The Third Party Litigation Funding Law Review

Editor
Leslie Perrin

The Law Reviews

The Third-Party Litigation Funding Law Review

First Edition

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This article was first published in December 2017
For further information please contact Nick.Barette@thelawreviews.co.uk

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed
to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-912228-03-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

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ATELIER JURÍDICO

BCH LAWYERS

BORDEN LADNER GERVAIS LLP

CALUNIUS CAPITAL LLP

DLA PIPER UK LLP

INCE & CO MIDDLE EAST LLP

LINKLATERS C WIŚNIEWSKI I WSPÓLNICY SPÓŁKA KOMANDYTOWA

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PREFACE

One afternoon in February 2008, my phone rang. It was a partner from a major New York law firm asking if I would like to be a non-executive director on the listing on the Alternative Investment Market in London of a 'third party funder'. I feel now that I was speaking then for (effectively) the entire London lawyer community when I asked my first question: 'What is third party funding?'

Well, now we know! Or do we? The decision by The Law Reviews to publish its inaugural *Third Party Litigation Funding Law Review* is certainly a sign of a substantial build-up of interest in the subject, but the contents of the *Review* itself show that it is perfectly possible for experienced practitioners who are well versed in the subject to differ when it comes to outlining their answers to what is essentially the same question that I asked back in February 2008 – once again, what is third party funding?

Even the naming of third party funding (TPF) can cause difficulties, as besides TPF we have litigation funding, arbitration funding, litigation finance, settlement funding, claims purchase, monetisation (of awards and judgments), law firm funding and in-house legal department finance – the list grows as awareness spreads. Perhaps the best way of describing what TPF has become is 'legal capital'.

The essence of TPF is the deployment of legal capital to fund the realisation of assets that are contingent on the resolution of some form of legal process. If the assets are sufficiently attractive, other things besides (or instead of) legal costs can be funded, including corporate expenses.

Legal capital is (almost) invariably invested on the basis that the investor is without recourse, other than to the proceeds of the legal asset whose realisation is being pursued. The investor's recovery is therefore limited to what can be realised in cash or kind from the legal asset itself. Absent breach, the funded party is not personally liable to the funder and therefore it would almost always be a major solecism to describe a TPF investment as a loan.

There are, of course, fundamental differences in approach between jurisdictions following the common law and those where civil law principles rule, but even within those two broadly distinct systems, there are a host of differences. In the United States alone, there are 50 states with 50 different approaches to describing TPF and how it should (if at all) be regulated.

In general, all common law jurisdictions have various degrees of survival of the ancient doctrines of maintenance and champerty, which historically prevented third parties from intervening in litigation in which they were not already directly involved as parties, although, having said that, maintenance and champerty have been abolished in Australia. On the other wing of opinion, TPF is absolutely forbidden in Ireland, following the Supreme Court ruling

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in the *Persona Digital* case. It seems that in Ireland TPF must wait for the legislature to permit it. The civil law, on the other hand, has never held any significant reservations about TPF.

In some common law jurisdictions, there is a difference of approach depending on whether the legal process is arbitration or litigation. In Hong Kong until recently, only insolvency office holders were permitted to access TPF because claims farming remains such a severe problem in personal injury litigation. Now a regulatory framework has been approved in Hong Kong for TPF to operate in commercial arbitration seated there. Singapore immediately followed suit.

Then there are a variety of controversies facing TPF that are generally resolved by individual jurisdictions in individual ways that suit them, thus defying any attempt to identify general principles that apply globally. Currently, those issues tend to revolve around three topics regarding the regulation of TPF providers; whether (and if so, in what circumstances and by what principles) a provider of TPF should be liable in unsuccessful cases to pay the costs of a victorious defendant or to give security for costs; whether disclosure to the court or the arbitral tribunal is required of the fact of TPF being used by a party; and the issue of privilege and confidentiality with reference to documents that are disclosed to a funder by a party to funded litigation or arbitration.

TPF provides access to justice for those who could otherwise not afford to fight their claims, and it brings access to rational commercial risk management for eminently solvent entities who do not wish to expose themselves to the significant costs of resolving their disputes from the own resources. TPF thus serves both those who are unable and those who are unwilling to fund the resolution of their disputes.

