2009-11-12 (last accessed 13 January 2024).

same meaning as in Part 2 of the Compensation Act 2006 (see section 4(2) of that Act)."

This enactment in section 58AA is the *first* manifestation of any possible statutory linkage between third-party funders, claims managements services and DBAs. If third-party funders provided claims management services as defined earlier in the Compensation Act 2006 (argued the defendants in *PACCAR*), then those funders were now caught by the DBA definition. However, to reiterate, this version of section 58AA *only* governed DBAs with respect to *employment* matters – and not with respect to the vast amount of commercial litigation which funders typically funded back then (and continue to fund). That situation was to change, prompted by the next development.

As the *fourth* piece of the jigsaw, in December 2009, Sir Rupert Jackson concluded his wide-ranging review of English civil procedure. He recommended that both solicitors and counsel be permitted to enter into DBAs with their clients for *contentious* business, and that the existing DBA legislation should be amended to give effect to that widened application of contingency fees.[35] In a separate chapter, Sir Rupert recommended that a Code of Conduct be introduced for third-party funders, and that "soft regulation" of the industry should be sufficient, "[p]rovided that a satisfactory code is established and that all funders subscribe to that code".[36] In a subsequent lecture, Sir Rupert stated: "I anticipate that solicitors will be advising their clients only to enter funding agreements with litigation funders who sign up to the Code and comply with its provisions."[37] Hence, it is plain that the chief architect of modern English civil procedure never envisaged that the funding agreements entered into by funders (LFAs) were, in any way, encompassed within the DBA stream of funding. Each was covered in separate chapters, and each was the subject of different recommendations – DBAs via hard-regulation (i.e. by legislation), and LFAs via soft regulation (i.e. by Code). These recommendations would have been nonsensical, had Sir Rupert envisaged LFAs *to be* DBAs. This was emphasised by what happened next.

The *fifth* piece of the jigsaw was the promulgation of the Code of Conduct for Litigation Funders in November 2011, in order to implement Sir Rupert's recommendation for the "soft regulation" of third-party funding.[38] That

[35] Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (London 2010), ch. 3, at [3.3], ch. 12, 133.

[36] Ibid., at [2.12].

[37] Sir Rupert Jackson, "Third Party Funding or Litigation Funding: Sixth Lecture in the Civil Litigation Costs Review Implementation Programme" (The Royal Courts of Justice, 2011), [4.1], available at https://www.bailii.org/uk/other/speeches/2011/G2XL7.html (last accessed 13 January 2024).

[38] The current version, as of January 2018, is "Code of Conduct for Litigation Funders", available at https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf (last accessed 13 January 2024).

Code was developed with the assistance of the Civil Justice Council (CJC).[39] The regulation of third-party funding has, ever since, been undertaken principally via two measures: by compliance with the Code; and by the establishment of the Association of Litigation Funders (ALF) by which to regulate those funders who voluntarily join the ALF and who are thereby deemed to have adopted that Code. As a system of self-regulation, only those funders who choose to join the ALF are bound by the Code (the terms of which are amended from time to time, consistently with the objective of, inter alia, "promot[ing] best practice in litigation funding")[40]. In reality, this development would never have been contemplated, nor implemented, had anyone – in the funding industry, the legal profession, the CJC or among those judiciary who have since judicially referenced the Code – considered that funders were offering "claims management services". Otherwise, the appropriate avenue for regulating funders would have been via sections 4(2)(b) and 4(3) of the Compensation Act 2006, for that avenue was *already* enacted.

What followed then, as the *sixth* piece of the jigsaw, mattered significantly to the *PACCAR* appeal because the scope of DBAs was considerably widened in January 2013, beyond the sphere of employment disputes only. As recommended earlier by Sir Rupert Jackson, that widening was made lawful[41] by a drafting change to section 58AA(1) (simply be deleting "which relates to an employment matter"). It meant that, from 19 January 2013, DBAs were permitted "across the board" as a funding mechanism for *all* contentious matters and in *all* subject areas. New DBA Regulations 2013[42] took effect on 1 April 2013, revoking the former 2010 Regulations. The definition of a DBA remained as it was in the previous version of section 58AA(3), reproduced previously,[43] and section 58AA(7) continued to define "claims management services" as before. At this point, the defendants in the *PACCAR* appeal argued that funders had always provided claims management services since the Compensation Act 2006's enactment, and that, following the widening of DBAs in 2013, all funders' LFAs which supported commercial, family and other litigation were caught by the revamped and widened section 58AA as DBAs, if they calculated their success fee as a percentage-of-damages.

[39] See "News Release: Civil Justice Council Working Group Agrees Code of Conduct on Litigation Funding", available at https://www.judiciary.uk/wp-content/uploads/JCO/Documents/CJC/Publications/CJC+papers/CJC+News+Release+-+Code+of+Conduct+for+Litigant+Funders.pdf (last accessed 13 January 2024).

[40] "Articles of Association of the Association of Litigation Funders of England and Wales", Article 2(a), available at https://associationoflitigationfunders.com/wp-content/uploads/2015/02/ALF-Articles-of-Association-final-July-2014.pdf (last accessed 13 January 2024).

[41] See Legal Aid, Sentencing and Punishment of Offenders Act 2012, s. 45, which amended section 58AA(3) of the CLSA 1990.

[42] The DBA Regulations 2013 were promulgated under sections 58AA(4) and 58AA(5) of the CLSA 1990.

[43] See text accompanying note 34 above.

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The *seventh* piece was the law reform report of the CJC in August 2015 regarding DBA funding. Via request from Lord Faulks Q.C. (Minister for Civil Justice and Legal Policy) to Lord Dyson M.R., then-Chair of the CJC,[44] the CJC was asked "to take a detailed look at some technical revisions to the Damages-Based Agreements Regulations 2013". A Working Group was duly formed, and for the purposes of its deliberations, the MoJ provided the Working Group with a redrafted set of DBA Regulations ("the 2015 DBA Regulations") in order to make any suggestions for clarification or improvement. In the resulting report,[45] section 10 is entitled, "Excluding Third Party Funders' Litigation Funding Agreements from the Ambit of the DBA Regulations". In defining "the issue", the Working Group recorded the following:

> It was argued in some quarters that LFAs were inadvertently caught up by the 2013 DBA Regulations (although, as a matter of statutory drafting and interpretation, it is very strongly arguable that the Regulations do not cover LFAs). However, for the removal of any slight prospect of satellite litigation on this point, however vainly pursued, the Ministry of Justice has conveyed the view to the Working Group that LFAs should be expressly omitted from the scope of the 2015 DBA Regulations.[46]

The Working Group discussed the issue and concluded that "it was extremely unlikely that Third Party Funders were inadvertently covered by the 2013 DBA Regulations. However, the intent of the Ministry of Justice to set any remote residual uncertainty about the point at nought was noted",[47] and hence, the Working Group suggested that any amended DBA Regulations should contain a new Regulation 1(4)(c):

> These Regulations shall not apply to – an agreement ("a litigation funding agreement") under which –
>
> i. 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
>
> ii. the litigant agrees to pay a sum to the funder in specified circumstances.

Following publication of its report in 2015, the CJC's redrafted suggestions to the 2015 DBA Regulations (including Regulation 1(4)(c)) were not taken forward to enactment.

Then comes the very regime under which the *PACCAR* litigation arose, as the *eighth* piece of the jigsaw. On 1 October 2015, Parliament enacted the collective actions regime re competition law infringements. Not only has

[44] Via letter dated 30 October 2014: see Civil Justice Council, "Damages-Based Agreements Reform Project", vi.
[45] See Justice Council, "Damages-Based Agreements Reform Project". As chair of the Working Group, the author was principal author of that report.
[46] Ibid., at 33 (emphasis removed).
[47] Ibid.

