Litigation Funding 2020

Contributing editors
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Woodsford Litigation Funding

LEXOLOGY
Getting The Deal Through

WOODSFORD
LITIGATION FUNDING

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Litigation Funding*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 Italy and the United States of America.

Lexology 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.lexology.com/gtdt.

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.

Lexology 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.

LEXOLOGY
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Introduction

Steven Friel and Jonathan Barnes
Woodsford Litigation Funding

This is the fourth edition of our global survey of the law and practice of litigation funding. Reflecting on the previous three editions, we can see that certain international norms are now becoming clear.

As to the law of litigation funding, the last year has highlighted that most relevant legal principles are now relatively settled.

We are a generation on from a time when many jurisdictions were still grappling with the lawfulness of litigation funding and the enforceability of litigation funding agreements. With limited exceptions (places such as Ireland will catch up eventually), it is now well established in the leading global dispute resolution centres that the historic principles of champerty and maintenance have little impact on our industry.

The Supreme Court of Queensland in *Murphy v Gladstone* found that the funding agreements at issue in the case did 'not involve unlawful conduct or purpose and are not prejudicial to the administration of justice'. In making declarations that the funding agreements were 'not, by reason of maintenance, champerty or public policy, unenforceable' the court held that the agreements accord with the public policy considerations of representative proceedings in Queensland.

Glustein J. in *Marriott v General Motors of Canada Company*, stated, 'It is settled law [in Canada] that funding agreements are an acceptable way to promote access to justice.'

As to privilege, while there are a wide variety of approaches to evidential issues across the world, particularly as between common law and civil law jurisdictions, it is now commonly accepted that a litigant's communications with litigation funders are protected from disclosure. Whether this protection comes from common interest privilege or some version of the work product doctrine, the global norm is to recognise a circle of confidence and privilege that includes the litigant, its legal advisers and its third-party litigation funder.

There is perhaps less uniformity around the world on whether litigants are required to disclose, to opposing parties and to the relevant court or tribunal, the fact that the litigation is funded by a third party, but a norm is forming. While the fact of litigation funding, and possibly also the identity of the litigation funder, is required to be disclosed in certain jurisdictions, it is almost universally the case that the confidential funding terms contained in the litigation funding agreement are not to be disclosed. In an environmental contamination case in the US Federal Court in New Jersey, Magistrate Judge Schneider stated:

> *[T]he Court rejects the notion that it must know the details of plaintiffs' funding arrangements to decide the scope of discovery, the outcome of discovery cost-shifting, and the proper assessment of sanctions. The Court routinely decides these issues without inquiring as to how the parties finance their cases. If the Court accepted defendants' argument, the source(s) of defendants' assets and funding could become fair game for discovery. The Court has no intention of going down this 'rabbit hole'.*

Most other attempts by defendants to disrupt litigation funding arrangements have also proved unsuccessful. Attacking the propriety of a plaintiff's standing to sue is a common defence strategy in US litigation, particularly patent enforcement litigation. Some defendants have sought to argue that litigation funding agreements may affect a patent owner's standing to sue.

In the *WAG Acquisition v Multi Media* litigation, a US company alleged that defendants were infringing its patents as part of their businesses, namely by providing and streaming adult entertainment videos and related online social venues. The defendants sought to dismiss the plaintiff's cases for lack of standing by alleging that the plaintiff's funding agreement with Woodsford deprived the plaintiff of the rights necessary to sue independently for patent infringement. All of the defendants' arguments against standing were solidly rejected by the district court.

As to the practice of litigation funding, we can now clearly see the positive impact that this additional tool of access to justice is having on certain key legal practice areas.

For far too long, large corporate enterprises have engaged in misconduct, to the detriment of their shareholders, customers and others, without fear of litigation because of inadequate collective redress mechanisms. That is beginning to change, in no small part because of litigation funders. The last year or so has seen an increase in the number of group actions in the competition and securities space in particular. In many of these cases, litigation funders play a key role in providing the professional and intellectual input, as well as the financial investment, that is required to get these claims off the ground, and ultimately to bring corporate wrongdoers to account.

