



Collective actions and litigation funding: reasons for optimism in 2024

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Applications for collective proceedings orders in the UK Competition Appeal Tribunal (CAT) continued apace in 2023, with seven new applications lodged.¹ Such collective proceedings are invariably brought with the benefit of third-party funding, and 2023 also saw one of the most significant judgments for the litigation funding industry in this space for some time.

In *PACCAR*², the Supreme Court determined that litigation funding agreements in which a funder's return is based on a percentage of the damages pot constitute 'damages-based agreements' (DBAs). DBAs are unenforceable in opt-out collective proceedings³ and thus so were the prevailing models of litigation funding agreements in place to finance opt-out collective actions. This has led to uncertainty in the litigation funding market, with many funders switching to alternative funding models, which themselves continue to be subject to scrutiny in the appeal courts⁴. In parallel there has also been lobbying for solutions in primary legislation, be that via the Digital Markets, Competition and Consumers Bill or, more recently, alternative legislation.

While 2023 may have cast a certain level of doubt over the viability opt-out collective actions, 2024 has offered significant hope that third-party funding is here to stay. In January, Justice secretary, Alex Chalk, said in a statement: "*I'm proud of the UK's reputation as the heart of global legal services and I want to keep it that way. That's why the government will be reversing the damaging effects of PACCAR at the first legislative opportunity.*"⁵ Last week, as promised, the Government announced the introduction of new legislation which is aimed at "[restoring] the position that existed before the Supreme Court's ruling last year".⁶

This week the CAT offered a further boon to funders in the form of its judgment in *Gutmann v Apple Inc. & others*⁷, a collective action seeking damages for the allegedly planned obsolescence of iPhone handsets. The proceedings were certified in November last year subject to a review of the terms of the litigation funding agreement, which was to be revised in view of *PACCAR*. The Tribunal's judgment issued on 12 March 2024 approved the terms of the revised litigation funding agreement and, notably, held that the Tribunal may make an order that a funder's fee (or 'return') be paid not only out of unclaimed damages but pre-distribution damages more generally.⁸

This is an illuminating finding that will provide comfort to the litigation funding industry. The payment of funders' fees had hitherto been an open question pending the first award of damages in a collective action. Judicial pronouncements on the issue had previously been confined to *obiter* remarks assuming payment would be made from unclaimed damages following distribution to class members. However, the Tribunal's judgment should reassure funders that their returns will not be subject to the risk that the pot of unclaimed damages is insufficient to provide a reasonable return.

Indeed, if funders recover their returns prior to distribution to the class this could dramatically widen the scope of fundable cases and promote access to justice considerably. For example, the judgment may pave the way for more modest actions seeking smaller damages sums on behalf of more constrained classes. Funders may well be more willing to fund such actions now that their ability to secure returns appears more assured.

¹ *Arthur v Google* (claims now pursued as part of the consolidated proceedings brought by Ad Tech Collective Action LLP), *Ennis v Apple*, *Stopford v Google*, *Hammond v Apple and Amazon*, *Christine Riefa Class Representative Limited v Apple and Amazon*, *Roberts v Anglian Water & others* and *Gutmann v BT/EE & others*.

² *R (on the Application of Paccar Inc and others) v Competition Appeal Tribunal* [2023] UKSC 28.

³ Per the terms of section 58AA of the Courts and Legal Services Act 1990.

⁴ *Neill v Sony Interactive Entertainment Europe Limited & another* [2024] CAT 1; *Kent v Apple Inc. & another* [2024] CAT 5 and *CICC II v Visa Inc. & others* [2024] CAT 16

⁵ As reported in the Financial Times on 15 January 2024: <https://www.ft.com/content/3d089314-eb97-4e21-9101-962876c7d480>.

⁶ Press release: [New law to make justice more accessible for innocent people wronged by powerful companies](https://www.gov.uk/government/news/new-law-to-make-justice-more-accessible-for-innocent-people-wronged-by-powerful-companies) - GOV.UK (www.gov.uk).

⁷ [2024] CAT 18

⁸ *Ibid*, paragraph 35. The Tribunal referred to section 47C(3)(b) of the Competition Act 1998 as providing the power to make such a costs order.

Whether those returns may be calculated as a percentage of overall damages remains to be seen though. Over to Parliament. We will be watching 2024's developments closely.



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