Litigation Funding

Contributing editors
Steven Friel and Jonathan Barnes

2019

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Litigation Funding 2019

Contributing editors

Steven Friel and Jonathan Barnes

Woodsford Litigation Funding

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2016
Third edition
ISBN 978-1-78915-041-4

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Preface

Litigation Funding 2019

Third edition

Getting the Deal Through is delighted to publish the third edition of *Litigation Funding*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Israel, Spain and the United Arab Emirates and a new article on United States – other key jurisdictions.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford Litigation Funding, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
November 2018

Australia

Gordon Grieve, Greg Whyte, Simon Morris and Susanna Khouri

Piper Alderman

1 Is third-party litigation funding permitted? Is it commonly used?

Third-party litigation funding is permitted in Australia, however, not without complexity.

Maintenance and champerty are obsolete as crimes at common law (*Clyne v NSW Bar Association* (1960) 104 CLR 186, 203) and maintenance and champerty have been abolished as a crime and as a tort by legislation in New South Wales, South Australia, Victoria and the Australian Capital Territory. In Queensland, Western Australia, Tasmania and the Northern Territory, the torts of maintenance and champerty have not been abolished. Notwithstanding legislation, it remains the position in all Australian jurisdictions that general principles of contract law, pursuant to which a contract may be treated as contrary to public policy or as otherwise illegal, are not disturbed. This means that a third-party litigation funding agreement could be set aside by an Australian court if it were found to be inconsistent with common law public policy considerations.

The High Court in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) CLR 386 (*Fostif*) considered provisions of the New South Wales legislation abolishing maintenance and champerty as torts. The High Court held that third-party funding per se was not contrary to public policy or an abuse of process. The Court ruled that the fact that a funder may exercise control over proceedings and bought the rights to litigation to obtain profit did not render the funding arrangements contrary to public policy. The Court held that profiting from assisting in litigation and encouraging litigation could only be contrary to public policy if there was a rule against maintaining actions (which in New South Wales had been abolished). Concerns raised about the possibility of unfair bargains and the potential for litigation funding to distort the administration of justice were rejected. The Court ruled that where these concerns arose they could be adequately dealt with through existing doctrines of contract and equity (unfair contracts), abuse of process (rules of court dealing with the administration of justice) and existing rules regulating lawyers' duties to the court and clients (conflicts, etc).

Importantly, *Fostif* did not consider the position in those Australian jurisdictions where the torts of maintenance and champerty had not been abolished.

In a joint publication by the Law Council of Australia and the Federal Court of Australia it was stated that:

> *In many cases, litigation funding has proven to be the lifeblood of much of Australia's representative proceeding litigation at federal and state level. Not all cases are funded by third-party litigation funders but a sufficiently large number of class actions have been funded in this manner that it has had a major impact of the sort of cases conducted.*

The availability of funding has not been attributed to any overall rise in litigated matters, suggesting that litigation funding is being used cautiously in order to improve access to justice while bringing commercial gain and without encouraging vexatious or unmeritorious claims.

The available statistics about class action filings demonstrate that funded litigation is on the increase in Australia. Between June 1997 and May 2002, funded class actions comprised 1.7 per cent of all class actions. In the past five years, funded class actions compromised 46.2 per cent of all class actions. Further, 71 per cent of all shareholder class actions filed in Australia on or before 31 May 2017 were funded by commercial litigation funders.

2 Are there limits on the fees and interest funders can charge?

There is no legislation or regulation in Australia that limits the fees that funders can charge.

The High Court in *Fostif* held that contract law considerations such as illegality, unconscionability and public policy may still arise in relation to a litigation funding agreement but there is no objective standard against which the fairness of the agreement may be measured. Accordingly, whether a particular clause in a litigation funding agreement may contravene public policy will be answered having regard to the circumstances of each particular case.