Wider public and press interest in litigation funding is increasing. When we first published this survey in 2017, only a small number of legal industry journalists had any interest in what we do. Now, litigation funding stories frequently appear in the mainstream press, particularly in the financial pages. Litigation funders back some of the most high-profile litigation, we hire some of the most impressive lawyers and other professionals, and we raise and deploy significant capital. Some of the most successful funders, including Woodsford, continue to grow impressive track records of success, earning significant returns for investors. Most of the press about litigation funding is positive, and most journalists and other commentators have a fairly good understanding of what litigation funders do. However, the press surrounding *Muddy Waters v Burford Capital* highlights that there remain significant pockets of confusion.

The future for litigation funding remains bright; a good thing for everyone who cares about access to justice.

As always, we are grateful to all of the chapter authors for their hard work in putting this book together.

Third-party funding in international arbitration

Zachary D Krug, Charlie Morris and Helena Eatock
Woodsford Litigation Funding

While international arbitration spans multiple types of claims, overlapping jurisdictions and legal regimes, there are some commonalities to consider it an appropriate subject for a brief addendum within this guidebook's framework. A practitioner considering a transaction involving third-party funding of international arbitration will need to consider multiple potentially relevant jurisdictions. For example, one might need to consider the applicable arbitral rules (if any), the law of the seat of the arbitration, the governing law of the underlying agreements, any applicable international treaties, the law of the jurisdiction in which the award will be enforced, and, potentially, the law of the parties' counsels' home jurisdictions. Accordingly, this addendum is necessarily limited and endeavours to highlight some of the issues and approaches that are common in the context of third-party funding and international arbitration.

Prime among these commonalities is the tremendous uptake of third-party funding in international arbitration in recent times, regardless of claim type or venue. This is hardly surprising: international arbitration generally involves complex commercial disputes with sophisticated counsel at premier international law firms. The resulting fee burden can be substantial. Moreover, many international arbitrations involve claimants who are capital constrained (often as a direct result of a respondent's conduct) and would not be in a position to have their claims heard in the absence of third-party funding.

Third-party funding is an increasingly routine part of the landscape of international arbitration. Anecdotally, our experience speaking with claimants, practitioners and others who are frequently involved in international arbitration suggests that most claimants involved in larger international arbitrations are either being funded or have, at some stage of the process, considered using funding. What little public data is available tends to confirm this trend. As an example, when the International Centre for Settlement of Investment Disputes (ICSID) proposed updated rules on a variety of key topics, it included new rules on third-party funding because it had noted an 'increased resort' to funding, with at least 20 recent ICSID cases involving third-party funding. That number has likely grown substantially. Likewise, it has recently been announced that the European Commission will begin negotiations to modernise the Energy Charter Treaty and will be including new provisions on third-party funding, while we understand a number of bilateral investment treaties texts under negotiation also include specific provisions on funding.

Growing recognition of the use of funding in international arbitration

Concomitant with the increased use and availability of funding generally, there has been a gradual easing of the traditional doctrines of champerty and maintenance, which typically exist in common law (rather than civil law) jurisdictions. As is well covered in the country-specific chapters of this guide, this trend is occurring rapidly in a number of jurisdictions globally. For arbitration, this is potentially significant given that the law of the arbitral seat is most likely to govern whether or not a claimant is permitted to avail itself of funding.

Indeed, certain jurisdictions, notably Singapore and Hong Kong, have recently introduced legislation to expressly allow third-party funding of international arbitration. In 2017, Singapore's parliament passed the Civil Law Amendment Act and the Civil Law (Third-Party Funding) Regulations 2017, which effectively abolish the common law torts of champerty and maintenance, and permit third-party funding in respect of international arbitration and associated proceedings (eg, enforcement and mediation proceedings). In addition to the legislative provisions, the Singapore Institute of Arbitrators (SIArb) has introduced a set of guidelines for third-party funding, with which funders will be expected to comply. It is also anticipated that the key arbitral institutions, such as Singapore International Arbitration Centre (SIAC), will amend their rules to accommodate the new legislative provisions (indeed, SIAC has already addressed third-party funding in the first edition of its Investment Arbitration Rules).