Demand grows as acceptance of TPF spreads. Acceptance spreads as law firms increasingly perceive that unless TPF becomes part of their offering, they will become less able to compete for valuable work from every kind of client.

This is a global phenomenon, but the resolution of every dispute by the principal international dispute resolution mechanisms, litigation and arbitration, will be rooted in the law of a particular jurisdiction. The choice of jurisdiction is not always made with wisdom or foresight, and providers and users of TPF sometimes have to reflect that, as the proverb goes, 'as you make your bed so you must lie in it'. This book, covering as it does all the principal TPF centres, should, in the best possible way, help users and providers of TPF to a good night's rest!

Leslie Perrin
Calunius Capital LLP and the Association of Litigation Funders of England & Wales
London
November 2017

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Chapter 5

ENGLAND AND WALES

Leslie Perrin[1]

I MARKET OVERVIEW

In November 2016, the Court of Appeal in London heard a judgment by Lord Justice Tomlinson in the costs appeal in the *Excalibur* case, as cited below. This judgment represented a new high point in acceptance by the London judiciary of the funding of litigation through third party funding (TPF). This is what he said; 'Litigation funding is an accepted and judicially sanctioned activity perceived to be in the public interest.'

The market for the funding of litigation in England and Wales is dominated by the nine funder members of the Association of Litigation Funders of England and Wales (ALF). At the time of writing, those funder members are Augusta Ventures, Balance Capital, Burford Capital, Calunius Capital, Harbour Litigation Funding, Redress Solutions, Therium Capital, Vannin Capital and Woodsford Litigation Funding.

Some other funders are active in England and Wales, including global hedge funds and family offices, mostly on an opportunistic basis. Indeed, of the nine TPF providers who became costs defendants in the disastrous *Excalibur* litigation,[2] two were entities of the now-defunct US TPF provider, BlackRobe Capital, five were entities associated with the Platinum Partners hedge fund from New York and three were from Greek shipping interests, who were investing in litigation for the very first time. None were members of the ALF.

The 2017 Litigation Finance Survey by Burford Capital reports that use and awareness of litigation finance in law firms is higher in England and Wales than in any other jurisdiction polled.[3] The dominant view of UK law firms who responded to the survey was that the use of TPF to fund litigation and arbitration is a growing and increasingly important area of the business of law, associated with innovation and an improved ability to compete for clients' business.

In any review of the TPF market in England and Wales, it is worth pointing out at the outset that the overwhelming majority of investments by funders in England and Wales are in the context of commercial disputes, and that the overwhelming majority of funded litigants are either commercial entities, experienced professionals or business people. By way of example of this proposition, no funder member of the ALF transacts with personal injury claimants.

1 Leslie Perrin is chairman of Calunius Capital.
2 *Excalibur Ventures v. Texas Keystone and others* [2016] EWCA Civ 1144.
3 www.burfordcapital.com/2017-litigation-finance-survey/.

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i A historical perspective

The TPF industry aimed at the funding of litigation in England and Wales has developed within the context of the underlying common law on maintenance and champerty and the associated risks to which funders of litigation are exposed in delivering TPF to clients.

Until the Criminal Law Act 1967, the funding of litigation, as we now know it, would have been a crime. Even now, litigation funding agreements (LFAs) are at risk of being found to be unenforceable for illegality if their terms are found to be in breach of the rules against maintenance and champerty, especially if funders exert any material amount of control over the case.

Maintenance and champerty were originally rules of the common law that were aimed at preventing the rich and powerful from interfering in court proceedings, to the detriment of the administration of justice. However, by the 19th century, it had become apparent that, far from protecting justice, the inability of the claimant to fund his or her claim other than with his or her own money was a bar to access to justice, and exceptions to maintenance and champerty were then created in insolvency cases.