Theoretically, Australian courts could set aside a litigation funding agreement where the funder's interest constituted an equitable fraud in the sense that it involved capturing a bargain by taking surreptitious advantage of a person's inability to judge for him or herself, by reason of weakness, necessity or ignorance.

Australian courts exercising equitable jurisdiction can set aside bargains where terms are harsh or unfair. The High Court in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 restated the principles relating to unconscionable conduct. A court may set aside a bargain as unconscionable if one party, by reason of some condition or circumstance, is placed at a special disadvantage compared to another and the other party takes unfair or unconscientious advantage of that special disadvantage. In those circumstances, the innocent party may be relieved of the consequences of the unconscionable conduct. In *Kakavas v Crown Melbourne Limited* (2013) 250 CLR 392 HCA 25, a gambling addict sought to avoid losses with a casino, arguing that the casino had taken unconscionable advantage of his vulnerability. The Court in rejecting his claim ruled that inequality of bargaining power was relevant, but not essential to establish unconscionability and that a party must rely upon standards of personal conduct known as 'the conscience of equity'. The High Court drew a clear distinction between the equitable principles of unconscionable conduct and undue influence.

Prohibitions against unconscionable and misleading or deceptive conduct that may apply to dealings between litigation funders and funded litigants are also reflected in general consumer protection provisions in the Competition and Consumer Act 2010 (Cth) and provisions in the Australian Securities and Investment Commission Act 2001 (Cth).

The Federal Court Class Actions Practice Note (GPN-CA) requires disclosure to group members who are clients or potential clients of the applicant's lawyers regarding applicable legal costs or litigation funding charges in class action matters, and sets out the manner in which these arrangements should be communicated. The Court must also be provided with a copy of any litigation funding agreement. Disclosure of a litigation funding agreement to other parties to the litigation is also required with the disclosure being redacted to conceal information that might reasonably be expected to confer a tactical advantage.

While not a means of formally limiting litigation funding charges, settlements in funded class actions (including the amounts allocated for the payment of a funder's fee) are subject to approval by the court. In a number of recent cases the courts have made so-called 'common fund' orders, both as part of a class action settlement and also at an early stage of proceedings. A common fund order has the effect of binding all members of the represented group to the terms of a funding agreement, not just those who have executed the agreement. Its purpose is to equalise the distribution of damages so that unfunded claimants must also contribute to the costs of the claim, including the funder's fee. It was observed in *Money Max Int Pty Ltd (trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191 FCAFC 148 at [82]:

> *We expect that the courts will approve funding commission rates that avoid excessive or disproportionate charges to class members but which recognise the important role of litigation funding in providing access to justice, are commercially realistic and properly reflect the costs and risks taken by the funder, and which avoid hindsight bias.*

3 Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

Third-party litigation funders in Australia currently are not required to be licensed and are not subject to any form of prudential supervision.

In 2012, the federal government exempted a person providing financial services to a litigation scheme from all forms of regulation that apply to providers of financial services and credit facilities. However, the federal government has enacted a regulation that requires that providers of litigation funding services adopt and maintain adequate processes to manage conflicts of interest. Criminal sanctions apply for non-compliance with the conflict management requirements. The conflict management requirements are policed by the Australian Securities and Investment Commission (ASIC).

The purpose of the regulation is to ensure that conflicts – ordinarily where the interests of funders, lawyers and claimants diverge – are appropriately managed by the litigation funder. ASIC's Regulatory Guide 248 sets out ways in which funders can meet their conflict management obligations under the regulation, but otherwise do not prescribe the required mechanism for compliance with the regulation. There is a requirement that providers of litigation funding maintain adequate practices and follow certain procedures for managing conflicts of interest. However, the regulation does not prescribe the content of the policy or the processes that a litigation funder must have in place to respond to a conflict of interest.

The Federal Court Practice Note Class Actions (GPN-CA) requires that 'any costs agreement or litigation funding agreement should include provisions for managing conflicts of interest (including of "duty and interest" and "duty and duty") between any of the applicants, the class members, the applicant's lawyers and any litigation funder'. Similar practice notes operate in Victoria, Queensland and New South Wales.