In 2013, Hong Kong's Law Reform Commission launched a public consultation on whether to permit third-party funding for international arbitration seated in Hong Kong. This culminated in October 2016 with a recommendation to allow it. Following approval of the Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Bill 2017, the Arbitration Ordinance was amended to provide, in summary, that the doctrines of champerty and maintenance no longer apply to third-party funding of arbitration or related court or mediation proceedings. Interestingly, unlike in Singapore, no distinction is made in Hong Kong between domestic and international arbitration; funding will be permitted in both. Along with the amendments, a code of practice has been promulgated which regulates a funder's conduct on a variety of matters, including capital adequacy, disclosure and the funding agreement.

The trend has expanded to other jurisdictions. In Nigeria, for example, where recent amendments to the Nigerian Arbitration and Conciliation Act have been passed which would allow the costs of obtaining third-party funding to be included in the arbitration costs.

Nevertheless, some jurisdictions have been more hesitant when it comes to the current legacy of champerty and maintenance restrictions. In May 2017, delivering the judgment for *Persona Digital Telephony Ltd v The Minister for Public Enterprise* [2017] IESC 27, the Supreme Court of Ireland ruled the common law prohibitions on maintenance and champerty remain in force in Ireland, thereby restricting the availability of third-party funding. While the *Persona* decision did not itself address international arbitration, the court's decision will have implications

for an arbitration seated in Ireland or if an arbitral award were to be enforced in Ireland.

By contrast, in civil law jurisdictions – which did not inherit the common law's restrictions on maintenance and champerty, and have long permitted the alienation of litigation rights in some form – there has been predictably little discussion of the permissibility of funding whether in arbitration or litigation. That will likely soon change, given the substantial use of arbitration in many civil law countries, for example in Latin America. In this vein, the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC), a leading arbitration centre in Brazil, became the first arbitral centre in the region to affirmatively address the use of third-party funding, issuing guidelines regarding the disclosure of funding arrangements.

In 2018, the long expected International Council for Commercial Arbitration (ICCA) Queen Mary Task Force on Third-Party Funding issued its final Report on Third-Party Funding in International Arbitration, ICCA Report No. 4 (April 2018). Expansive in scope, the report covers a range of important topics on third-party funding from a variety of angles, and serves as a useful resource for consideration of the relevant issues and current precedents from both international and domestic sources. Further, the Task Force issued a set of Principles and Best Practices, which attempted to distil the overall conclusions of the committee.

Disclosure and conflicts of interest

A topic of substantial discussion in the international arbitration community has been the potential for conflicts to arise in funded cases, and whether disclosure of the fact that a party is funded and, if so, the identity of the funder is necessary to prevent such conflicts. While the same discussion has arisen in the context of litigation, the issue is perhaps more acute in the context of international arbitration, because the parties have a role in appointing arbitrators, and there is a relatively small pool of practitioners who act as both arbitrators and advocates, who themselves may be involved in funded matters. (See ICCA Report, chapter 4.)

After some healthy debate, a consensus has begun to emerge that the disclosure of a party's funded status and the identity of the funder (but not of the terms of the funding arrangement) in an arbitration may be beneficial so as to avoid potential conflicts. Accordingly, in the last several years, a number of jurisdictions, arbitral institutions and organisations have offered specific rules of guidance on this matter, summaries of which follow.

ICSID proposed rules

In 2018, ICSID published a set of proposed changes designed to modernise its rules, offering states and investors an improved range of dispute settlement mechanisms. Since then, the proposed rules have been subject to comment and undergone a series of further revisions. As regards funding, the proposed rules would make it compulsory for parties to file a written notice identifying the existence of funding at any stage in the proceedings. Importantly, disclosure is limited to use of funding and the identity of the funder. The proposed rules also define funding for disclosure purposes to include donation and grant-originated funding. In the latest ICSID Working Paper No. 3 (August 2019) discussing the proposed rule, it is expressly noted that the proposed rules do not contemplate 'further right to information or disclosure of the agreement', while noting that a tribunal has the power to order such disclosure where appropriate.

International Criminal Court

The International Criminal Court (ICC) International Court of Arbitration addressed the issue of potential conflicts in its 2017 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (October 2017) (paragraph 24), which noted, among other things, that 'relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case'.

Singapore International Arbitration Centre

The SIAC's newly released Investment Arbitration Rules (IARs) specifically allow arbitral tribunals to order disclosure of the existence of third-party funding and the identity of such a funder (IAR 24(l)).