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every action filed thus far relied upon third-party funding, but that reality was judicially acknowledged too. In *Merricks v Mastercard Inc. and others*, the Court of Appeal stated that, "the power to bring collective proceedings … was obviously intended to facilitate a means of redress which could attract and be facilitated by litigation funding",[48] an observation which was cited by the UKSC in *Mastercard Inc. and others v Merricks*.[49] Prior to the regime's enactment, the Government of the day was determined that law firms and counsel should *not* be able to charge a DBA for opt-out proceedings where an aggregate judgment or settlement was reached. the Government stated, in its preceding Consultation Paper, that to permit lawyers' contingency fees as a means of funding opt-out collective proceedings could "unduly distort the incentives to bring cases" and could "[c]reate an incentive for lawyers to focus only on the largest cases, neglecting smaller, meritorious claims, as the amount received by the legal firm is directly proportional to the number of claimants, rather than the amount of work done".[50] The concern about incentivising lawyers was reiterated in the Government's Final Response, where it restated its intention to "[prohibit] contingency fees, though continuing to allow conditional fees and after the event insurance".[51] Each of these statements had *lawyers* in its contemplation. It was no surprise, then, that the regime contained this prohibition in section 47C(8): "[a] damages-based agreement is unenforceable if it relates to opt-out collective proceedings." Later in section 47C, it was provided that a "'damages-based agreement' has the meaning given in section 58AA(3) of the [CLSA] 1990".[52]

The next step on the timeline, the *ninth* piece, occurred in 2019, when the MoJ commissioned another review of the DBA Regulations 2013.[53] As part of the co-reviewers' set of redrafted DBA Regulations 2019, a provision similar to that of Regulation 1(4)(c), as earlier recommended by the CJC's DBA Working Group, was recommended. The co-reviewers noted in the "Explanatory Memorandum" that:

[48] [2019] EWCA Civ 674, [2019] Bus. L.R. 3025, at [60] (Patten L.J.).
[49] [2020] UKSC 51, [2021] 3 All E.R. 285, at [98] (Lord Sales and Lord Leggatt).
[50] Department for Business, Innovation and Skills, "Private Actions in Competition Law: A Consultation on Options for Reform" (2012), 58, available at https://assets.publishing.service.gov.uk/media/5a79793340f0b642860d8671/12-742-private-actions-in-competition-law-consultation.pdf (last accessed 13 January 2024).
[51] Department for Business, Innovation and Skills, "Private Actions in Competition Law: A Consultation on Options for Reform – Government Response" (2013), 26, [5.43]–[5.45], [5.62]–[5.63], available at https://assets.publishing.service.gov.uk/media/5a795a65ed915d07d35b4c60/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf (last accessed 13 January 2024).
[52] Competition Act 1998, s. 47C(9)(c).
[53] See Ministry of Justice, *Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): Civil Litigation Funding and Costs*. CP 38 (London 2019). The MoJ accepted (at [19]) that stakeholders had identified that "the DBA Regulations [2013] would benefit from additional clarity and certainty. … It will give careful consideration to the way forward in the light of the outcome of the independent review of the drafting of the regulations, which is being undertaken by Professor Rachael Mulheron and Nicholas Bacon QC".

> It is not intended that litigation funding agreements entered into between a client and a third party funder should be caught by the 2019 DBA Regulations, and nor is it intended that these should be inadvertently treated as DBAs. For that reason, a litigation funding agreement, as defined in Reg 1(4)(c) and in accordance with s 58B of the CLSA 1990 (unenacted), is expressly excluded from the ambit of the 2019 DBA Regulations.[54]

Again, that law reform recommendation was not taken forward, given other more urgent priorities for the MoJ at that time (particularly post-Brexit).

The *tenth and final* piece of the legislative jigsaw was that, as of 1 April 2019, the regulation of CMCs was transferred from the MoJ's CMRU unit to the better-resourced Financial Conduct Authority (FCA).[55] The CMC sector of activity had continued to evolve since 2006, and with vast amounts of money involved. It was estimated that, between 2011 and 2016, CMCs had taken over £3.5 billion in consumer charges for payment protection insurance mis-selling claims alone. Amidst ongoing stakeholder and governmental concerns, the Government commissioned an independent review in order to examine how the sector could be better regulated to improve conduct and outcomes for those who used such services.[56] Ultimately, the Government accepted the recommendations of that review. The FCA now regulates defined groups of activities undertaken by CMCs across certain claims sectors. Furthermore, the definition of "claims management services" was transferred from section 4 of the Compensation Act 2006 (which is now repealed) to the Financial Services and Markets Act 2000 (FSMA 2000). Section 419A of that Act reproduced section 4 of the Compensation Act 2006 in closely similar terms (and any slight change in wording between the repealed section 4 and the current section 419A did not have any material effect on the outcome of the statutory interpretation exercise in question in *PACCAR*).[57]

So, those were the 10 pieces of the legislation, "soft law", and law reform activity affecting claims management services, DBA funding and third-party funding. Undoubtedly, it was a complex, piece-meal and messy landscape.

Notably, whilst it was in the Compensation Act 2006 that the phrase, "claims management services", was *first* defined, that definition was referred to or drawn in no less than *four* more times by statutes later in the timeline. This occurred in 2009 re the "employment DBA" of the original section 58AA; in the wider DBA provisions of 2013; in section 47C(8) of the CA 1998, which prohibited DBAs from funding opt-out

[54] Mulheron and Bacon, "Explanatory Memorandum", 6.
[55] By virtue of section 27 of the Financial Guidance and Claims Act 2018 (discussed in further detail in Mulheron, *Modern Doctrines*, ch. 2(C)(2), and by the sources cited therein).
[56] See Brady, *Independent Review*, 3.
[57] Agreed as common ground: *PACCAR v Road Haulage Association* [2021] EWCA Civ 299, at [12] (Henderson L.J.).

collective proceedings in 2015; and in the re-enactment of the phrase in section 419A of FSMA 2000, when the FCA took over their regulatory supervision in 2019. The central point of the *PACCAR* appeal turned on whether third-party funders provide "claims management services". If the answer to that was "yes", then those types of services were included in the definition of DBAs in section 58AA(3), and funders' LFAs must be DBAs if their success fee was computed as a share of the damages recovered.

B. How the PACCAR Appellate Courts Resolved This Jigsaw

1. The Divisional Court

The *PACCAR* Divisional Court unanimously affirmed the CAT's view[58] that section 58AA of the CLSA 1990 did not apply to LFAs in which the success fee was computed by reference to the financial benefit received. Hence, UKTC's and the RHA's LFAs, entered into so as to fund the collective proceedings in *PACCAR*, did not need to comply with the DBA legislation. On this "short question of construction of the definition of 'claims management services' [in section 4(2) of the CA 2006]", as Henderson L.J. put it,[59] the Divisional Court's conclusions were principally twofold as to why a funder's LFA which included a percentage-of-recovery success fee did not constitute a DBA.

The adjoining, and different, provisions. First, the Divisional Court considered that the two different regimes in section 58B (for LFAs) and in section 58AA (for DBAs) were crucial. Parliament had already enacted a comprehensive scheme for the regulation of LFAs in the (prospective) section 58B in 1999 (piece one of the jigsaw), and it was "most improbable that Parliament would have intended by a side wind to bring LFAs which were potentially liable to regulation under section 58B within the ambit of the scheme for the regulation of claims management services [covered by section 4(2)(b)]" that was introduced in 2006 (as piece two of the jigsaw).[60] If Parliament had intended third-party funders and their LFAs to fall within the scope of "claims management services" when the Compensation Act 2006 was introduced to regulate those services, then one would have expected that Act to have repealed or to have modified section 58B so as to avoid "two potentially competing regimes for the regulation of the same kinds of litigation funding services".[61] But that did not happen. This suggested that Parliament's

[58] *UK Trucks Claim v Fiat Chrysler Automobiles* [2019] CAT 26, at [45], [100]. The Divisional Court's reasoning was summarised by the author in R. Mulheron, "The Funding of the United Kingdom's Class Action at a Cross-Roads" (2023) King's Law Journal (online publication 5 January 2023).
[59] *PACCAR v Road Haulage Association* [2021] EWCA Civ 299, at [87].
[60] Ibid., at [89].
[61] Ibid.