On 7 September 2017, the Victorian Law Reform Commission (VLRC) published its review of current regulation of litigation funders and lawyers in Victoria. The VLRC Report suggested that as the Federal Court has done, the Supreme Court could also introduce practice requirements for litigation funders involved in class actions in relation to conflicts of interest.

In December 2017 the Australian Law Reform Commission (ALRC) was asked to consider a range of matters relating to class action proceedings and third-party litigation funders and in particular whether third-party funders should be subject to Commonwealth regulation.

The ALRC released a discussion paper in June 2018 that proposed that third-party litigation funders be required to obtain and maintain a 'litigation funding licence' to operate in Australia and that such licence should include requirements relating to adequate risk management systems, adequate arrangements for managing conflicts of interest, ensuring that the licensee does all things necessary to provide services efficiently, honestly and fairly and have sufficient resources (including financial, technology and human resources). See: Australian Law Reform Commission, *Class Action Proceedings and Third-Party Litigation Funding*, Discussion Paper No. 85 (2018).

The ALRC is due to provide its report and recommendations to the federal government by December 2018.

4 Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

There are no specific professional or ethical conduct rules that apply to the role of legal professionals in advising clients in relation to third-party litigation funding or in funded proceedings.

Australian legal practitioners are regulated by state-based regimes prescribing professional obligations and ethical principles when dealing with their clients, the courts, their fellow legal practitioners, regulators and other persons.

The interposition of a third-party litigation funder into the lawyer–client relationship raises ethical issues around conflicts, loyalty, independence of a lawyer's judgement and confidentiality. Legal practitioner conduct rules in all Australian jurisdictions deal with each of these concepts. The conduct rules reflect a lawyer's fiduciary duty towards his or her client and primary duty to the court.

A practitioner (which includes a law practice) will have a conflict of interest when the practitioner serves two or more interests that are not able to be served consistently, or honours two or more duties that cannot be honoured compatibly.

5 Do any public bodies have any particular interest in or oversight over third-party litigation funding?

See question 3 with respect to the regulation of conflicts of interest. Outside of managing conflicts of interest, there is currently no formal regulatory framework applying to litigation funders.

There are some specific examples where the terms of litigation funding agreements are subject to review by the courts. In a corporate insolvency context, it is common for a liquidator to enter into a funding agreement with a third-party funder to pursue recoveries on behalf of creditors.

Under the Corporations Act 2001 (Cth), a liquidator is required to seek the approval of the company's creditors or the court's approval, where the terms of a contract that he or she enters into will last for more than three months. This means that in many cases where a liquidator enters into a litigation funding agreement, court approval is sought.

When reviewing a litigation funding agreement for approval, the court takes account of a range of factors, including:

- the liquidator's prospects of success in the litigation;
- the interests of creditors;
- possible oppression in bringing the proceedings;
- the nature and complexity of the cause of action;
- the extent to which the liquidator has canvassed other funding options;
- the level of the funder's premium and other funding terms;
- the liquidator's consultations with creditors; and
- the risks involved in the claim, including the amount of costs likely to be incurred in the proposed litigation and the extent to which the funder is to contribute to those costs, to the costs of the defendant in the event that the action is not successful, or towards any order for security for costs.

The decisions involving approval of funding agreements demonstrate that the courts do not simply 'rubber stamp' a funding proposal put forward by a liquidator. The approval of the court is not intended to be an endorsement of the proposed funding agreement or the proposed claim, but merely a permission for the liquidator to exercise his or her own commercial judgement in the matter.

The case management of class actions commenced in the Federal Court and other state courts involving litigation funding require at or prior to the initial case management conference that each party disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order.