Hong Kong International Arbitration Centre

The Hong Kong International Arbitration Centre (HKIAC) has recently proposed rules amendments, at article 44.1, which echo the requirement in section 98U of the Arbitration Ordinance in Hong Kong, stating that if a funding agreement is made, the funded party must give written notice of the fact that a funding agreement has been made, and the name of the third-party funder.

China International Economic and Trade Commission

The China International Economic and Trade Commission (CIETAC) mandates disclosure of third-party funding pursuant to article 27 of its International Arbitration Investment Rules (2017). Specifically, the rule provides that 'as soon as a third-party funding arrangement is concluded' the funded party 'shall notify in writing' and 'without delay' the tribunal and other parties. Such a disclosure must provide the 'existence and nature' of the funding arrangement and the identity of the funder. Moreover, the rules provide the tribunal shall have the power to order further disclosure as appropriate.

Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada

CAM-CCBC's Administrative Resolution No. 18 (2016) 'recommends' the parties disclose the use of funding 'at the earliest opportunity'.

ICCA – Queen Mary Task Force Principles

The Task Force Principles of the ICCA state that a party 'should' voluntarily disclose the existence of funding, and that arbitral institutions have the authority to request disclosure.

IBA

The International Bar Association (IBA) was the first organisation to take a position on funding, when it published the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration. The IBA Guidelines state that parties shall disclose 'any relationship, direct or indirect, between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration'.

Nevertheless, such disclosure obligations should be narrowly limited to their intended purpose of avoiding conflicts, rather than an opportunity for distraction, delay or satellite litigation regarding, for example, disclosure of the terms of a funding agreement or waiver of privilege or confidentiality. As ICSID's comments to the proposed rule make clear that its proposed disclosure requirement 'does not create a general duty to disclose the terms of funding or the agreement itself' as 'this more elaborate information is not required to achieve the objective of preventing conflicts of interest'.

Confidentiality and privilege

Another issue that has frequently arisen in domestic litigation in various jurisdictions around the world is whether a claimant's sharing of confidential and privileged information with a funder might raise issues of waiver. Parties to arbitrations are similarly mindful of the issue.

Arbitration is commonly a confidential process between the parties to the arbitration. However, the emerging consensus is that the sharing

of information with a funder pursuant to a non-disclosure agreement will not result in a waiver. That said, an arbitral tribunal often has wide discretion to determine the scope of material admitted into the proceedings and application of privilege is generally determined by resort to the relevant law of the seat of the arbitration (or potentially the substantive law of the dispute).

The rules of the major arbitral institutions do not yet, for the most part, address this issue expressly. However, in its recent rules consultation the HKIAC has indicated how arbitral instructions may do so. Article 45.3(3) of the HKIAC's proposed new rules, which are based on section 98 of the Arbitration Ordinance, expressly permits the sharing of confidential information to a person for the purposes of having, or seeking, third-party funding of arbitration.

Similarly, the recent Task Force Principles provide that although the existence of funding is not itself privileged, the underlying provisions of a funding agreement may be privileged and should only be ordered disclosed in 'exceptional circumstances'. Moreover, the Task Force Principles note the disclosure of information between a party and a funder should not be a basis for privilege waiver. Further, as the comments to ICSID's proposed rules note parties should be able to seek appropriate confidentiality protections on privilege in the context of disclosure.

Ultimately, while we predict that concerns over waiver will fade, those contemplating funding should still ensure that all communications with funders are made pursuant to non-disclosure agreements.

Third-party funding and costs in international arbitration

Another important issue is the impact of third-party funding, if any, in the allocation of costs and related costs orders.

While arbitral panels generally have wide discretion in the allocation of costs, the principle of 'costs shifting' (ie, the loser pays the winner's costs) is prevalent in arbitration in numerous jurisdictions. In general, the fact that a prevailing party has been funded has not been deemed relevant as a basis to deny the recovery of costs. (See *Kardassopoulos and Fuchs v The Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award (3 March 2010); *RSM Production Corporation v Grenada* (ICSID Case No. ARB/05/14), Decision on Costs (28 April 2011).)