There is an authoritative and comprehensive account of the history of maintenance and champerty and the gradual escape of TPF from its prohibitions in the 2013 Harbour Litigation Funding Annual Keynote Address by Lord Neuberger of Abbotsbury, the then president of the UK Supreme Court.[4]

In brief, the modern history of this process lies in various Court of Appeal decisions from around 2002–2005 (including *R (on the application of Factortame and others) v. Secretary of State for Transport, Environment and the Regions* (No. 2) [2002] EWCA Civ 932 and *Arkin v. Borchard Lines Ltd & Others* [2005] EWCA Civ 655) that made it clear that, within certain boundaries, the provision of funding by third parties for litigation in England and Wales would not necessarily offend against maintenance and champerty and could be permissible. However, following these decisions, but prior to publication in January 2010 of Lord Justice Jackson's immensely influential Review of Civil Litigation Costs (the Jackson Report)[5] and the formation of the ALF that followed, it was still necessary for a funder of litigation in England and Wales to look to the common law to determine what was permissible. This landscape of cases, especially *Arkin*, still delineates the business model for litigation funders in England and Wales as it is operated now.

II LEGAL AND REGULATORY FRAMEWORK

Today, in England and Wales, the ALF is the instrument by which the funding of litigation through TPF is subject to voluntary regulation. Voluntary regulation is a mechanism that is widely recognised by government and others as providing a viable regulatory framework as an alternative to statutory regulation, especially when, as in the case of TPF, no statutory body has ever put itself forward or been nominated for the purpose by government. The classical model for voluntary regulation is that industry professionals, with sponsorship from government entities, develop voluntary standards and codes of conduct to regulate standards,

4 'From Barretry, Maintenance & Champerty to Litigation Funding'; available at https://www.supremecourt.uk/docs/speech-130508.pdf.

5 https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.

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subjecting themselves to a complaints procedure of demonstrable independence. Voluntary regulation provides a strong alternative to statutory regulation, being flexible to introduce and update, but requiring a high degree of commitment from those involved.

An account of the history and constitution of the ALF can be found on its website.[6] In brief, in November 2011, the creation of the ALF and the Code of Conduct were welcomed by the Civil Justice Council of England and Wales (CJC), the Master of the Rolls, Lord Neuberger of Abbotsbury, and by Lord Justice Jackson. The CJC is an advisory public body that was established by the Lord Chancellor under the Civil Procedure Act 1997 (CPA) with responsibility, *inter alia*, for:

a keeping the civil justice system under review;

b considering how to make the civil justice system more accessible, fair and efficient; and

c advising the Lord Chancellor and the judiciary on the development of the civil justice system.

The CJC summarises these duties on its website as 'responsibility for overseeing and coordinating the modernisation of the civil justice system'.[7] The CJC's members must include UK judges, civil servants, senior practitioners and academics, representatives of various interest groups, representatives of the UK government and others specified in the CPA. For the first six years of the life of the ALF, the CJC played an invaluable role as a 'critical friend' of the ALF.

The subject of TPF took up just eight pages of the Jackson Report in January 2010. However, that was plenty of time for Lord Justice Jackson to bestow a generous blessing on litigation funding, which he saw as beneficial because it promoted access to justice without imposing financial burdens on defendants, and filtered out unmeritorious cases.

The ALF was then charged with delivery of voluntary regulation of the TPF industry in England and Wales. Voluntary regulation by the ALF was to be achieved by means of the ALF Code of Conduct (the Code), with an independent complaints procedure that is available to any person or entity who has entered into an LFA with a funder member of the ALF.

The Code, which sets out standards of best practice and behaviour for litigation funders in England and Wales, was essentially the product of a working party established under the auspices of the CJC, which produced a draft code of conduct in the form that was adopted by the board of the CJC in November 2011. This version of the Code was then revised in 2014 to introduce strengthened capital adequacy requirements for ALF members as well as a fresh, detailed complaints procedure.

A copy of the Code can be found online.[8] At the time of writing, the Code is undergoing a further revision to take effect before the end of 2017.

It should be noted that funder members have their standard draft LFAs confidentially examined by an independent barrister to confirm compliance with the fairness provisions of the ALF's Code of Conduct. Each funder member of the ALF agrees to adhere to the terms of the Code and submits to the ALF complaints procedure, thereby assuring and promoting best practice in TPF.

6 www.associationoflitigationfunders.com.

7 www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/.

8 http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Nov2016-Final-PDF.pdf.