All settlements reached in class action proceedings must be approved by the court. Where a settlement involves a funder's success fee being deducted from funds otherwise available to class members, those terms are subject to judicial scrutiny as to reasonableness and proportionality.

6 May third-party funders insist on their choice of counsel?

Yes. It is a permissible level of control over the litigation process for a third-party funder to insist on their choice of lawyers retained. Third-party funders are invariably consulted when it comes to retaining counsel. Commonly, the funder will, pursuant to the funding arrangement, appoint the lawyers to provide the legal work, and the retainer agreement between the lawyers and the funded client will be pursuant to terms agreed by the funder subject to the lawyers' overriding duties to act in the best interests of their client.

7 May funders attend or participate in hearings and settlement proceedings?

Yes. It is a permissible level of control over the litigation process for the litigation funding agreement to provide that the funder has the right to give instructions to the lawyers concerning the conduct of the litigation, subject to the funded client having the right to override the funder's instructions.

Commonly, save in respect of settlement (see below), in circumstances where a conflict arises between the lawyer's duty to his or her client and the funder, the lawyer is required to prefer the interests of and to take instructions from his or her client.

It is submitted that this level of control over the litigation process is consistent with the principles in *Fostif* and not contrary to public policy.

In a settlement context, in recognition of the funder's interest in the resolution of the litigation, where there is a difference of opinion between the funded client and the funder in respect of a settlement offer, the standard practice among funders operating in Australia and consistently with ASIC's Regulatory Guide 248 is that the difference of opinion is referred to the most senior counsel acting in the matter for advice whether the settlement offer is reasonable in all the circumstances and the parties agree to act in accordance with that advice. In the class action context, any settlement reached on behalf of the representative applicants, including the reasonableness of the funder's commission, will be subject to court approval. The Federal Court Practice Note Class Actions (GPN-CA) sets out a range of requirements for parties in order to satisfy the court that the proposed settlement is fair and reasonable and in the interests of the group members.

8 Do funders have veto rights in respect of settlements?

In class actions, a funder cannot veto a settlement and any difference of opinion between a funder and a representative applicant regarding a proposed settlement are dealt with pursuant to the practice outlined in question 7. For other types of funded litigation, the funder's control over a settlement is subject to terms of the funding agreement.

9 In what circumstances may a funder terminate funding?

Commonly, litigation funding agreements entered into in Australia allow a funder to terminate the litigation funding agreement without cause on the giving of notice.

Usually, the circumstances giving rise to the termination of a funding agreement will relate to the commercial viability of the claim, a material change to the legal merits or to the value of the claim. Circumstances may also arise where the funder considers that there is an irreconcilable and unavoidable conflict of interest in its continuing to be a party to the funding agreement. Contract law principles that apply to the termination of contracts generally will apply.

It is usual that the litigation funder will have responsibility to pay adverse costs and provide security of costs incurred up to the date of termination. In *Trafalgar West Investments Pty Ltd v LCM Litigation Management Pty Ltd* [2016] WASC 159, the funder (LCM) terminated a litigation funding agreement that obliged LCM to satisfy orders for security for costs. Beech J held that under that litigation funding agreement LCM was obliged to satisfy orders for security for costs made prior to the termination date but not after the termination date.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

It is recognised and accepted that litigation funding plays an important role in providing access to justice. Especially in the class action context, decisions of Australian courts following *Fostif* are philosophically supportive of the role that lawyers and third-party funders have in the identification and management of claims.

In a number of cases where the court is considering a common fund order or orders that could affect the funder's interest, the courts have permitted the funder to retain its own representation and appear before the court to make submissions (a recent example of this approach is *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 1422 (18 September 2018)).

11 May litigation lawyers enter into conditional or contingency fee agreements?

'No win, no fee' conditional costs agreements are permitted in Australia.

There are prohibitions on legal service providers obtaining a fee calculated by reference to the amount of a settlement or judgment. While the regulations differ from state to state, lawyers are prohibited from entering contingent fee agreements, but are permitted in a conditional fee agreement to charge an 'uplift' of up to 25 per cent of 'at risk' fees based on standard hourly rates. The permissible percentage uplift may vary from state to state.