Significantly, particularly in circumstances involving improper conduct on the part of the respondent, a funded claimant may be able to recover not only the costs of the arbitration but also the premium or success fee paid to the funder. For example, in *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm.), the English High Court, which had supervisory jurisdiction, reviewed the decision made in an ICC arbitration seated in London to award the claimant (Norscot) not only its legal costs of the arbitration, but also the cost of paying the funder, Woodsford, the funding's 'success fee' on the basis that the respondent had caused the claimant's impecuniosity and effectively 'forced' it to seek funding. The respondent challenged the award on the basis that the arbitrator erred in concluding that he had jurisdiction to award such costs as 'other costs', but the English High Court upheld the award.

A further important issue is the relevance, if any, of third-party funding in connection with a tribunal's consideration of security for costs applications. While each jurisdiction or tribunal has different rules that apply to such applications, in general, unless a tribunal establishes a likelihood that costs could, in principle, be awarded against an unsuccessful claimant, it cannot make a decision on security for costs applications. Moreover, a tribunal will often lack the jurisdiction to make an order for security for costs against a funder which is not party to the arbitration agreement.

Respondents seeking a security for costs application sometimes argue that the fact that a party has sought funding is evidence of impecuniosity or that it will render it less likely to be able to satisfy an award of costs in the event the claim fails. But third-party funding is frequently used by parties which are solvent and, in any event, such funding is generally provided on a non-recourse basis and therefore does not compromise a party's financial position if the claim is lost. As such, there is a growing consensus, particularly in investor-state arbitration, that the mere fact a party has obtained third-party funding is not, by itself, a reason to justify a security for costs order. (See *EuroGas Inc and Belmont Resources Inc. v Slovak Republic*, (ICSID Case No. ARB/14/14), Procedural Order No. 3 (23 June 2015); *South American Silver Limited v The Plurinational State of Bolivia*, (UNCITRAL, PCA Case No. 2013–15), Procedural Order No. 10 (11 January 2016); Guaracachi & Rurelec v Bolivia, (UNCITRAL, PCA Case No. 2011–17), Procedural Order No. 14 (March 11, 2013).) However, in two 'exceptional' matters, the existence of third-party funding has been an important – but not the sole – factor in the ultimate decision to order security for costs. In *RSM Production Corporation v Saint Lucia* (ICSID Case No. ARB/12/10), the tribunal made an order for security for costs, apparently on the basis of the claimant's poor conduct during the course of the arbitration (including, for example, repeated failures to comply with the tribunal's orders). (See also *Manuel García Armas et al v Venezuela* (PCA Case No. 2016–08), Procedural Order No. 9, (20 June 2018).) There is reason to suggest that *RSM* and *García Armas* may be relatively isolated cases.

Consistent with these decisions, under ICSID's proposed rules amendments, it is contemplated that a tribunal 'may consider' with regard to a party's ability to pay a costs order, but expressly cautions that 'the existence of third-party funding by itself is not sufficient to justify' a security for costs order.

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REGULATION

Overview

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 have been abolished as a crime and as a tort by legislation in New South Wales, South Australia, Victoria and the Australian Capital Territory. Queensland, Western Australia, Tasmania and the Northern Territory retain torts of maintenance and champerty.

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 the recent decision in *Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No 4)* [2019] QSC 228, Crow J ruled, in the context of a third-party funded class action, that the torts of maintenance and champerty had not been abolished but that provisions of the *Civil Proceedings Act 2011* (Qld) regulating class action procedures lay down a regime that permits class action proceedings to be funded by a commercial litigation funder.

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 period from March 1992 to March 2013, 15 per cent of class action proceedings filed in the Federal Court were funded. From 2013 to 2018, 64 per cent of filed class actions were funded, and between March 2017 and 2018, this number increased to 78 per cent. In the year ending 30 June 2019, 54 class actions commenced in Australia. This is the same number of class action claims as commenced in the previous year. The percentage of those claims that are funded by third-party litigation funding has stabilised at around 75 per cent of all class action claims filed. This is significantly higher than earlier periods both in terms of filings and the percentage of funded claims. The increase in volume and the proportion of funded class actions would appear to correlate with the judicial approval of common fund orders (see further below) which have increased the certainty of returns for litigation funders and reduced barriers to entry.