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intent was that LFAs would continue to be governed by section 58B and any SI promulgated thereunder, and that claims management services were something different, to be regulated under section 4 of the Compensation Act 2006. It did not matter to the overall outcome that the executive arm of the Government (the Lord Chancellor or the Secretary of State) had not brought section 58B into force, given that the executive is under a "continuing duty to consider whether it should be brought into force".[62]

Management and control are key. Second, the Divisional Court held that a third-party funder did not offer "claims management services" under section 58AA(3) of the CLSA 1990, meaning that funders did not fall within the governance of DBAs under section 58AA at all. Although funders undoubtedly provide financial assistance to their clients who are embroiled in litigation, other parties could do so too. What of the example used by both the CAT[63] and by the Divisional Court,[64] of a bank which lends money to one of its customers, so that their client can use the loan to engage lawyers or to pay for an ATE insurance policy? Neither considered that the bank would ever have been within the contemplation of Parliament as offering "claims management services". Nor do funders. Furthermore, "claims management services" was defined as "advice or other services in relation to the making of a claim".[65] *Management* of a claim was absolutely key to the definition. Neither the bank nor a funder undertakes that necessary "management" by merely providing another party with financial services or assistance. The drafters of the Compensation Act 2006 provided financial assistance merely as *an example* of what could constitute "claims management services", but it did not mean that everyone who provided financial assistance to another to make a claim engaged in "claims management services", said the *PACCAR* Divisional Court.[66] It followed from all of this that a funder did not ordinarily provide any of the necessary "services" mentioned in section 58AA(3) ("advocacy, litigation, or claims management"). Consequently, its LFA with a funded client could not be an agreement that was covered by section 58AA(3). In short, LFAs were not DBAs.

2. *The UKSC majority verdict*

By a 4:1 majority, the UKSC saw the statutory construction exercise quite differently. Two points were critical to the outcome.

"Financial services or assistance" means what it says. Litigation funding fell squarely within the phrase used in section 4(3)(a)(i), "financial services

[62] Ibid., at [88].
[63] *UK Trucks Claim v Fiat Chrysler Automobiles* [2019] CAT 26, at [40] (Roth J.).
[64] *PACCAR v Road Haulage Association* [2021] EWCA Civ 299, at [96] (Henderson L.J.).
[65] Compensation Act 2006, s. 4(2)(b); FSMA 2000, s. 419A(1).
[66] *PACCAR v Road Haulage Association* [2021] EWCA Civ 299, at [91]–[95] (Henderson L.J.).

or assistance", and that rendered those who provided such funding the providers of "claims management services" under section 4(2). That literal interpretation might sweep in many individuals who provide those services or assistance (including banks who offer loans to assist with the making of a claim[67]), but section 4 gives the Secretary of State the power to choose *which particular* claims management services should be regulated. The power to regulate the provision of "financial services or assistance" by third-party funders may not have been exercised thus far, but that was a different point. The literal definition of "claims management services" amply encompassed the activities carried out by funders. It did not require that those who perform those services had to have any role in the management of the claim either.[68] Even where funders did not manage the litigation which they were funding (and the vast majority did not), their activities constituted providing "financial services or assistance", and hence, "claims management services", and it was *that* phrase which is referred to in section 58AA(3)'s definition of a "damages-based agreement".[69] In respect of the phrase "claims management services" in section 4(2)(b) of the 2006 Act, "Parliament has taken the trouble to provide a definition", if only in inclusive terms in section 4(3); the phrase itself had no established legal meaning when section 4 was enacted; and hence, "it is the words of the [inclusive] definition which are the primary guide to the meaning of the term defined".[70] At bottom, the majority considered that the phrase "claims management services" was intended by Parliament to be very wide. It was then up to the Secretary of State as to which parts of those services were *regulated*.

The existence of section 58B was not significant. Of section 58B, which remains enacted but not in force, and which allowed for the regulation of LFAs, the majority did not think that it had the significance which the Divisional Court had accorded to it. Rather, it was a "comparatively blunt instrument which is focused on regulating particular persons identified as funders", whereas, when section 4 of the Compensation Act 2006 was enacted seven years later, "it was clear that, contrary to the view of the Divisional Court, section 58B did not provide a comprehensive scheme for regulation of litigation funders".[71] Even if the provisions happened to overlap somewhat, there was "nothing inherently untoward in this [as t]he statute book is not neat and tidy".[72] In other words, section 4 of the 2006 Act was not the "sidewind" that the

[67] *R. (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28, at [86] (Lord Sales).
[68] Ibid., at [63]–[65], [67], [78].
[69] Ibid., at [50].
[70] Ibid., at [49].
[71] Ibid., at [70].
[72] Ibid., at [71].

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Divisional Court had considered it to be. Rather, it was a deliberate decision by Parliament "to address a world of third party funding which had developed in significant ways beyond that for which section 58B had been devised".[73] The fact that both provisions were applicable to third-party funders was no reason to read down the ambit of "claims management services" in section 4, and into which funders properly fell.

In dissent, Lady Rose considered the key provisions very differently. Of section 4 of the 2006 Act, her Ladyship opined that it did not intend to cover third-party funders. Ultimately, she agreed with the submission that, insofar as a purposive construction of section 4 was concerned:

> the undoubted fact [is] that litigation funders were not and never have been brought within the regulatory regime created by the [2006] Act. … [It] was enacted shortly after the Court of Appeal had stated very clearly in *Factortame (No 8)* and *Arkin* that the courts at least did not regard litigation funding as problematic. On the contrary, as I have discussed earlier, the Court of Appeal stressed the importance of litigation funding as providing access to justice. The "state of affairs" … did not suggest that the purpose of the legislation was to bring litigation funding with the scope of potentially regulated activity.[74]

Moreover, Lady Rose considered that there was an absurdity arising if the provision of services in section 4(3) – which "included" providing financial assistance, making inquiries and referring one person to another – were to mean that all those activities, when *taken by themselves*, were claims management services. She could not agree with that outcome. Rather, these listed activities were certainly "claims management services" "when they [were] provided as part of an overall claims management service, but *not* when they are provided by themselves, not as part and parcel of managing a claim".[75] Again, the fact that funders do not, in the vast majority of cases, manage or control claims which they fund was crucial to her Ladyship's conclusions that those funders do not offer claims management services. One further point bothered Lady Rose. The definition of "services" in section 4(3) was inclusive only, and its constituent subparts were very wide too (e.g. how widely is "making enquiries" to be interpreted?), and that prompted her Ladyship to conclude that "[i]t cannot have been intended that everything falling within those terms is capable of being made a regulated activity even if the person does not also 'manage claims' in any recognisable way".[76]

Hence, the *PACCAR* litigation is an object lesson in how a narrow point of statutory interpretation can be resolved entirely differently by learned and experienced judges. It is now apposite to focus some attention upon

[73] Ibid.
[74] Ibid., at [201] (Lady Rose).
[75] Ibid., at [208], [211] (emphasis added).
[76] Ibid., at [216].

certain pieces of the jigsaw which occurred *after* the enactment of section 4's definition of "claims management services" in the 2006 Act.