The Productivity Commission's Access to Justice Report (September 2014) recommended lifting the prohibition on contingency fee arrangements because they promote access to justice by addressing imbalances between individual litigants in complex matters and well-resourced defendants.

The recommendation was on the basis that comprehensive disclosure was provided as to the percentage of damages to be recovered by law firms, responsibility for liability for disbursements and adverse costs orders and capping the percentage limit on a sliding scale (to prevent law firms gouging, or earning windfalls on high-value claims).

As a safeguard against contingency fees giving rise to unmeritorious claims, the Commission referred to the existing powers of courts to make adverse costs orders against non-parties, the regulation of the legal profession and lawyers' ethical and professional obligations. The Commission's recommendations have yet to be implemented.

The ALRC as part of its June 2018 discussion paper has proposed the introduction of a specific contingency fee arrangement for class actions subject to prior approval of the court. The ALRC will provide final recommendations to the federal government in December 2018.

12 What other funding options are available to litigants?

After-the-event insurance (ATE), while having long been available in the UK market is relatively new in Australia. It can be purchased after a dispute has arisen or a proceeding is contemplated and covers a claimant's liability to pay adverse cost orders in the event litigation fails. When purchasing ATE insurance for use in Australian courts, it is important to understand whether the policy includes an obligation on the insurer to provide security for costs and the form in which such security will be provided, in particular, the availability of a deed of indemnity by the insurer. See question 19 regarding security for costs.

On 1 January 2017, the Commonwealth Government extended funding for its Fair Entitlements Guarantee Recovery Program that is litigation funding for liquidators of companies and trustees in bankruptcy. It is focused on recovering employee entitlements paid by the Commonwealth Government to employees of insolvent enterprises. Evidence of the scheme in practice can be seen in *Needham, Re; Bruck Textile Technologies Pty Ltd (In Liquidation)* [2016] FCA 837.

13 How long does a commercial claim usually take to reach a decision at first instance?

It is not possible to say how long a commercial claim may take to reach a decision at first instance.

All Australian civil courts adhere to procedures, court rules and written practices of case management directed to the cost-effective, efficient and expeditious administration of justice. Cases must be brought under court management soon after their commencement. Different kinds of cases require different kinds of management. The general rule is that the number of court appearances must be minimised. Realistic but expeditious timetables must be set and trial dates are generally set as soon as possible and practicable. Unless there is good reason, the timetable provided to the legal practitioners to manage the progression of the case must be adhered to. One key objective of the state and federal regimes currently in place is to identify the issues in dispute early in the proceedings. Alternative dispute resolution is encouraged and sometimes mandated. There is monitoring of the courts' caseloads in order to provide timely and comprehensive information to judges and court officers managing cases.

The Productivity Commission's report into Government Services 2017 set out the clearance rates for Australian courts for 2015–16. While this figure encompasses all civil matters – not merely commercial proceedings – the overall picture is that the clearance rate in both lower and superior courts (from which data was available) suggests that Supreme Courts of each state and the Federal Court are, on average, clearing around 98 per cent of all civil matters listed in a given calendar year. This statistic discloses only that courts are close to disposing of as many proceedings as are commenced in any given calendar year. However, complex commercial matters are unlikely to be resolved within one year of commencement, for example, 7.3 per cent of the Federal Court caseload was over 24 months old, and that largely comprised matters where the causes of action are described as corporations, intellectual property, trade practices and taxation. That said, case management is an important component of the administration of justice in Australian courts.