Restrictions on funding fees

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 which 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 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. Common fund orders are made pursuant to the statutory protective and supervisory role that the courts are required to assume to do what is appropriate and necessary to ensure justice is done in the class action proceedings. As the common fund order involves the court imposing on unfunded class members an obligation to contribute to the payment of costs of the litigation without their consent, the courts are concerned that the terms imposed, insofar as is possible, deliver certainty and do not result in any group members being worse off. The purpose of the common fund order 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.*

While there are trends emerging in the common fund orders that are being made, there is as yet no uniformity and there is no certainty of outcomes for funders or class members. Points of distinction in the common fund orders made in the year in review are whether the order is net or gross of the funder's costs, capped to the lesser of a percentage of the funder's capital deployed or involve a minimum recovery guarantee.

A trend in the year in review has been the increased prevalence of competing overlapping class actions and how the courts have sought to manage multiplicity through the application of case management principles. A feature of these multiplicity disputes has been the courts evaluating the hypothetical returns to class members from the competing funding proposals. This increased competition has placed downward pressure on pricing.

In respect of common fund orders Lee J in *Lenthall v Westpac Life Insurance Services Limited[* 2018] FCA 1422 said that a percentage cap on a funder's commission under a common fund order may lead to a 'spurious air of authority to the figure, in the sense [of] communicating a default position'. In *Lenthall*, Lee J proposed a funding rate of the lesser of three times the total amount spent on legal costs, disbursements and adverse costs orders, or 25 per cent of the gross recovery upon resolution of the proceedings. Lee J's exercise of discretion in *Lenthall* was upheld on appeal.

In *Brewster v BMW Australia Ltd* [2019] NSWCA 35, the Supreme Court of New South Wales Court of Appeal upheld an order capping the funder's share of the proceeds of litigation to an amount based upon a multiple of the total amount paid by the funder so as to prevent the order from yielding a benefit which is out of all proportion to the capital deployed and the risk assumed by the funder. The court doubted that an interlocutory order:

> *[W]hereby a funder becomes contingently entitled to a return which might be out of all proportion to the capital deployed and put at risk, is one which is appropriate or necessary to ensure that justice is done.*

The decision of the Full Court of the Federal Court in *Lenthall* and the Court of Appeal in *Brewster* upholding the validity of common fund orders are on appeal to the High Court of Australia. Issues on appeal to the High Court involve constitutional questions, including whether making a common fund order involves the court acting in a manner that is inimical to the judicial function in breach of the doctrine of the separation of powers, and whether a common fund order involves the acquisition of property on other than just terms. At the time of publication the appeals have been heard and judgment is reserved.

Specific rules for litigation funding

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:

> *[A]ny 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 published its review of current regulation of litigation funders and lawyers in Victoria. The Commission's 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).) After a period of extensive industry consultation in December 2018, the ALRC provided its report and recommendations to the federal government. (See Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An inquiry into Class Action Proceedings and Third-Party Litigation Funding*, ALRC Report 134 (2018).) On the topic of a licensing regime for litigation funders, the ALRC concluded that, if its other recommendations were implemented, those measures would provide sufficient consumer protection that it would not be necessary for litigation funders to also be subject to a licensing regime. The Commission was also concerned that imposing capital adequacy restrictions on funders may stifle competition and add to costs.

Legal advice

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.

Regulators

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.

FUNDERS' RIGHTS

Choice of counsel

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 their choice of lawyers be 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.

Participation in proceedings

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, consistent 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.

Veto of settlements

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.

Termination of funding

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, LCM, the funder, terminated a litigation funding agreement that obliged it 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.

Other permitted activities

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)).

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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 question of contingency fees was addressed in the ALRC Report and also in a report of the Victorian Law Reform Commission. Both reports recommended that the ban on solicitor contingency fee arrangements be lifted in class actions, subject to limitations that included a prohibition on solicitors recovering a contingency fee if a litigation funder is also taking a percentage of the recoveries.

In *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* [2019] FCAFC 107, notwithstanding that a law firm may not enter into a cost agreement where the amount payable to the law practice is calculated by reference to the amount of any award that may be recovered, Lee J observed that a common fund order incorporating a contingency payment could be made and could be approved in a settlement approval. Lee J's comments did not form part of the ratio of the decision of the Full Court.

