

Third-party funding: kicking the tyres

SEAN HUGO - ASSOCIATE DIRECTOR, DRIVER TRETT OUTLINES THE PRACTICE OF THIRD-PARTY FUNDING AND HOW IT APPLIES IN THE JURISDICTIONS OF THE UNITED KINGDOM AND THE UNITED ARAB EMIRATES.

History of Third Party Funding

The funding of litigation or arbitration is a costly undertaking. There are countless circumstances whereby claimants who have meritorious legal claims are precluded from accessing justice because they cannot cover the legal costs. In these types of situations obtaining finance from a third-party may provide a viable solution¹. Sound business reasons may also lead a party towards third-party funding.

What is Third-Party Funding

Meredith and Mackinnon describe Third-Party funding² as: "A party who has no existing interest in the dispute but provides financing for some or all of the claimant's legal costs and disbursements in return for part of any recovery whether via settlement or judgment/arbitration award. It is non-recourse funding whereby the third-party funder will not require any repayment of the finance provided." An antagonist may cynically liken third-party funding to 'betting on the horses'.

Financing litigation or arbitration, with the sole intent of receiving an investment return, appears to be a financially ludicrous proposition but the practice can be highly lucrative for the party financing the litigation or arbitration. Taking an investment interest in the legal claim of another party is not new, it has been around for hundreds of years, possibly longer, as some suggest the practice can be traced back to the Roman era.



THE STRUCTURE OF THIRD-PARTY FUNDING

This can generally be separated into two categories: (1) Litigation Crowdfunding and (2) Corporate Third-Party Funding.

Litigation Crowdfunding

Litigation crowdfunding is obtained from multiple unrelated funders who independently have an interest in the outcome. The interest ranges from purely personal reasons to investment return, "most recently Grahame Pigney, a retired IT consultant, raised over £170,000 on a legal crowdfunding site in order to assist in funding the 'Brexit Case' reaching the Supreme Court"³. On the opposite end of the scale, until recently⁴, invest4justice.com developed a business model for crowdfunding litigation with the aim of providing an investment return to the independent funders. Once signed up to the invest4justice.com, platform contributors could review case information and evidence and ask the litigant or legal team further questions before finally committing funds to a case. Once the full litigation fees were raised, a crowdfunding agreement was developed outlining each funder's contribution and the agreed return on this contribution. Published information from invest4justice.com stated that: "statistics taken from various courts show that roughly one in two cases win and there is approximately a 94% chance of obtaining compensation if four cases are funded"⁵.

Corporate Third-Party Funding

The principles are similar with corporate third-party funding institutions but the mechanics of the process are slightly different. Typically, corporate third-party funding institutions require that lawyers are instructed prior to approaching them for funding. The specific lawyers instructed play a large part in the decision-making process of the corporate third-party funders; as do consultant experts, who may consider technical issues and the likely recovery in monetary terms. Corporate third-party funders must be sure they are backing a 'winning horse', right case, right lawyers and experts, and also the right claimant. If the decision is made to provide funding to the claimant, and the claimant agrees to the third-party funder's terms, then a contingency fee agreement is entered into by both parties.

When third-party funders get the right outcome on the right case it can be extremely lucrative. The underpinning principle of third-party funding is that the cost of accessing justice is typically far lower than the final amount that can be won as compensation⁶. The viability of the business model is evidenced by Burford Capital LLC (a third-party funder listed on the London Stock Exchange). In the financial periods 2013 through to 2015⁷ it recorded revenue growth, attributable to the provision of third-party funding, of 123% and an average operating profit margin of 80% over the same period⁸.

Ethics of Third-Party Funding

The practice of third-party funding has passionate protagonists on both sides and is quite frankly a morally challenging topic. One of those protagonists in the 'against' corner is Lisa Richard⁹ who stated (in an article authored in 2014) that: "No matter how much proponents try to dress up litigation funding, the reality is not pretty: litigation funders meddle in litigation, turning a profit for themselves at the expense of the parties to litigation, attorney-client relationships and the integrity of the U.S. judicial system"¹⁰. Richard cited the case of Chevron Corporation vs. Donziger. Donziger was the lead plaintiff in a mass-tort environmental contamination lawsuit, brought by Donziger on behalf of Ecuadorians who had suffered harm as a result of Texaco's operations in Lago Agrio, Ecuador. Judge Kaplan held that the, "decision in the Lago Agrio¹¹ case was obtained by corrupt means". Kaplan said, "the evidence showed that an American attorney Steven Donziger and his legal team bribed an Ecuadorean judge to issue an \$18 billion judgment against the oil company in 2011"¹².