14 What proportion of first-instance judgments are appealed? How long do appeals usually take?

Nationally, in 2016–17, 1,045 appellate cases were filed in the Federal Court. Despite variance in completion rates, and accepting that the caseload of the appellate court was preferable to proceedings on appeal that had been on the court lists outside 2016–17, in the reporting year 885 appeals and related actions were finalised by the Federal Court. At 30 June 2017 there were only two matters that were 24 months or older. The clearance rate for appeals was 99.3 per cent for 2016–17. Accordingly, it is appropriate to conclude that most appeals are determined within 12 months of the filing of a notice of appeal.

In NSW, as a further example, Supreme Court of NSW Provisional Statistics (as at 18 May 2018) show that 359 cases were filed in the NSW Court of Appeal during the 2017 year, and 380 cases were finalised. Note, where an appeal has been preceded by a grant of leave, this is counted as one continuous case, with a final disposal being counted only when the substantive appeal is finalised. For this reason, the figures for disposals of notices of appeal (and applications for relief) and disposals of applications for leave, combined, exceed the number of final disposals). From these statistics it is hard to determine the number of appeals not determined within a calendar year.

15 What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

There is no available data showing the proportion of judgments requiring contentious enforcement processes.

Enforcement of judgments in Australia can be undertaken through insolvency mechanisms. Non-compliance with a judgment is a recognised basis for the appointment of a liquidator or a trustee in bankruptcy. Judgments may also be enforced with the assistance and supervision of the court through the issuing of writs of execution. A judgment creditor may obtain a garnishee order directing a third party who holds funds on behalf of the judgment debtor, or owes the judgment debtor funds, to pay the funds, or a proportion of the funds, to the judgment creditor. In some jurisdictions, judgment creditors have a right to secure a judgment against real and personal property of the judgment debtor through the registration of a security interest.

16 Are class actions or group actions permitted? May they be funded by third parties?

Yes. Class actions are permitted in Australia and are common. Class actions can be funded by third parties. In late 2016, the Supreme Court of Queensland became the third state after New South Wales and Victoria to introduce court procedures specifically directed to the conduct of class actions in that court.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

Yes. The courts in Australia have power to order that an unsuccessful party pay the costs of the successful party although the amount that may be recovered varies from court to court. Costs are at the discretion of the court. Unless it appears to the court that some other order should be made, costs follow the event. The usual adverse order for costs requires the unsuccessful party to pay the successful party's reasonable legal costs.

There are differing regimes for the determination of the reasonable legal costs that an unsuccessful party is obliged to pay.

There is currently no case law in Australia that holds that an unsuccessful party to litigation may be required to pay the litigation funding costs of the successful party.

18 Can a third-party litigation funder be held liable for adverse costs?

Yes. Confirmation that a court can order costs against a non-party was confirmed by the High Court in *Knight v FP Special Assets* (1992) 174 CLR 178 (*Knight*). In this case, Mason CJ and Deane J stated that there was a general category of cases in which an order for costs should be made against a non-party. The category consists of circumstances where the non-party has played an active part in the conduct of the litigation and where the non-party has an interest in the subject of the litigation. In these circumstances, an order for costs should be made against the non-party if the interests of justice require that it be made.

In a third-party litigation funding context, the *Knight* case was cited in *Gore v Justice Corp Pty Ltd* (2002) FCR 429 FCA 354, where Justice Corp was held liable to pay the appellants' costs in this appeal and the costs of and incidental to the hearing of the appellants' notice of motion in the court below.

In *Ryan Carter and Esplanade Holdings Pty Ltd v Caason Investments Pty Ltd & Ors* [2016] VSCA 236, the Court of Appeal of the Supreme Court of Victoria upheld a non-party costs order against a litigation funder Global Litigation Funding Pty Ltd (Global), Global's sole director and company secretary of Global and shareholder. The decision arose in a context where the amounts ordered by way of security for costs were insufficient to cover the defendant's actual costs. Arguments that making a costs order against the company director was 'piercing the corporate veil' were rejected. The Court of Appeal determined that the trial judge had exercised his discretion appropriately, there was no miscarriage of justice and the appeal was dismissed.