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III THE CODE

The Code provides various protections to litigants who contract with the ALF's funder members, and develops and codifies the model that has developed within the parameters of the common law. The Jackson Report speaks of the desirability of 'a fair balance between the interests of funder and client', and the Code delivers on this by requiring funders to behave reasonably. It does so by providing that funders must:

a take reasonable steps to ensure that the funded party shall have received independent advice on the terms of the LFA (paragraph 9.1);

b not take any steps that cause or are likely to cause the funded party's lawyers to act in breach of their professional duties (paragraph 9.2);

c not seek to influence the funded party's lawyers to cede control or conduct of the dispute to the funder (paragraph 9.3);

d maintain adequate financial resources to meet their funding obligations (paragraph 9.4);

e not include in any LFAs a right to terminate the LFA at the pure discretion of the funder (paragraph 12). The right for a funder to terminate a LFA as and when it pleases is seen as a potential shortcut to control of the claim, control by the funder being the principal of the vestigial elements of maintenance and champerty that can still void an LFA;

f behave reasonably in exercising rights to terminate for material breach of the LFA by the funded party or because the claim is no longer viable, if such rights are included in the LFA. This is achieved by requiring funders to give litigants the contractual option of going to an independent Queen's Counsel (QC) for a binding opinion if the reasonableness of the funder's behaviour comes into question in the context of such terminations (paragraphs 11–13);

g in relation to approval of settlements, the LFA must state whether (and if so, how) the funder may provide input to the funded party's decisions in relation to settlements. In practice all funders will insert into their LFAs a right to be consulted about any settlement opportunities that may arise during a funded case. This is part of the funder's need to ensure that funded claims are always conducted in an economically rational manner. In the event that there is a dispute about a settlement, either party may take the dispute to an independent QC for an opinion that would bind both funder and funded party.

IV THREE MAJOR LEGAL ISSUES FOR TPF IN ENGLAND AND WALES

i The funder's liability for adverse costs and the question of security for costs

In England and Wales, by virtue of Section 51 of the Senior Courts Act 1981, which provides that: '[t]he court shall have full power to determine by whom and to what extent the costs are to be paid', a provider of TPF can be pursued for costs where it has helped to fund litigation on behalf of the losing party.

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The jurisdiction of the courts to make such orders was confirmed by the House of Lords in *Aiden Shipping Co v. Interbulk,*[9] and guidelines for the exercise of this power were laid down by the Court of Appeal in *Symphony Group v. Hodgson.*[10] The ultimate question is whether in all the circumstances it is just to make a non-party costs order.

In *Arkin* the claimant was only able to pursue his claim to judgment because of the financial support (in excess of £1.3 million) provided by a professional funder. The defendants, having successfully defended the claim, sought an order that the funder should pay their costs (which amounted in total to nearly £6 million).

However, the Court of Appeal, in order not to discourage professional funders, held that they should only be liable to pay the costs of opposing parties to the extent of the funding that they had provided – what is now referred to as the '*Arkin* cap' on costs. This limits the potential liability of the funder on a 'pound for pound' basis – for every £1 of outlay, the funder has a contingent liability for adverse costs of up to £1 – but also means that when a funder invests £1 in a case proceeding in the London High Court, the risk of loss will be twice that, because of adverse costs.

More recently, in *Excalibur Ventures* the Court of Appeal confirmed that a commercial funder will ordinarily be required to contribute to the defendants' costs on the same basis as the funded claimant. Therefore, if a claimant has been ordered to pay costs on the indemnity rather than standard basis, the funder will be liable to indemnity costs irrespective of its own conduct, but still subject to the *Arkin* cap.

The Court of Appeal in *Excalibur* also held that an order for adverse costs may be made not only against the funder named in the funding agreement but also against a third party that provided those funds and stood to benefit in the event of success, in that case the funder's parent company, thus comprehensively piercing any funder's corporate veil.

In arbitration, on the other hand, it is generally taken that an arbitral tribunal lacks jurisdiction to issue a costs order against a funder of the arbitration. This is because it is only the parties to the dispute being arbitrated that are within the jurisdiction of the tribunal, normally by virtue of their being parties to a contract or through the terms of a treaty. This leads many respondents to arbitration to respond by making applications for security for costs.

In arbitration, applications for security for costs are generally decided on the basis of the party's impecuniosity or its inability to pay if costs were to be awarded against it at the conclusion of the proceedings.