The opinions in the 'for' corner suggest that third-party funding is here to stay, and not just for small or cash strapped firms. →

Indeed, many claimants are pursuing what they consider to be their entitlements using third-party funding as a matter of choice and in doing so shifting risk and cost off of the balance sheet. Many global law firms have also bought into third-party funding and often promote its use to their potential clients, corporate and otherwise, when bidding for work in connection with large disputes.

Third-Party Funding in the UK

The antique common law doctrine of 'champerty and maintenance' historically determined the legality of third-party litigation funding. Maintenance being defined as the situation that exists when a party supports litigation, without having any interest in the outcome. Champerty being defined as a form of 'aggravated maintenance' whereby a party supports litigation with the specific intent of sharing in the spoils¹³.

Prior to 1 January 1968, 'champerty and maintenance' was considered a crime at common law and by statute¹⁴. Subsequently the Criminal Law Act 1967 abolished criminal and civil liability with respect to 'champerty and maintenance' under the law of England and Wales. However, s. 14(2) of the 1967 Act states that, "...the abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal"¹⁵.

Interestingly the UK's close neighbour Ireland, who inherited the Maintenance and Embracery Act passed in 1634¹⁶ while under British rule, have upheld the doctrine in the Statute Law Revision Act 2007. In 2016, in the case of *Persona Digital Telephony and Anor. v Minister for Public Enterprise and Ors.*¹⁷, Justice Donnelly held that third-party funding is illegal in Irish law. The court found as follows: "In conclusion, maintenance and champerty continue to be torts and offences in this jurisdiction. From the Irish authorities above mentioned [Statute Law Revision Act 2007], there is a prohibition on an entity funding litigation in which it has no independent or bona fides interest, for a share of the profits..."¹⁸.

A recent development with respect to

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third-party funders being liable for costs, within the jurisdiction of England and Wales, is in the case of *Essar Oilfields Services Limited v Norscot Rig Management PVT Limited* (2016)¹⁹. The court upheld the decision of a sole arbitrator relying upon s59(1) and s63(3), who determined that Essar was liable for US\$4 million of costs of which a portion included third-party funding costs. A key factor in the arbitrator's mind when making his award was the conduct of Essar. The arbitrator considered that Essar had deliberately sought to financially damage Norscot such that Norscot would abandon their claims. Third-party funding was therefore a lifeline for Norscot and the arbitrator recognised this, "Norscot had no alternative, but was forced to enter litigation funding ... It was blindly obvious to [Essar] that the claimant ... would find it difficult if not impossible to pursue its claims by relying on its own resources. The respondent probably hoped that this financial imbalance would force the claimant to abandon its claims"²¹.

In the case of *Excalibur Ventures v Texas Keystone and others*²⁰, the Court of Appeal decision further confirms that a costs order may be made against a party who has provided funding, i.e. without being a party to the claim.

Funds were provided to Excalibur, the claimant, who had submitted claims to the value of \$1.6 billion. The judge noted that the claims "failed on every point" at the original trial, not in the least due to "false and misleading statements" made by Excalibur's leading witness, and that there had been a "resounding, indeed catastrophic defeat" for Excalibur.

The Court of Appeal considered that since third-party funders seek to derive benefit from a decision in favour of their client just as much as their client and that the, "derivative nature of a commercial funder's involvement should ordinarily lead to his being required to contribute to

the costs" such that they should also have to pay costs if so awarded.

Given the legal and ethical standing of third-party funding, an important consideration going forward is how the industry is regulated in order to prevent abuses that have been perpetrated in the past. In the UK, the Association of Litigation Funders (ALF) is one such body who describe themselves as, "an independent body that has been charged by the Ministry of Justice, through the Civil Justice Council, with delivering self-regulation of litigation funding in England and Wales"²². The regulatory body sets out that its primary role is to ensure the practice of ethical behaviour, ensure improved use and application of third-party funding in the interests of prudent financial risk management, and help shape the legal and regulatory framework with respect to third-party funding.