Legislation also confers power on the courts to make adverse costs orders against non-parties. For example, section 98 of the Civil Procedure Act 2005 (NSW) confers a general power to make costs orders against parties and non-parties alike.

Non-party costs orders are rarely made against litigation funders because in almost all third-party funded cases the funded litigant will be ordered to provide security for the defendant's costs.

19 May the courts order a claimant or a third party to provide security for costs?

The court has the power to order a plaintiff to give security for the defendant's cost of defending the plaintiff's claim. The court can order a stay of proceedings until security is given and if there is persistent non-compliance, the court may dismiss the plaintiff's claim. The power to order security for costs comes both from statutory rules and from the inherent jurisdiction of the court. Security is sought in circumstances where there is a concern that the plaintiff may be unable to satisfy an adverse costs order made against it should the plaintiff's claim fail.

The existence of a litigation funding agreement will be relevant in an application for security for costs. In most instances, the litigation funding agreement would be tendered in any response to an application for security, and consideration will be had to the ability of the funder to meet its indemnity obligations in respect of adverse costs.

If recourse to the third-party funder's balance sheet is not accepted as satisfactory evidence of the funder's ability to meet its indemnity obligations, recognised forms of security include the payment of money into court, bank guarantees and in more recent times, ATE insurance and deeds of indemnity from insurers securing direct recovery rights to the defendants in the event of an adverse cost order.

In that regard, *In the matter of DIF III Global Co-Investment Fund LP (formerly Babcock & Brown DIF III Global Co-Investment Fund LP) v BBLP LLC (formerly Babcock & Brown LP)* [2016] VSC 401 (DIF) the Court accepted as adequate security a deed of indemnity proffered by an overseas based ATE insurer. However, in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699, Yates J, while accepting that an appropriately worded ATE policy may be capable of providing sufficient security for an opponent's costs, in the circumstances of that case and based on the terms of the ATE policy before him, rejected an ATE insurance policy from an overseas insurer as providing sufficient security.

The amount of security is calculated by reference to the reasonable and necessary costs of defending the action. This will be a matter for evidence. In complex claims, it is usual that security orders will be given in stages by reference to identified phases in the litigation.

20 If a claim is funded by a third party, does this influence the court's decision on security for costs?

If the matter is funded, the court will generally order security for costs. It is a relevant consideration in the granting of security that a third-party litigation funder intends to benefit from any recovery (*Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744).

In the case of *Perera v Getswift Limited* [2018] FCA 732, the Court observed: 'it is accepted that in the event that funders are using the processes of the court in order to procure a commercial benefit, a sine qua non of this is the provision of adequate security.'

21 Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

ATE insurance is permitted and is commonly used, particularly in funded class action litigation.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Generally, no. However, for class actions commenced in the Federal Court and certain of the state courts, claimants are required to disclose the litigation funding agreement. The commercial terms may be redacted. *Coffs Harbour City Council v Australian and New Zealand Banking Group Ltd (t/as ANZ Investment Bank)* [2016] FCA 306 provides examples of terms that may be redacted.

23 Are communications between litigants or their lawyers and funders protected by privilege?

Some but not all communications between a litigant or their lawyers and a funder may be protected by privilege.

A claim of privilege can be made to object to the production of, or access to, documents in response to a subpoena to produce, notice to produce or order to give discovery. In addition, privilege can be claimed to object to answering interrogatories.

Client legal privilege protects confidential communications made, and confidential documents prepared, for the dominant purpose of a lawyer providing legal advice or a lawyer providing legal services relating to litigation. Professional confidential relationship privilege protects communications to preserve the confidential nature of certain relationships that could be undermined by disclosure. Settlement negotiations privilege protects communications or documents created in connection with an attempt to settle a dispute. A common interest privilege may arise if two parties with a common interest exchange information and advice relating to that interest, the documents containing that information may be privileged from production in the hands of each.