The impecunious claimant may then produce evidence of funding and submit to redacted disclosure of the LFA under which the TPF arrangements have been made. The attention of the tribunal and the respondent will be focused on the LFA's provisions on the funder's termination rights and the funder's obligation to cover adverse costs. Disclosure orders are normally limited to those parts of the LFA.

If an arbitral tribunal decides that a security for costs order is warranted, it can order security for costs in various ways – by production of a funder indemnity or after the event (ATE) insurance, or, in exceptional circumstances by way of a bank guarantee. The tribunal will normally order a defendant, for whose benefit the security for costs is granted, to pay the costs reasonably incurred by the funded claimant in complying with the order for security in the event that the claimant eventually prevails.

9 *Aiden Shipping Co v. Interbulk* [1986] AC 965.
10 *Symphony Group v. Hodgson* [1994] QB 179.

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In High Court litigation the position is similar. Defendants can seek orders for security for costs if, under all circumstances, it is just to make such an order, or the claimant is resident out of the jurisdiction, or there is any other reason to believe that the claimant, wherever situated, will be unable to pay the defendant's costs if ordered to do so.

An application may be made for security for costs directly against a professional TPF provider, as it was recently in the *RBS Rights Issue Litigation*.[11]

In the *RBS* case, the judge listed various factors that should be taken into account when deciding on whether security for costs should be ordered against a funder, such as whether its motivations were commercial or altruistic and whether there is a real risk of non-payment by the funder, such as that perceived by the judge as 'deliberate reticence' by one of the funders in that case, Hunnewell BVI. In the event, Hunnewell BVI was ordered to provide security for costs.

The judge also ordered RBS to give a cross undertaking to pay the claimants' costs of complying with the order, saying, 'though not common-place or inevitable, I do not think it should be considered particularly exceptional for the court to require a cross-undertaking as the price of an order for security.'

For *Excalibur*, the real surprise in that judgment was that payment by a funder of security for costs was not counted as a payment on account of the defendant's potential costs, but, for the purposes of the *Arkin* cap, it counts as funding. So, if a funder pays £10 million in claimants' costs and is ordered to (and does) pay security of £5 million, the *Arkin* cap on the amount of costs for which the claimant and its funder could be liable is set at £15 million, not £10 million as might have been expected.

ii Disclosure of the fact that a claimant is funded?

This is an area where practice differs between arbitration and litigation in England and Wales.

In arbitration, at the time of writing, the debate about disclosure (and many other matters) is being taken forward in a 177-page internal working draft from the ICCA-Queen Mary Task Force on Third-Party Funding, which contains a request that it should not be cited, but that is available online.[12] The draft is said to be limited to those issues that directly affect international arbitration proceedings and are capable of being addressed at an international level.

The principal (perhaps, only) reason for the vigour of the debate in the arbitration community about disclosure of the existence of funding is the potential in arbitration for conflicts of interest between third-party funders and arbitrators, particularly if an arbitrator has sat in a number of cases where the claimant has been funded by the same funder or if the funder is funding another case in which the funded claimant is represented by that arbitrator's law firm. To be frank, funders are very much alive to the destructive potential of these conflicts and will normally do their utmost to avoid taking on cases where such conflicts might exist.

Such issues could never arise in litigation in the civil justice system in England and Wales, so the controversy is confined to arbitration where existing rules of the International Chamber of Commerce (ICC), London Court of International Arbitration, Stockholm Chamber of Commerce, International Centre for Settlement of Investment Disputes, United

11 *RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch).

12 http://www.arbitration-icca.org/media/9/75899457734281/submission_version_for_public_comment_draft.pdf.

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Nations Commission on International Trade Law and many others make up an alphabet soup of procedural requirements through which funders and funded parties alike must navigate most carefully.

iii Privilege and confidentiality

A funder's evaluation of a claim for funding will invariably involve comprehensive disclosure to the funder by the claimant's legal team of the evidence in the case, including documents protected from disclosure to the defendants by legal advice or litigation privilege. From the points of view of both the funded party and the funder, it is essential to ensure that disclosure to the funder does not cause the loss of the protection from disclosure to the defendants that is conferred by the privileged status of the evidence.