III. The Significance (or Otherwise) of the Post-2006 Events

A. The Key Principle of Statutory Interpretation Applied – and Questioned

The phrase, "claims management services", may have been referenced or incorporated four times after it first appeared in the Compensation Act 2006, but in *PACCAR*, the majority cited authority[77] to the effect that "the meaning of the definition in the later statute must be the same as the meaning of the definition in the earlier statute".[78] The learned authors of *Bennion, Bailey and Norbury on Statutory Interpretation*[79] ("*Bennion*") cite that same authority for their statement that, where a statute says that the meaning of a phrase is to be determined by reference to the definition in an earlier Act, "the courts are likely to give short shrift to any argument that the term should be given a different meaning from that which it has in the earlier Act simply because of the context in which it is used in the later one".[80]

Given this idiom of statutory interpretation, the majority's attention was devoted exclusively to the meaning of "claims management services" as it *first appeared in the 2006 Act* ("the principal issue on this appeal", as Lord Sales put it[81]). Indeed, Lord Sales dismissed the post-2006 events in these terms:

> neither of Sir Rupert Jackson's reports nor the Code of Conduct assist in answering the question of statutory interpretation which arises in this case. They post-date the enactment of the statutory definition in section 4 of the 2006 Act by several years and do not provide guidance regarding the policy context in which it was enacted or its purpose. . . . Participants in the third party funding market may have made the assumption that [their] arrangements are not DBAs and hence are not made unenforceable by section 58AA(2). But this would not justify the court in changing or distorting the meaning of "claims management services" as it is defined in the 2006 Act . . . [The respondents] submitted that later legislation, in particular section 58AA, may be referred to as an aid to interpretation of the 2006 Act in order to resolve an ambiguity in that earlier legislation. . . . I am not persuaded by this. It is not clear that section 58AA would provide helpful guidance even if the statutory definition of "claims management services" in section 4 of the 2006 Act . . . were ambiguous. However, it is

[77] *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] A.C. 1189, at [50] (Lord Neuberger).
[78] *R. (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28, at [2] (Lord Sales) (quoting *Williams v Central Bank of Nigeria* at [50]).
[79] D. Bailey and L. Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed. (London 2020).
[80] Ibid., at section 18.4.
[81] *R. (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28, at [33].

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> not necessary to examine this submission in detail, because I do not consider that there is any ambiguity in that definition.[82]

Therein truly lies the crux of this appeal. Once the post-2006 events outlined in Section II of this article were disregarded ("given short shrift", as *Bennion* would say), and an extremely literal interpretation of the definition of "claims management services" was adopted, the appeal was destined for one outcome only.

The reality "at the coalface", however, is and was quite different. The world of funding changed enormously between 2006 and the time at which the *PACCAR* litigation arose. Third-party funding was judicially said to be "nascent" in 2005.[83] But the frequency with which it was used thereafter, the sums involved, the increasing sophistication of third-party funding products, the use of portfolio funding, and the number of entrants in that market, contributed to a very different environment than when Parliament decreed, in 2006, that those who offer "claims management services" encompassed everyone who provided "financial support or assistance".[84] The post-2006 events, such as the Jackson review, the CJC review of DBA funding, the promulgation of the Code of Conduct for litigation funders, and the transfer of CMCs' regulation from the CMRU to the FCA in 2019, also demonstrated significant changes in the governance of all streams of funding. To ignore those developments might well adhere to the longstanding precedential principle governing statutory interpretation (i.e. "that the meaning of the definition in the later statute must be the same as the meaning of the definition in the earlier statute", hereafter, "the Principle"), but it bore no resemblance to the governance and the practicalities surrounding the operation of third-party funding which developed post-2006.

However, another post-2006 event was far, far different – and given its bright light, it is appropriate to ask whether the *PACCAR* litigation demonstrates that the Principle should be made subject to a caveat, "unless to do so would contravene the presumption against absurdity; and one factor relevant to absurdity is where Parliamentary Hansard regarding a later statute shows that the meaning of the definition in the earlier statute cannot apply". Of course, such a caveat to the Principle would be controversial – but perhaps no more so than the outcome in *PACCAR* itself! It is important to explain why this caveat is being suggested as a possible modification for future cases of statutory interpretation. It is this: that courtesy of Hansard discussion which

[82] Ibid., at [90]–[92].

[83] *Arkin v Borchard Lines* [2005] EWCA Civ 655 "was decided when third party funding of litigation was still 'nascent' and conditional fee agreements and ATE insurance relatively new": *Davey v Money and another; Dunbar Assets plc v Davey* [2020] EWCA Civ 246, [2020] 1 W.L.R. 1751, at [36] (Newey L.J.).

[84] A number of publications which have explained that development, with additional analysis, are discussed in Mulheron, *Modern Doctrines*, 30–32, 102–20.

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accompanied the passage of Schedule 8 of the Consumer Rights Bill 2014 – the very legislation which gave rise to the *PACCAR* litigation, and the eighth piece of the jigsaw outlined previously – it was manifestly plain that *Parliament itself* did not consider that LFAs were DBAs. Quite the contrary.

Naturally, given that the Principle was carefully applied by the *PACCAR* majority, this Hansard discussion did not feature in their judgment at all. Whatever "claims management services" meant in 2006 was what it meant in 2015 (or at any other time). However, it seems important to at least consider whether the Principle merits modification for any similar type of case in the future, precisely to avoid any absurdity or illogicality from arising. For the purpose of suggesting a modification to the Principle, it is not being suggested that Hansard is being referred to, via the conditions laid down by *Pepper v Hart*,[85] in order to resolve an ambiguity in the meaning of "claims management services" in the 2006 Act. Rather, what follows in the next section flows from the use of Hansard in a *different* context, as explained by the learned authors of *Bennion*:

> There is a growing tendency for courts to rely on legislative debates on a Bill not as an indication of legislative intent in resolving an ambiguity as to the meaning of a particular word or phrase but rather to supply context or identify the nature or extent of the issue at which legislation is aimed. To this extent, the cases seem to provide support for a wider relaxation of the exclusionary rule against relying on parliamentary materials outside the conditions laid down by *Pepper v Hart*.[86]

Hansard is referred to in the next section in two contexts accompanying the passage of the Consumer Rights Bill 2014 – the first is for an amendment to the Bill which did not materialise, and the other relates to an amendment which did.

B. The Circumstances Supporting the Suggested Change of Principle

When the collective proceedings regime in Schedule 8 of the Consumer Rights Bill was first introduced to the House of Commons on 23 January 2014, it contained the very prohibition upon the use of DBAs for opt-out collective proceedings that appears in section 47C(8) today. The reasons for the Government's dislike of percentage contingency fees for lawyers have already been mentioned,[87] and thus, the clause's inclusion was entirely expected by all interested observers. What happened after that, however, is germane to the oddity of the *PACCAR* outcome.

[85] [1993] A.C. 593, 634 (H.L.).
[86] Bailey and Norbury, *Bennion*, section 24.12.
[87] See notes 50 and 51 above.

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Some six months after the Bill's introduction, Lord Hodgson[88] proposed certain amendments to clause 47C(8) that would have had the effect of banning third-party funders' LFAs from being used in opt-out collective proceedings as well.[89] Lord Hodgson sought to move an amendment[90] so that clause 47C(8) would have been changed to read as follows (with the effect of the amendment in italics): "A damages-based agreement *or third party litigation funding agreement* is unenforceable if it relates to opt-out collective proceedings."

To buttress this amendment, Lord Hodgson sought to move another amendment[91] which also would have tweaked the definitions in clause 47C(9) to distinguish LFAs from DBAs (with emphasis added):

> "third party litigation funding agreement" means an agreement *other than a damages-based agreement* or conditional fee agreement under which a person agrees to meet, directly or indirectly, all or a portion of the costs or expenses that may be incurred in connection with legal proceedings to which that person is not a party in return for a financial benefit, howsoever determined, that is contingent upon the outcome of the proceedings.