Whilst there may be a move towards contingency payments being payable from a settlement sum, there is yet to be any change made to the regulations, and it is still in breach of the *Legal Profession Uniform Law* for lawyers to enter into a costs agreement that contains a contingency fee.

Other funding options

12 | What other funding options are available to litigants?

After-the-event insurance (ATE), while having long been available in the United Kingdom's 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, which provides 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.

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

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 2019 set out the clearance rates for Australian courts for 2017-18. 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 99 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 with a very small increase in caseload during the reporting period. However, complex commercial matters are unlikely to be resolved within one year of commencement, for example, according to its 2017-18 Annual Report, 12.5 per cent of the Federal Court's 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.

Time frame for appeals

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

Nationally, in 2017-18, 1,514 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 2017–19, in the reporting year 1,229 appeals and related actions were finalised by the Federal Court. On 30 June 2018, there were 15 matters that were 24 months or older. The clearance rate for Australian court appeals was 98.8 per cent for 2017-18. Accordingly, it is appropriate to conclude that most appeals in Australian courts are determined within 12 months of the filing of a notice of appeal.

In New South Wales, as a further example, Supreme Court of NSW Provisional Statistics (as at 26 June 2019) show that 355 cases were filed in the NSW Court of Appeal during 2018, and 361 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 calculate the number of appeals not determined within a calendar year.

Enforcement

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.

COLLECTIVE ACTIONS

Funding of collective actions

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. Legislation was recently introduced to the Western Australian parliament in the *Civil Procedure (Representative Proceedings) Bill 2019* which seeks to provide a legislative regime for the WA Supreme Court to mirror the current Federal Court regime pursuant to Part IVA of the Federal Court of Australia Act 1976 (Cth).

Award of costs

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 an unsuccessful party to 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.

Liability for costs

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), a company that was Global's only shareholder, and an individual who was Global's sole director and company secretary. 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.

In *Wigmans v AMP Ltd (No 3)* [2019] NSWSC 162, five competing class actions had been commenced, all with different lawyers and funders; four in the Federal Court, and one in the Supreme Court of New South Wales. There ensued a contest as to whether the litigation would be conducted in the Federal Court or the Supreme Court of New South Wales. Those applications were resolved in favour of the representative applicant in the Supreme Court action and the four Federal Court actions were transferred to the Supreme Court. Under the Civil Procedure Act 2005 (NSW) the Supreme Court did not have power to make a cost order against the Federal Court applicants. Stevenson J ruled that the court has power to make a costs order against non-parties and held that as each of the funders stood to make a significant profit from the fruits of the litigation, in the circumstances where the applications had failed, each of the funders should pay the costs.

Security for costs

19 | May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

The courts have 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 given 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, after-the-event (ATE) insurance and deeds of indemnity from insurers securing direct recovery rights to the defendants in the event of an adverse cost order. (See question 21.)

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. In *Capic v Ford Motor Company of Australia Ltd*, the court approved security for costs being provided by way of a deed of indemnity from an ATE insurer in the UK, together with a payment of $20,000 into court for the purpose of covering the enforcement costs of the deed in the United Kingdom.

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 Ltd* [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'.

The ALRC Report also made a recommendation that there be a statutory presumption that a litigation funder will provide security for costs.

Insurance

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.

DISCLOSURE AND PRIVILEGE

Disclosure of funding

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 subject to redactions to conceal information which might reasonably be expected to confer a tactical advantage to another party. 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.

Privileged communications

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).

DISPUTES AND OTHER ISSUES

Disputes with funders

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.

Other issues

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 two cases awaiting judgment in the High Court of Australia, *Westpac Banking Corporation & Anor v Lenthall & Ors* (S14/2019) and *BMW Australia Limited v Brewster & Anor* (S152/2012) where the legality of common fund orders made by justices of the Federal Court and the New South Wales Supreme Court will be decided.

UPDATE AND TRENDS

Current developments

26 Are there any other current developments or emerging trends that should be noted?

The developments and trends that should be noted are the preparedness of courts to use broad case management powers to influence litigation funding terms and practises. This trend manifests itself in judicial activism and flexibility in:

- resolving overlapping competing funded actions;
- making common fund orders; and
- scrutinising settlements for fairness and reasonableness.