With the exception of the common interest privilege each of these privileges was derived from the common law but is now given a statutory basis in the Uniform Evidence legislation.

In *IOOF Holdings Ltd v Maurice Blackburn Pty Ltd* [2016] VSC 311, the claimant sought production of certain documents created in connection with investigations carried out by law firm Maurice Blackburn in anticipation of the commencement of representative proceedings. Maurice Blackburn claimed client legal privilege over the majority of the documents sought by IOOF. The Court accepted, for the most part, the client legal privilege claims made by Maurice Blackburn. However, the Court stopped short of accepting in their entirety similar claims from the litigation funder, Harbour Litigation Funding Ltd, who separately claimed privilege over certain documents relating to communications with Maurice Blackburn.

Despite the fact that there was no 'traditional client-lawyer relationship' between Harbour and Maurice Blackburn, the Court accepted that Harbour sought legal advice from Maurice Blackburn (despite not formally retaining them) and could claim privilege over that advice. Where documents that could be subject to a claim for litigation privilege by Maurice Blackburn's 'client' had been confidentially shared with Harbour, the Court accepted that this may not amount to a waiver.

Harbour was, however, required to produce certain communications with Maurice Blackburn that related to proposed funding agreements for the class action as these were found to be 'commercial negotiations between . . . two arm's length parties' and not created for the dominant purpose of legal advice. This finding is noteworthy because it distinguished previous authority that had held that litigation privilege could apply to a funding agreement and related documents on the basis that, in this case, there was no evidence that any client had sought to claim privilege over the documents in question and Harbour could not claim litigation privilege in its own right (as it was not a potential party to the class action).

24 Have there been any reported disputes between litigants and their funders?

There are numerous decisions involving challenges to the funding relationship brought by defendants to the funded litigation, but very few reported decisions in disputes between plaintiffs and their funders.

The two reported cases arose in the context of the termination of a litigation funding agreement.

In *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45, which is significant for its clarification that a litigation funder did not require an Australian Financial Services Licence (AFSL), the funder sought payment of an early termination fee that arose as a result of a change in control transaction by the litigant. The litigant resisted the payment of the early termination fee on the basis that it had a statutory right of rescission due to the funder's failure to hold an AFSL. The Court held that the funder was not required to hold an AFSL and the litigant could not avoid the financial consequences under the funding agreement.

Trafalgar West Investments Pty Ltd v LCM Litigation Management Pty Ltd [2016] WASC 159 considered whether a litigation funder was obligated to satisfy a staged security for costs order made prior to termination. The court dismissed the litigant's claim and determined that LCM was not obliged to satisfy the remaining stages of the order.

PiperAlderman

Gordon Grieve ggrieve@piperalderman.com.au
Greg Whyte gwhyte@piperalderman.com.au
Simon Morris smorris@piperalderman.com.au
Susanna Khouri skhouri@piperalderman.com.au

Level 23, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
Australia

Tel: +61 2 9253 9999
Fax: +61 2 9253 9900
www.piperalderman.com.au

25 Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

Practitioners should be aware of the current reference to the ALRC Inquiry into Class Action Proceedings and Third-Party Litigation Funders. Key law reform proposals include:
- regulation of third-party litigation funders through licensing;
- enhancing the powers of the court to reject, vary or set commission rates in third-party funding arrangements for funded class actions; and
- amendments to require all class actions to proceed as 'open' class actions and powers to manage 'competing' class actions.

The ALRC is to report to the federal government in December 2018. It is not clear whether the federal government will act on any, some or all of the ALRC's recommendations and if so, how quickly law reform may occur.

In addition to the ALRC reference, there is currently a reserved judgment of the Full Court of the Federal Court of Australia in relation to class action litigation concerning *Get Swift Limited*. This judgment should illuminate the approach that the Federal Court of Australia will adopt in the management of multiple identical class actions supported by different lawyers and third-party litigation funders.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

ISBN 978-1-78915-041-4