Hence, both amendments moved by Lord Hodgson clearly show that he considered an LFA and a DBA to be entirely different things – that they were different funding streams, and that *both* should be barred from use in opt-out collective proceedings. He was not the only Peer who thought so. On 3 November 2014, Lord Hodgson's amendments were discussed by Baroness Noakes,[92] who stated that DBAs are "unenforceable in relation to opt-out proceedings. These amendments add third-party litigation funding agreements. Damages-based agreements are too narrow a concept. … the incentive may well not be damages and gaining access to those, but simply the ability to be able to siphon off legal and other fees related to the litigation".[93]

Thereafter, Baroness Neville-Rolfe,[94] one of the proponents of the original Bill, concurred that LFAs were not DBAs. She responded that:

> law firms are prohibited from taking a percentage of the damages as a success fee – so-called damages-based agreements. … My noble friend raised many understandable concerns. We have thought carefully about this. *The Bill already contains restrictions on the financing of claims as it prohibits*

[88] The Lord Hodgson of Astley Abbotts (HL, Conservative Life Peer).
[89] Moved on 28 July 2014 and as part of the Seventh Marshalled List of Amendments to be moved in Grand Committee. These amendments were proposed to the version of the Bill that was brought to the House of Lords from the House of Commons on 17 June 2014: see HL Bill 29 2014–15. The text of the amendments is reproduced at: https://publications.parliament.uk/pa/bills/lbill/2014-2015/0029/amend/ml029-VII.htm.
[90] See ibid., amendment 72 at p. 113, line 36, of the Bill.
[91] See amendment 74.
[92] The Baroness Noakes (HL, Conservative Peer).
[93] See HL Deb. vol. 756 col. GC575 (3 November 2014), as occurring on the seventh day of the HL Bills Committee proceedings.
[94] The Baroness Neville-Rolfe (HL, Conservative Peer).

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> *damages-based agreements* and does not provide for a claimant to be able to recover any uplift in a conditional fee agreement. *Therefore there is a need for claimants to have the option of accessing third-party funding* so as to allow those who do not have a large reserve of funds or those who cannot persuade a law firm to act pro bono to be able to bring a collective action case in order to ensure redress for consumers. Blocking access to such funding would result in a collective actions regime that is less effective. This would bar many organisations, including reputable consumer organisations such as *Which?*, from bringing cases as Parliament hoped in 2002. Restricting finance could also create a regime which was only accessible to large businesses. This would weaken private enforcement in competition law, which is of course not the Government's wish or intention.[95]

Hence, this Hansard discussion demonstrates that a funder's LFA was perceived to be a different funding type from a DBA by the very Parliamentarians who were considering how, precisely, collective proceedings were expected to be funded. None of this makes sense, if these Peers had appreciated that funders were undertaking "claims management services" under the Compensation Act 2006 and, hence, their LFAs were *already* DBAs where a percentage-of-recovery was used to calculate the success fee. Clearly they did not think that at all.

The other Hansard record accompanying the passage of Schedule 8 of the Consumer Rights Bill concerned the section 47C(6) amendment. This subsection provides as follows:

> In a case within subsection (5) [i.e. where the Tribunal makes an award of damages in opt-out collective proceedings], the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings.

This subsection was not originally in the first iteration of Schedule 8 which was introduced to the Commons in January 2014.[96] It was inserted for consideration by the Public Bill Committee on 6 March 2014.[97] Between those two dates, the CAT's Working Party had met in order to develop draft procedural rules to govern collective proceedings and collective settlements.[98] Its discussions included the issue of how third-

[95] HL Deb. vol. 756 cols. GC581–83 (3 November 2014) (emphases added).

[96] As confirmed by the "tracked changes" version of Schedule 8: https://www.parliament.uk/globalassets/documents/commons-public-bill-office/2013-14/compared-bills/Consumer-Rights-bill-140314.pdf (last accessed 13 January 2024).

[97] Via Notice of Amendments moved on Thursday 6 March 2014, as amendments 115 and 116: see Public Bill Committee (Bill 180) 2013–14 (notice of amendments given on 6 March 2014): https://publications.parliament.uk/pa/bills/cbill/2013-2014/0161/amend/pbc1610603a.pdf (last accessed 13 January 2024).

[98] Details of the Working Party and its terms of reference are stated at the outset of the Draft Tribunal Rules, which were published on 10 Mar 2014: CAT, "Collective Proceedings and Collective Settlements in the Competition Appeal Tribunal: Draft Tribunal Rules", available at https://www.catribunal.org.uk/sites/default/files/2017-12/Collective_Actions_Rules_Draft.pdf (last accessed 13 January 2024).

party funders would be paid their success fee in opt-out proceedings, particularly in the absence of any "common fund" doctrine or other equitable or restitutionary doctrine which might apply.[99] It was considered that a statutory right to enable such recovery would be the safest course. Following those discussions, a new proposed section 47C(6) was introduced into the text of Schedule 8, in the terms described above.

That amendment was then discussed in the Public Bill Committee on 11 March 2014. The Parliamentary Under-Secretary of State for the Department for Business, Innovation and Skills said this (with emphasis added):

> The amendments will allow the [CAT] to order that any unclaimed damages be used to cover a claimant's legal costs. . . . One option to fund opt-out cases would be to use unclaimed damages to cover all or part of a claimant's costs, *which could include any success fee agreed with a legal representative* and any insurance taken out.[100]

Hence, the section 47C(6) amendment created a legal avenue by which a funder could be paid its success fee in the event of a successful outcome in an opt-out collective proceeding, but not before the class members had an opportunity to come forward. Clearly, this amendment would not have been necessary if LFAs were DBAs, for if that was the case, then the issue would have been irrelevant: a funder's percentage-of-recovery LFA would have been prohibited by section 47C(8). Of course, a multiple-of-costs LFA would (probably) not have been caught by the DBA legislation – but it is extremely unlikely that the Peers and the Parliamentary Under-Secretary had those in mind, given that multiple-of-cost success fees were practically unheard of back then. Percentage-based success fees were the norm. Hence, why even legislate to permit the recovery of those from unclaimed damages, if LFAs were DBAs and if DBAs were prohibited from being used for opt-out collective proceedings?

To conclude, the Hansard discussions which accompanied the passage of the Consumer Rights Bill reiterate that some of those with the responsibility for debating and passing the competition law collective proceedings regime considered LFAs and DBAs to be two different funding streams. They never regarded them as the same thing and, undoubtedly, the UKSC decision in *PACCAR* will have come as a real surprise. It is for this reason that it is argued herein that a modification to the Principle be considered for future cases of similar ilk, viz. that:

[99] The author had raised this during the Working Party's deliberations, in light of her research on that subject at the time: see R. Mulheron, "Third Party Funding and Class Actions Reform" (2015) 131 L.Q.R. 291, 295–310.

[100] Public Bill Committee (Bill 161) 2013–14, col. 588 (11 March 2014) (Jenny Willott) (emphasis added).

> the meaning of the definition in the later statute must be the same as the meaning of the definition in the earlier statute, unless to do so would contravene the presumption against absurdity; and one factor relevant to absurdity is where Parliamentary Hansard regarding the later statute shows that the meaning of the definition in the earlier statute cannot apply.

IV. The Possibility of Legislative Reversal

Inevitably, for such an impactful decision, a reversal of *PACCAR* was always likely to become the subject of law reform and parliamentary attention. Indeed, the Government suggested, soon after the decision was delivered, that *PACCAR* might be legislatively reversed.[101]

Essentially, there are two ways by which this might be achieved. The *direct* avenue is to legislate that third-party funders do not provide "clams management services". This would constitute a direct reversal of the ratio of *PACCAR*, and it would depend upon an amendment of the "claims management services" definition in section 419A of FSMA 2000. The other is the *indirect* avenue, viz. to accept the verdict of *PACCAR* that third-party funders *do* offer claims management services, but to legislate that funders cannot enter into a DBA or that their agreements (LFAs) cannot constitute DBAs. Others, namely lawyers, can enter DBAs, but funders cannot. The latter would require an amendment to the DBA definition itself which is contained in section 58AA(3) of the CLSA 1990. This would entail a more sympathetic reversal of *PACCAR*, in that it would represent a consequential, rather than a direct, reversal of its ratio. Dealing with each of these in reverse order:

A. Amending the DBA Definition

The idea here is that, from the whole set of agreements which presently fall within the definition of a DBA in section 58AA(3) of the CLSA 1990, there is a subset of DBAs – viz. LFAs – which are carved out from that definition. This would be achieved by targeting the entities who can, and who cannot, enter into DBAs. The DBA definition has been reproduced previously.[102] To remove LFAs from this definition, the simplest device is to delete reference to "claims management services" so that a DBA can *only* be entered into between those who offer "advocacy services" or "litigation services" on the one hand, and the client who uses those services on the other (i.e. that the opening words of section 58AA(3)(a) should provide that "a

[101] See Department for Business and Trade, "Department for Business and Trade Statement on Recent Supreme Court Decision on Litigation Funding" (2023), available at https://www.gov.uk/government/news/department-for-business-and-trade-statement-on-recent-supreme-court-decision-on-litigation-funding (last accessed 13 January 2024) ("[t]he department is aware of the Supreme Court decision in *PACCAR* and is looking at all available options to bring clarity to all interested parties").