The courts' approaches to each of these topics affects how litigation funders conduct themselves in Australia, especially when funding class actions.

Resolving overlapping funded actions

In *Perera v GetSwift Ltd* [2018] FCAFC 202, the Full Court of the Federal Court of Australia provided guidance on how courts deal with multiple competing class action claims against the same defendant. The Full Court concluded that whilst courts have a general power to consolidate proceedings, an order for consolidation of competing proceedings will seldom be made without conferral between the subject solicitors, funders and applicants to resolve differences in funding models, rates and progress. Although, there are some concerns that such conferrals may contravene laws regulating anticompetitive trade practices as they reduce competition in the market.

Factors relevant to whether a funded competing action is stayed or consolidated include, in addition to factors directly bearing on the real issues in dispute, the following:

- the funder's percentage;
- the extent of the funder's book-build and the size of the respective classes;
- the funder's experience; and
- how the funder proposes to meet obligations for security for costs.

Reflecting some level of concern with substantive rights being determined through the use of procedural case management powers to address complexities associated with competing class actions, the ALRC's report *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* recommended that Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to give the court an express statutory power to resolve competing class actions. Practically speaking, unless and until the ALRC's recommendation is adopted, the courts will continue to manage issues arising from competing class actions through existing case management powers. In the year in review, the courts have dealt with multiplicity by variously ordering matters be stayed (see *Wigmans v AMP Ltd* [2019] NSWSC 603), directing consolidation (see *Southernwood v Brambles Limited* [2019] FCA 1021) and directing one action proceed by way of an open class and the other as a closed class (see *McKay Super Solutions Pty Ltd (trustee) v Bellamy's Australia Ltd* [2017] FCA 947).

Common fund orders

One curious feature of the common fund application process is the tension that arises between funders as to the timing of the making of the application, to maximise returns and the peculiarity of defendants taking on a quasi-contradictor role through class members arguing against common fund applications on grounds of the fairness and reasonableness of funder returns (see *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd* [2019] FCA 1500).

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The recent decisions in *Tredrea v KPMG Financial Advisory Services (Australia) Pty Ltd (No. 3)* [2019] NSWSC 871 and *Kuterba v Sirtex Medical Limited (No. 3)* [2019] FCA 1374 involved the approval of class action settlements and the reasonableness of the litigation funders' success fees. Both decisions considered whether the court ought appoint a person independent of the funder and the lawyers for the class to act as a contradictor in order to protect the legal rights of group members. In *Tredrea*, Parker J referenced Dr Kirk SC's paper *The Case for Contradictors In Approving Class Action Settlements* (2018) 92 *Australian Law Journal* 716 in ruling that a contradictor be tasked with acting as a respondent to the application for settlement approval, to ensure that the legal costs, funding commission and distribution of the settlement sum are all appropriate. In *Sirtex*, Beach J rejected the appointment of a contradictor as a waste of time and expense preferring instead to rely on the evidence of an independent costs referee and the court's understanding of the broader dimension of risk borne by litigation funders. In a different context, *Botsman v Bolitho* [2018] VSCA 278 saw the Court of Appeal hold that a trial judge erred by not appointing a contradictor to safeguard the interests of group members in circumstances where the interests of some group members and the funder were in conflict.

Fair and reasonable settlements

There have been a number of class action settlements approved by the courts in the year in review. The settlement approval process is an important feature in the maintenance of public confidence in the class action regime. *Liverpool City Council v McGraw Hill Financial, Inc* [2018] FCA 1289 and *Petersen Superannuation Fund Pty Ltd v Bank of Queensland* [2018] FCA 1842 illustrate the flexibility in the judicial oversight of settlement approvals. In *Liverpool City Council*, a settlement that returned a substantial return to the funder, Lee J appointed an amicus to report on the reasonableness of the returns to the funder and the legal costs incurred and the returns to the class members. Notwithstanding the levels of returns to the funder and the legal costs Lee J, after hearing from the amicus, approved the settlement and warned against the risk

of hindsight bias. In *Petersen*, the settlement involved less than 2 per cent of the settlement sum returning to the class members, in order to achieve a modicum of parity between the class, funder and lawyers, Murphy J adjusted the settlement by limited the funding commission and reducing the lawyers' costs.

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