Third-Party Funding in the United Arab Emirates (UAE)

The UAE has a federal court system, as well as the common-law jurisdictions of Dubai Financial Centre Courts (DIFC) and Abu Dhabi Global Markets Courts (ADGM). Third-party funding of litigation within the civil jurisdiction of the UAE is not prohibited by the law. Keith Hutchison of Clyde & Co. points out that the UAE has not traditionally been considered as a market, largely owing to the level of uncertainty and unpredictability of the legal processes and outcomes²³. His article states that this trend is being reversed, both by the way in which local courts and parties to a dispute perceive the arbitration process and by the establishment of dedicated specialist financial courts within the UAE. Unlike the UK, where the litigation finance industry has setup a self-regulatory body (ALF), the UAE has no such body. Edward Brown of Al Tamimi and Co recently looked into crowdfunding platforms in the UAE and noted that, "any financial service or activity in the UAE or the DIFC is regulated by the Central Bank, the Securities and Commodities Authority (SCA) or, in respect of the DIFC, the Dubai Financial Services Authority (DFSA)"²⁴. Although there appear to be no legal issues with the practice of third-party funding in the common-law jurisdictions of DIFC, ADGM or the civil jurisdiction of the UAE federal

courts, it would be prudent for all parties to fully understand where they may trespass into territory of existing regulatory bodies in the UAE.

Conclusion

There are certainly numerous factors to consider when evaluating the use of third-party funding. The divisiveness of both peoples' opinion with respect to the ethics of the practice and the legality in different jurisdictions bears witness to this fact. The principle of third-party funding is sound. In many respects, if the process is left uncorrupted, it ensures that the most meritorious claims are pursued. Going forward, regulatory bodies like ALF will be key to ensuring that third-party funding is practiced ethically and in the interests of justice. ■

¹ Interchangeably the terms "Litigation Financing" and "Litigation Funding" are also used

² L. Meredith & T. Mackinnon, 'Third-Party Funding of Construction Disputes: An Overview of Litigation and Arbitration Finance' (Klconstructionlawblog.com, 13 October 2016) <<https://www.klconstructionlawblog.com/2016/10/third-party-funding-of-construction-disputes-an-overview-of-litigation-and-arbitration-finance/>> accessed 5 January 2017

³ Sophie Hannaway, 'Is crowdfunding the future of financing litigation?' (Dispute Resolution, 22 December 2016) <<https://www.roydswithyking.com/is-crowdfunding-the-future-of-financing-litigation/>> accessed 5 January 2017

⁴ invest4justice.com removed its website in or around the end of 2016.

⁵ <invest4justice.com>, 13 November 2016

⁶ <invest4justice.com>, 13 November 2016

⁷ Burford Capital LCC Financial Results

⁸ 2016 interim results were not considered as the results were significantly improved by the demise of the British pound.

⁹ President of the US Chamber Institute for Legal Reform at the time she authored the article.

¹⁰ <http://www.dandoddiary.com/2014/03/articles/litigation-financing-2/guest-post-the-real-and-ugly-facts-of-litigation-funding/>

¹¹ Lago Agrio was a mass-tort environmental contamination lawsuit.

¹² Ricassin, 'Ecuador judgment against chevron tainted by corruption US judge says' (Petro Global News, 5 March 2014) <<http://petroglobalnews.com/2014/03/ecuador-judgment-against-chevron-tainted-by-corruption-u-s-judge-says/>> accessed 5 January 2017

¹³ Giles v Thompson [1993] 3 All E.R. 321, 328, CA.

¹⁴ Chitty on Contracts (Sweet & Maxwell, 32nd ed., 2015)

¹⁵ Chitty on Contracts (Sweet & Maxwell, 32nd ed., 2015), at 16-057

¹⁶ Maintenance and Embracery Act 1634

¹⁷ *Persona Digital Telephony Ltd and Anor. v. The Minister for Public Enterprise and Ors.* [2016] IEHC 187

¹⁸ *Persona Digital Telephony Ltd and Anor. v. The Minister for Public Enterprise and Ors.* [2016] IEHC 187

¹⁹ *Essar Oilfields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361

²⁰ *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144

²¹ Robert Wheel & Others, 'Excalibur Litigation: Court of Appeal Confirms that Funders Will be Put to the Sword' (White & Case - Client Alert - Commercial Litigation, November 2016) <<http://www.whiteandcase.com/insights/publications/2016/11/excalibur-litigation-court-of-appeal-confirms-that-funders-will-be-put-to-the-sword>> accessed 5 January 2017

²² Association of Litigation Funders.com <<http://www.alf.org.uk/>> accessed 7 December 2016

²³ Keith Hutchison, 'Legal developments and funding in the UAE', [2016], *Vannin Capital - Funding in focus Content Series* | pg. 5

²⁴ <http://www.tamimi.com/en/magazine/law-update/section-14/jun-jul/crowdfunding-platforms-in-the-uae.html>