[102] See note 34 above and the accompanying main text.

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damages-based agreement is an agreement between a person providing advocacy services *or* litigation services and the recipient of those services").

Obviously, a great deal hinges on the key phrases of "advocacy services" and "litigation services" in order for the abovementioned amendment to work so as to exclude funders. These phrases are defined in section 119 of the CLSA 1990 and encompass those who enjoy rights of audience before a court or who have the right to conduct litigation, namely barristers, solicitors and other legally-qualified persons who are the subject of regulation in respect of those activities. As funders do not enjoy those rights of audience nor have the right to conduct litigation – they merely fund those who do – then it would be impossible for a funder to enter into a DBA if section 58AA(3) was amended in this way. Essentially, this type of amendment would explicitly restrict DBAs to those who operate in the legal profession and who are undertaking regulated activities therein.

Interestingly, the majority in *PACCAR* did not pay much attention to these phrases other than to cite them,[103] but Lady Rose, dissenting, focused quite markedly upon these phrases:

> Litigation funders are not offering to manage their clients' claims, they are not lawyers and they do not represent their customers in any kind of proceedings, however informal. There is always *one or more other firms or individuals providing litigation services or advocacy services to the funded person*.[104]

> The structure of this series of statutory provisions shows that agreements entered into by funders *who agree to fund the provision of advocacy and litigation services by someone else* were dealt with separately from agreements entered into by those providing the advocacy and litigation services. The former were intended to be dealt with, if at all, by section 58B CLSA.[105]

Preserving that distinction within the legislative framework is at the heart of the section 58AA(3) amendment, to enable it to "bite effectively" so as to exclude funders' LFAs from the bigger set of DBAs.

Another drafting possibility for carving out LFAs from the definition of DBAs in section 58AA(3) is to define an LFA (by reference to, say, the definition used in section 58B of the CLSA 1990, reproduced previously,[106] or via similar words), and then to provide, in a new section 58AA(3)(b), that such a defined agreement *cannot* constitute a DBA.

To reiterate, the focus of this "indirect" method of reversing *PACCAR* is to accept that funders *are* providing "claims management services", and to focus upon the definition of a DBA under section 58AA(3) of the CLSA 1990 in order to carve out the subset of LFAs from the whole set of DBAs.

[103] See *R. (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28, at [25]–[26], [30].
[104] Ibid., at [180] (emphasis added).
[105] Ibid., at [234] (emphasis added).
[106] See note 24 above.

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B. Amending the Definition of "Claims Management Services"

According to *PACCAR*'s majority, funders are offering "advice and other services" as defined in section 419A(2) of FSMA 2000, including offering "financial services or assistance". Hence, the second option for reversing *PACCAR* is to seek to overturn the UKSC's majority judgment by legislatively *reversing its very essence*, namely by legislatively providing that funders (and others like them who may be taken to provide "other services", including "financial services or assistance") do *not* offer claims management services at all. That would require an amendment to section 419A, which is the source definition of "claims management services" now (having repealed sections 4(2)(b) and 4(3) of the Compensation Act 2006).

Under this second option, there would be no need to amend section 58AA(3) of the CLSA 1990 to restrict those who can enter into a DBA – because those who truly offer claims management services would *still* be bound by the requirements of a DBA, which are set out in section 58AA(4) and the DBA Regulations 2013. However, under this more direct route of reversal, entities such as funders would no longer be caught by section 58AA's requirements, because they would no longer be offering claims management services.

One suggestion for this type of amendment, by which to omit from the ambit of section 419A the activities of third-party funders, could be along the following lines (with amendment in italics):

> (1) In this Act "claims management services" –
>
> (a) means advice or other services in relation to the making of a claim; *but*
>
> *(b) excludes any advice or other services provided by a person (the funder) who enters into a litigation funding agreement under which 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 where the litigant agrees to pay a sum to the funder in specified circumstances.*
>
> (2) In subsection (1)(a) "other services" *means providing* financial services or assistance, *together with one or more of the following*:
>
> (a) legal representation,
>
> (b) referring or introducing one person to another, or
>
> (c) making inquiries,
>
> but giving, or preparing to give, evidence (whether or not expert evidence) is not, by itself, a claims management service.

This type of amendment would have consequences for a number of parties. First, funders would be excluded from offering "claims management services" under the new section 419A(1)(b). Second, entities

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such as crowd-funders, litigation lenders, conscience ("pure") funders, and so on – who may financially assist another's litigation, but not necessarily for reward – would be precluded from offering "claims management services" under the new section 419A(2) because they do not represent, refer or make inquiries; they just provide some financial support. To offer claims management services under the amended section 419A(2), those entities have to finance the litigation, *as well as* represent, refer or make inquiries. This amendment to section 419A of the FSMA 2000 would also exclude from "claims management services" entities, such as banks who offer litigation loans or ATE insurers, both of whom may financially assist another to bring a claim for some "reward", but without managing the claim. This amendment goes to the very heart of *PACCAR*, for it declares that those who provide financial assistance do not provide claims management services, and it matters not whether or not they were regulated to provide those services – the mere act of providing financial assistance alone does *not* amount to "claims management services".

To be clear, both of the aforementioned suggestions in this section of the article would seek to reverse *PACCAR* in general (as a "General *PACCAR* Amendment"). It would seek to reverse *PACCAR* across all litigation, in all sectors, across all courts and wherever an LFA has been entered into which does not comply with the relevant DBA legislation. However, a narrower reversal was always a possibility – and at the time of writing, that is what has actually been proposed by the Government.

C. What a "Narrow Reversal" Means

The alternative to a general reversal of *PACCAR* is to target the prohibition upon using DBAs for opt-out collective proceedings, which is contained in section 47C(8) of the CA 1998 – by amending that particular provision only. After all, the *PACCAR* litigation came to the fore precisely through that competition law collective proceedings regime, and the challenge to the LFA which had been entered into by the representative claimant was precisely because of section 47C(8)'s bar on the use of DBAs for opt-out class actions. The immediate significance of *PACCAR* was that those LFAs which were supporting opt-out collective proceedings were in jeopardy if they calculated the success fee to the funder on the basis of a percentage-of-recovery of the damages (or settlement amount) achieved. Either judgment or settlement would constitute a "financial benefit obtained"[107] – and if the success fee was negotiated to be a percentage of that, then the LFA was immediately in trouble, post-*PACCAR*. By only reversing *PACCAR* in respect of opt-out collective proceedings brought in the CAT, it would leave those LFAs which are supporting commercial

[107] Courts and Legal Services Act 1990, s. 58AA(3)(a)(ii).

and other litigation in the High Court at the risk of challenge, whether from the defendant to the funded proceedings or from the client who pays (or has paid) the success fee.

In fact, the narrow reversal of *PACCAR* is precisely what has been promulgated by the Government at the time of writing. This has been achieved by insertion of an amendment in the Digital Markets, Competition and Consumers Bill ("the DMCC Bill"), sponsored by Secretary of State for Business and Trade, Kemi Badenoch M.P. (Con), in the following terms (the "Narrow *PACCAR* Amendment"):[108]

> 126. Use of damages-based agreements in opt-out collective proceedings
>
> (1) In section 47C(9) of CA 1998 (collective proceedings: damages and costs), for paragraph (c), substitute –
>
> "(c) 'damages-based agreement' has the same meaning as in section 58AA of the Courts and Legal Services Act 1990 but as if in subsection (3)(a) of that section, in the words before sub-paragraph (i), for ', litigation services or claims management services' there were substituted 'or litigation services'."

