

# Government should clarify the future of litigation funding

By [Lord Gold](#) | 3 November 2023

**T**he Supreme Court last summer issued a judgment that rewrites the way legal proceedings can and can't be financed in the UK: *PACCAR*. This judgment has created significant uncertainty in the legal sector. Since the judgment, there has been widespread — and sometimes confused — reporting on the impact it will have on the legal finance industry, on funded claims that are ongoing in the UK courts, and on the future ability of claimants to obtain funding to support claims. It is crucial that the uncertainty created by this decision be urgently resolved.

Legal finance plays an important role in the UK's civil justice system. Many claimants in the UK rely on external funding to help them meet the high costs of litigating claims in the UK courts. Without this financial support, many claimants would not be able to access justice. This includes corporate or SME claimants that choose to use external funding to help mitigate the expense and risk of a legal case, or groups of consumers involved in class actions which rely on external funding, such as those in the UK's competition tribunal which would not be possible without funding.



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The availability of third party funding for claimants boosts the UK courts' status as a global legal centre. Litigation funding enables claimants to hold defendants to account (balancing the playing field where the defendant has deeper pockets), supports the rule of law and helps deter future bad behaviour. It is often used to support claimants in claims which seek to convert regulatory decisions into compensation for impacted parties, or where regulators do not have sufficient resource or remit to hold wrongdoers to account. This beneficial impact of litigation funding has been recognised by the courts and the Competition and Markets Authority, as well as by the Supreme Court itself, with Lord Justice Sales noting that litigation funding is 'widely acknowledged to play a valuable role in furthering access to justice'.

A claimant's ability to use external funding to help pay for legal costs has been an accepted and established part of the UK's legal system for nearly a decade. The *PACCAR* decision has undermined this, by finding that, on a strict constructionist view (and in opposition to findings made by the Court of Appeal and Competition Appeal Tribunal), litigation funding agreements may fall within the ambit of legislation designed to govern solicitor fee arrangements (called Damages-Based Agreements or DBAs). This was clearly not the intention behind the relevant legislation for DBAs, and as the court recognised it could be tricky for litigation funding agreements to even comply with the DBA regulations given they were not drafted with this intention. The decision runs contrary to established practice; as Lady Rose noted in her dissenting judgment in *PACCAR*, the state of affairs 'did not suggest that the purpose of the legislation was to bring litigation funding within the scope of potentially regulated activity.'

This ruling has caused widespread market uncertainty around the enforceability of existing funding agreements. It has given rise to satellite proceedings and challenges around funding agreements entered by claimants in relation to both ongoing and historic cases. Defendants are using the *PACCAR* decision to try and bog down funded proceedings with technical arguments and in some cases essentially submitting that all funding agreements may be invalid given the Supreme Court's findings. This is blocking the ability of claimants in these cases to seek redress for their claims.

Significant court time and resource will be used up in resolving the uncertainty, time which could be better allocated to dealing with other matters. This is not a satisfactory outcome for the effective operation of the UK civil justice system.

This unsatisfactory state of affairs could be resolved by a simple clarification of the statutory position, consistent with the long held understanding of the legal market (and with the government's original policy intent) that DBAs do not include litigation funding agreements. A legislative solution would be a simple fix to achieve and would restore contractual certainty, avoid unnecessary demands on court time and resources, and avoid disruption in the court system. The government should act to resolve this.

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