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# Issues to consider in relation to third party funded claims

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## Introduction

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The development of these doctrines can be traced back to the thirteenth century, when justice was less open and transparent and there was a tendency for claims to be assigned to nobles or other persons of wealth and influence who could expect to receive a sympathetic hearing. Actions would be 'maintained' at the assignee's expense, in return for a share of the profits upon a successful outcome. The rationale for the rules against champerty and maintenance was explained by Lord Denning MR in Re Trepeca Mines (No 2)[1]:

"*The reason why common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses*"

Until the passing of the Criminal Law Act 1967, champerty and maintenance were also criminal and tortious offences. Thereafter, the common law has continued to provide that any funding agreement which breaches the rules against champerty and maintenance is rendered void and unenforceable. However, a number of statutory exemptions been introduced, and the courts have been increasingly willing to accept the validity of third party funding as a means of furthering access to justice.

This relaxation of the common law has spawned a rapidly growing litigation funding market and the emergence of England and Wales as a key worldwide jurisdiction. Publically available figures suggest that the main litigation funders operating in the UK have assets over £1.5bn under management, with this figure representing growth of 743% from £180m in 2009, as at the time of Sir Rupert Jackson's Review of Litigation Costs. In consequence, PI insurers are more likely than ever to encounter third party funded claims.

This note is intended to flag some key issues to consider in the context of defending third party funded claims.

## The consequences of funding contravening the rules against champerty and maintenance

Pursuant to the modern common law, the provision of funding, including in return for a share of the proceeds, is only precluded if the funding agreement discloses an element of impropriety so as to constitute "*wanton and officious intermeddling with the disputes of others*"[2] . In practical terms, this is likely to be by virtue of the funder having excessive involvement or control over the conduct of the litigation, or receiving a disproportionately high level of profit.

Whilst the scope of champerty and maintenance has receded in recent years, the consequences of such a finding remain significant. In summary they are that:

1. The funding agreement is void and unenforceable.

2. The funded party will be unable to recover its costs from an opponent (on account of the indemnity principle – because the funding agreement is void and unenforceable, no liability exists in relation to the funded costs).
3. The funder may well face a non-party costs order pursuant to section 51 of the Senior Courts Act 1981.

It follows that the issue remains worth exploring from a defendant's perspective. This is particularly so in circumstances where there is reason to doubt the claimant's integrity or the funder involved is not a well-known organisation or a member of the Association of Litigation Funders (**AoLF**). However, a practical consideration is that it is incumbent upon a defendant wishing to contest the validity of a funding agreement to put this in issue; potentially, this might be within or a statement of case or at the conclusion of an action in the context of assessing liability for costs.

# How can a defendant find out about third party funding?

There is no general obligation upon a claimant to disclose the existence of third party funding, although a claimant may well elect to do so on the basis that this demonstrates the availability of resources to pursue the claim to trial and that the merits are good enough to persuade an objective third party to support the claim.

However, in many cases, basic enquiries concerning a claimant's financial position (such as reviewing its accounts), as are likely to be undertaken in the context of considering whether security for costs is appropriate, are likely to reveal whether a claimant has the necessary resources to self-fund a claim. Thereafter, more focussed enquiries can be made in correspondence.

A claimant can also be compelled to reveal the identity of its funder, but only where the information has relevance to a specific issue. Examples of such circumstances are:

- *Wall v The Royal Bank of Scotland Plc* [2016] EWHC 2460 (Comm) – a claimant was ordered, pursuant to CPR 25.14, to reveal the identity of its funder in order to facilitate a security for costs application against the funder (with the essential reasoning being that there was (a) good reason to believe that funding was in place, and (b) a realistic prospect of security being granted).
- *In The Matter Of Hellas Telecomunications (Luxembourg)* [2017] EWHC 3465 (Ch) – a similar outcome, but the respondent was also ordered to reveal, subject to a confidentiality club, the funding terms in order to consider whether CPR 25.14(2)(b) (the provision of funding in return for a share of any recovery within the proceedings) applied.
- *The RBS Rights Issue Litigation* [2017] EWHC 463 (Comm) – the claimants were ordered to disclose the identity of their funders in connection with a potential security for costs application (but not the terms of their ATE cover) – one notable feature of this case being that the prospects of the intended security for costs application succeeding were limited (but were not hopeless).
- *Raiffesen Zentralbank Osterreich AG v Crossseas Shipping Ltd and Ors.* [2003] EWHC 1381 (Comm) – an unsuccessful defendant was ordered, pursuant to section 51 of the Senior Courts Act 1981 (**SCA**), to disclose the identity of the parties funding his defence for the purposes of enforcing an award of costs in the claimant's favour.
- *JSC BTA Bank v Ablyyazov and another* [2018] EWHC 1368 (Comm) – a defendant was ordered to provide full disclosure as to how he was funding his defence in order to determine whether a worldwide freezing order had been contravened.

# Costs

Whilst not always so, costs are often a key issue in connection with third party funded claims. This is because, if a claimant is reliant upon third party funding to pursue a claim, it is unlikely that they will have sufficient resources to meet an adverse costs award. However, the involvement of third party funders is generally good news for defendants in this context because:

- It is likely that a professional funder will insist upon the maintenance of adequate ATE cover to protect it against the possibility of being ordered to provide security (pursuant to CPR 25.14) and/or to pay the defendant's costs (pursuant to s.51 of the SCA) upon an unsuccessful outcome. This is particularly so where the claim entails material risk.
- As noted above, a defendant can seek security for its costs from a funder pursuant to CPR 25.14 if the funder has "*contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings*". The leading authority here is The RBS Rights Issue Litigation [2017] EWHC 1217 (Comm), which provides helpful guidance[3] regarding the factors to be taken into account.
- The funder provides an obvious target for non-party costs order following successful defence if costs are not recovered from the funded party. In relation to a professional funder, the prospects of such an application succeeding are invariably good. Further, whilst there was a historic presumption that a funder's exposure would be capped by the level of its investment (a principle known as the

'Arkin cap'), in accordance with the recommendations made by Sir Rupert Jackson in his Review of Civil Litigation Costs, this is now unlikely to be the case. Helpful cases in relation to the issue include:

  - *Arkin v Borchard Lines Ltd & Ors* [2005] EWCA Civ 655
  - *Excalibur Ventures LLC v Texas Keystone Inc & Ors* [2016] EWCA Civ 1144
  - *Davey v Money and others* [2019] EWHC 997 (Ch)

- AoLF members are required to maintain a specified minimum level of capital (currently £5m).

# Privilege

A final issue to consider is whether privilege has been lost in relation to documents by virtue of disclosure to funders, or where efforts to secure funding have been put in issues within the proceedings (for example, as explanation for a period of delay[4]).

It is generally thought that, where funding is provided, common interest privilege is likely to apply to preserve any underlying claims to litigation or legal advice privilege. However, this is not so in relation to unsuccessful attempts to secure funding. In such circumstances, the material issue becomes whether confidentiality in the erstwhile privilege documents (for example, counsel's advice), being a prerequisite for a claim to privilege, has been lost.

Where unsuccessful efforts to secure funding are put in issue within the proceedings, the analysis is slightly different. Such communications are both relevant and do not, prima facie, attract litigation or legal advice privilege. They are thus subject to an obligation to provide disclosure and inspection. However, such documentation will benefit from legal advice privilege if it reveals the nature of the advice which has been given to the claimant (within discrete privileged communications). The leading authority in relation to this scenario is *Edwardian Group Ltd and another v Singh and others* [2017] EWHC 2805 (Ch).

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(1) [1963] Ch 199

(2) As described by Fletcher Moulton LJ in *British Cash & Parcel Conveyors v Lanson Store Services Co Ltd* [1908] 1 KB 1006

(3) In particular, see paragraph 19 of the judgment (of Hildyard J)

(4) A scenario considered in *Edwardian Group Ltd and another v Singh and others* [2017] EWHC 2805 (Ch)

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# Related expertise