According to the Member's explanatory statement, the amendment "responds to the [decision in *PACCAR*]", and provides that a DBA "is only unenforceable in opt-out collective proceedings before the [CAT] if the agreement is with a provider of advocacy or litigation services".[109] Notably, the Narrow *PACCAR* Amendment seeks to reverse *PACCAR* along the lines outlined in Section IV(A) of this article, viz. those who can validly enter into DBAs by which to fund opt-out collective proceedings exclude those who provide claims management services and, hence, because they offer those types of services, third-party funders are necessarily excluded.[110]

At the time of writing, the DMCC Bill has passed through the House of Commons, and is now at Committee Stage in the House of Lords. The Narrow *PACCAR* Amendment is at present the *only* tabled amendment to the DMCC Bill relating to *PACCAR*. Various attempts by Members of the House of Commons and by Peers to table a General *PACCAR* Amendment via an amendment of section 58AA of the CLSA 1990 have not, as yet, borne fruit. This is because of ongoing debates as to whether a General *PACCAR* Amendment falls within the long title (scope) of the DMCC Bill.[111] At the time of writing, there is no other Bill passing

[108] Digital Markets, Competition and Consumers Bill, cl. 126. The relevant provision is now cl. 127 at the time of writing.

[109] See HC Deb. vol. 741. col. 132 (20 November 2023).

[110] A further amendment to this provision is probably needed, however, to exclude the application of section 58AA entirely to LFAs which would, but for the amendment in section 47C(9), be DBAs under section 47C(8).

[111] This provides as follows: "A Bill to provide for the regulation of competition in digital markets; to amend the Competition Act 1998 and the Enterprise Act 2002 and to make other provision about competition

through Parliament which (it is said by government[112]) could accommodate a General *PACCAR* Amendment – although that landscape may change during the remainder of this parliamentary term.

D. Retrospectivity

Finally, the Narrow *PACCAR* Amendment has retrospective effect.[113] This is necessary (and would be necessary for a General *PACCAR* Amendment too), given that the inevitable impact of *PACCAR* is that third-party funders have *always* provided claims management services (at least, since the enactment of section 4(2)(b) of the Compensation Act 2006). This gives rise to the potential for challenges to historical LFAs as well as to those which are being used to fund currently-ongoing litigation. According to *Bennion*, "[i]t is a principle of legal policy that, except in relation to procedural matters, changes in the law should not take effect retrospectively".

However, whilst there is a general presumption against retrospectivity,[114] that presumption is rebuttable. *Bennion* again: "[d]espite the general principle, there is no doubt that Parliament does have power to produce a retrospective effect."[115] In particular, retrospectivity is permissible where that legislation "reverse[s] an unexpected decision by the courts".[116] It is suggested that *PACCAR* (UKSC) aptly falls into that category. It overturned the earlier decisions of the Divisional Court[117] and of the CAT.[118] It also departed from parliamentary understanding in 2015 as to how the funding of the competition law collective proceedings regime could viably proceed via the use of third-party funding. It also deviated from Sir Rupert Jackson's view of the funding streams of LFAs and DBAs as being separate and distinct in his 2009 review of English civil procedure.[119]

The *PACCAR* scenario is rather reminiscent of the UKHL decision (also a 4:1 majority decision) in *Barker v Corus UK Ltd*.[120] In cases in which joint tortfeasors had tortiously exposed the claimant to asbestos, and which exposure had given rise to mesothelioma, a majority held that the joint tortfeasors should share liability proportionately, rather than jointly and

law; to make provision relating to the protection of consumer rights and to confer further such rights; and for connected purposes": see https://bills.parliament.uk/bills/3453 (dated accessed 13 January 2024).

112 Via discussions between the author and officials at the Dept for Business and Trade and the Ministry of Justice.

113 As per the Digital Markets, Competition and Consumers Bill 2023, clause 126(2): "The amendment made by subsection (1) is treated as always having had effect."

114 *BDW Trading Ltd. v URS Corporation Ltd.* [2023] EWCA Civ 772, [2024] 2 W.L.R. 181, at [158], citing *Wilson v First County Trust Ltd. (No. 2)* [2003] UKHL 40, [2004] 1 A.C. 816, at [98] (Lord Hope), [198] (Lord Rodger); *R. (Coal Action Network) v Welsh Ministers and another* [2023] EWHC 1194 (Admin), [2023] 1 W.L.R. 4536, at [74] (Steyn J.).

115 Bailey and Norbury, *Bennion*, section 7.13.

116 Ibid., citing various examples of where statutes had reversed particular decisions in that category.

117 *PACCAR v Road Haulage Association* [2021] EWCA Civ 299.

118 *UK Trucks Claim v Fiat Chrysler Automobiles* [2019] CAT 26.

119 Each of which is discussed in Section II of the article.

120 [2006] UKHL 20, [2006] 2 A.C. 572.

severally. Less than three months later, on 25 July 2006, that decision was reversed by section 3 of the Compensation Act 2006, which reinstated joint and several liability in such cases. It is an important case on retrospectivity,[121] in which the reversal was justified on the basis that "[t]he practical effects of this decision … were that claims could take much longer to be concluded, and would be much more difficult and time-consuming for claimants in circumstances where they and their families are already under considerable pain and stress".[122] Any *PACCAR* reversal shares similar justification. It would avoid the inconvenience and significant court and litigants' time and resources that challenges to established funding would entail, and where the relevant judicial decision being reversed was in effect for only a matter of months.

V. Conclusion: The Post-*PACCAR* Landscape

In *PACCAR*, the majority "express[ed] no view" as to whether it was desirable for third-party funding to "be available to support claimants to have access to justice".[123] In response to that, two points could be made.

First, the implementation of any new procedural regime is entirely ineffective without a workable funding mechanism – and that mechanism is, in the case of the competition law collective proceedings regime, third-party funding. The English judiciary has already accepted that in *Merricks*.[124] In reality, there are not that many avenues by which to fund class actions litigation, as experience around the world has demonstrated. Class members are immune from having to provide own-side funding or adverse costs cover.[125] No seeded and self-perpetuating public fund was set up by the Government simultaneously with the UK's regime (of the type established in Ontario, for example).[126] As previously discussed, lawyers' funding via DBAs was vehemently rejected by the Government for opt-out proceedings.[127] As the only legislatively-stipulated *cy-près* beneficiary of the collective proceedings regime,[128] the Access to Justice Foundation is unlikely to use undistributed residues of judgments to fund future class actions in whole or in part (and nothing compels that it should). And before-the-event insurance (which many

[121] Referred to in O. Gay, "Retrospective Legislation", SN/PC/06454, available at https://researchbriefings.files.parliament.uk/documents/SN06454/SN06454.pdf (last accessed 13 January 2024).
[122] "Explanatory Notes: Compensation Act 2006", at [14], available at https://www.legislation.gov.uk/ukpga/2006/29/pdfs/ukpgaen_20060029_en.pdf (last accessed 13 January 2024).
[123] *R. (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28, at [90] (Lord Sales).
[124] See notes 48 and 49 above.
[125] CAT Rules 2015, r. 98.
[126] See R. Mulheron, *Class Actions and Government* (Cambridge 2020), ch. 4.
[127] Competition Act 1998, s. 47C(8).
[128] Ibid., at section 47C(5).

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consumers will hold via contents insurance, mobile phone contracts, or car insurance) is typically excluded for group actions of any sort.[129] Hence, in the absence of any of these other funding avenues, third-party funding is the *only* remaining viable option for the UK's collective proceedings regime.

Second, why the Government decided to enact the collective proceedings regime in the first place is instructive. Not only was it to achieve compensatory redress for those who were in no position to sue individually – specifically, to further the goal of access to justice – but it was also to enforce the rule of (competition) law. This is encapsulated in the following passage from the Department of Business, Innovations and Skills' predecessor report of 2013:

> Breaches of competition law, such as price-fixing, often involve very large numbers of people each losing a small amount, meaning it is not cost-effective for any individual to bring a case to court. Allowing actions to be brought collectively would overcome this problem, allowing consumers and businesses to get back the money that is rightfully theirs – as well as acting as a further deterrent to anyone thinking of breaking the law.[130]

In other words, substantive law means very little without the mechanisms in place to enforce it. This is particularly true for those who cannot afford to litigate themselves and where their grievances to be tested are widely shared. The scandalous miscarriage of justice for current and former Postmaster claimants arising from the defective Horizon software;[131] the settlement achieved on behalf of Uber drivers who were not being paid minimum wage or holiday pay, following a Supreme Court ruling;[132] and the claim on behalf of 100,000 women in their equal pay claims against five supermarkets in the employment tribunal,[133] have all been due to the support of third-party funding. Indeed, it is rather difficult to conceive of how these cases, or those which have been pursued under the collective proceedings regime, could have proceeded without it.

Quite apart from the "access to justice" ramifications, there is the reputational impact of *PACCAR* upon the UK litigation market to

[129] Civil Justice Council, "The Law and Practicalities of Before-the-Event Insurance: An Information Study" (2017), available at https://www.judiciary.uk/wp-content/uploads/2017/11/cjc-bte-report.pdf (last accessed 13 January 2024) (the author chaired this Civil Litigation Review Working Group of the CJC and was principal author of that report).

[130] Department for Business, Innovation and Skills, "Government Response", 6.

[131] In the public domain since the airing of ITV's series, *Mr Bates vs The Post Office* (2024). For the history of the dispute and the compensation schemes, see e.g. "Compensation Schemes", available at https://corporate.postoffice.co.uk/en/horizon-scandal-pages/post-office-compensation-schemes (last accessed 13 January 2024); "Post Office scandal explained" (*BBC News*, 11 January 2024).

[132] *Uber B.V. and others v Aslam and others* [2021] UKSC 5, [2021] 4 All E.R. 209; see also "Uber Drivers Entitled to Workers' Rights After Supreme Court Ruling", available at https://www.leighday.co.uk/news/news/2021-news/uber-drivers-entitled-to-workers-rights-after-supreme-court-ruling/ (last accessed 13 January 2024).

[133] As outlined in the media: see N. Barber, "The Latest Equal Pay Claims Against Supermarkets", available at https://www.peoplemanagement.co.uk/article/1799149/latest-equal-pay-claims-against-supermarkets (last accessed 13 January 2024); A. Willshire and T. Cunningham, "Are You at Risk of an Equal Pay Claim?", available at https://parissmith.co.uk/blog/are-you-at-risk-of-an-equal-pay-claim/ (last accessed 13 January 2024).

consider. Take the economic value of English law, as expounded by the organisation, LegalUK, and with the endorsement of the Courts and Tribunals Judiciary.[134] Established in 2017 in conjunction with enterprises, such as the Chancery Bar, the City of London, Combar and GC100, LegalUK is described as being:

> committed to encouraging, internationally, the wider use of English law and UK dispute resolution. Our purpose is to promote English law as the principal platform that underlies global trade, as the governing law of choice for international business, and as a national asset of the UK. … English law is of value well beyond the legal sector. In fact, English law annually underpins hundreds of trillions of pounds of business activity nationally and internationally.[135]

The authors further summarise "the status of the UK as a world leading litigation centre, [whereby] English judges can take the lead on developing exportable legal solutions …, ensuring that English law maintains its global influence".[136] To maintain these lofty goals may be somewhat more difficult where thousands of funding agreements are now in jeopardy as being unenforceable. Similarly, the words of the Courts and Tribunals Judiciary, that "[w]hen planning a transaction or having to deal with the situation that has gone wrong, businesses know where they stand under English law and can predict outcomes with a high degree of certainty",[137] may ring rather more hollow, post-*PACCAR*.

The majority suggested in *PACCAR* that the situation is remediable because third-party funders can alter their LFAs so as to comply with the DBA legislation. Lord Sales noted that, "even if the LFAs are to be classified as DBAs, such third-party funding arrangements will be enforceable provided that the various stipulated requirements in respect of them are satisfied".[138] Unfortunately, the reality is not nearly that straightforward, for two reasons in particular. First, there has been a definite movement within the litigation funding market, post-*PACCAR*, to draft the funder's success fee as a multiple of the funder's "outlay", "costs limit", or similar, as an alternative to a percentage-of-recovery formula.[139] However, can it confidently be said that even that formula is not determined "by reference to the amount of the financial benefit obtained", as section 58AA(3) stipulates? If the success fee is *only*

[134] See Courts and Tribunals Judiciary et al., "LegalUK: The Strength of English Law and the UK Jurisdiction" (2017), available at https://www.judiciary.uk/wp-content/uploads/2017/08/legaluk-strength-of-english-law-draft-4-FINAL.pdf (last accessed 13 January 2024).

[135] Oxera, "Economic Value of English Law" (2021), available at https://legaluk.org/report/foreword/ (last accessed 13 January 2024).

[136] "The Global Reach of English Law", available at https://legaluk.org/the-global-reach-of-english-law/ (last accessed 7 February 2024).

[137] Courts and Tribunals Judiciary et al., "LegalUK", "Summary" point 2 and associated text.

[138] *R. (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28, at [90].

[139] See e.g. *Alex Neill Class Representative Ltd. v Sony Interactive Europe Ltd.* [2023] CAT 73, at [136]–[137].

payable upon receipt of a financial benefit and if that success fee is capped by the amount of damages recovered, or if the size of the multiple depends upon (or varies with) the extent of financial benefit obtained by the funded client, then it is not difficult to envisage another round of litigation to test the point of what "by reference to" means in the context of section 58AA(3).[140] Second, redrafting LFAs to accord with the DBA legislation ignores the fact that drafting DBAs appropriately has been very troublesome terrain for lawyers, and funders are unlikely to tiptoe through the legislation's thickets with any greater degree of confidence. Indeed, the application of the "netting off" provisions in the DBA Regulations 2013;[141] the fact that, unlike lawyers, funders never charge an hourly rate, which renders the definition of "costs" in those Regulations puzzling at best and irrelevant at worst;[142] and the unknown impact of the indemnity principle to funders,[143] are obscure. It is difficult not to agree with Lady Rose's assessment in *PACCAR* that a funder's LFA "cannot realistically comply with either the 2010 or 2013 DBA Regulations because those Regulations are not drafted in a way which applies to their business".[144] With these problems in mind, and as the President of the CAT has recently stated: "[e]veryone needs a degree of assurance that there isn't a *PACCAR* point waiting in the wings".[145] In another recent case, the CAT was presented with "every conceivable point that could be covered [relevant to whether a revised LFA was *PACCAR*-compliant]", including severability.[146]

Legislative reversal of the decision is urgently required in order to stave off a potential round of "sons of *PACCAR*" litigation. If this achieves, simultaneously, the clarification of the legislation surrounding DBA funding generally – the many problems of which have been known to the Government since *before* the enactment of the DBA Regulations on 1 April 2013 – then that will be to the benefit of the Legal UK plc brand internationally, as well as to litigants, lawyers, insurers and funders alike.

[140] Also adverted to in recent commentary: see J. Diamond, "Why PACCAR Is a Catastrophic Decision", available at https://www.lawgazette.co.uk/practice-points/why-PACCAR-is-a-catastrophic-decision/5117468.article (last accessed 7 February 2024).

[141] See the DBA Regulations 2013, reg. 4(1), which is by far the most troublesome part of the SI.

[142] See ibid., at Regulation 1(2). The crucial provision then pertains to what a DBA permits a "representative" to be paid under Regulation 4(1).

[143] See the discussion of this difficult point in Civil Justice Council, "Damages-Based Agreements Reform Project", 85–91.

[144] *R. (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28, at [227].

[145] *Boyle v Govia Thameslink Railway Ltd. and others* (Case Management Conference transcript, 12 October 2023), 78–79 (Marcus Smith J.).

[146] *Alex Neill Class Representative Ltd. v Sony Interactive Entertainment Europe Ltd. and another* (Case Management Conference transcript, 9 October 2023), 91.