There are a number of generally accepted principles at work in this difficult area that apply equally to litigation and arbitration.

First, it is absolutely essential for the funder and claimant to enter into a comprehensive non-disclosure agreement (NDA) at the outset of their discussions.

Secondly, the fact of the existence of an LFA and the identity of the funder will never in themselves be privileged information, although the detailed terms of the LFA will almost certainly include much content that is privileged.

Thirdly, the principle that a common interest exists between an insurer and its insured has been usefully imported to the world of TPF. If privileged evidence is disclosed to a third party, the evidence might cease to be confidential, and, if so, any privilege in it would normally be regarded as waived. However, where the person entitled to the privilege and the person to whom the evidence is disclosed have a common interest so that the sharing of the evidence is entirely consistent with its confidentiality, then privilege is unlikely to be regarded as having been waived. Establishment of the common interest in writing is one of the vital functions of the NDA between the claimant and the funder.

In England and Wales, there is little in the way of legal precedent on privilege specific to TPF, but the law is widely regarded as well-established in accepting that claimants should be able to share evidence with funders, under an NDA that establishes a common interest, without waiving legal advice or litigation privilege.

iv Structure of an English litigation funding agreement

The essence of a classical LFA is a clear promise in writing by the funder to pay the claimant's legal costs of its claim in return for a share of the proceeds, provided the case is successful. Each side gives undertakings to the other; the claimant gives warranties (e.g., that independent legal advice has been taken, that all material facts have been disclosed) and undertakes duties, such as to pursue the claims 'with the due care and diligence of a prudent business person' and to produce, say, monthly reports to the funder. The funder promises to pay the claimant's legal costs up to the amount specified in the LFA and as particularised in a legal costs budget, which is usually scheduled to the LFA.

The funder may also promise to indemnify the claimant against any order for adverse costs to which the claimant may become subject. However, it is important to recognise that, as already mentioned, in England and Wales, a funder may be liable for the adverse costs of a failed claim whatever the LFA may say.

LFAs should provide a fair, transparent and independent dispute resolution process.

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The LFA will often contain a period of exclusivity during which the funder can conduct its initial due diligence before exercising its rights contained in the LFA to elect to proceed with funding of the case or to withdraw.

A conventional LFA will be supported by a trust deed, sometimes called a priorities agreement, which creates a cash waterfall governing the order in which parties to the transaction are entitled to be paid. The parties will include the funder and the claimant and, perhaps, an ATE insurer, if such insurance was taken to deal with the adverse costs risk, and the lawyers if they were on some form of contingent fee.

There may be a need for further collateral documents. If the funded party is corporate, then the funder might wish to take security, but only over the proceeds of the claim, bearing in mind the fact that the transaction is non-recourse other than to the proceeds. The circumstances of some LFA transactions may also require a creditors' and shareholders' standstill agreement, at which point the transactional documents begin to have a corporate finance feel to them.

IV THE YEAR IN REVIEW – RECENT CASES

i Excalibur on TPF and due diligence

In *Excalibur*, the Court of Appeal recognised the ALF's role as the voluntary regulator of 'professional funders', and also the important distinction drawn by the Court between professional funders and 'the funders [in the *Excalibur* case] [who] were inexperienced and did not adopt what the ALF membership would regard as a professional approach to the task of assessing the merits of the case.'

Apart from its clarification of the position relating to adverse costs, security for costs and the *Arkin* cap, perhaps the most interesting aspect of the judgment for the litigation funding market is the clarification of funders' ongoing role in relation to review of the cases in which they have invested. Lord Justice Tomlinson said:'By funding, the funder takes a risk, a risk as to the nature of which he has the opportunity to inform himself both before offering funding and during the course of the litigation which he funds.' Also, 'when conducted responsibly, as by the members of the ALF I am sure it would be, there is no danger of such review being characterised as champertous.' Lord Justice Tomlinson had earlier defined champerty to mean 'behaviour likely to interfere with the due administration of justice'.

Funder members of the ALF have always known that claims evolve over time and have recognised the legal and commercial importance of maintaining an active oversight of cases throughout. Their aim is to ensure, to the extent possible, that they are only ever funding meritorious claims being conducted properly by all concerned. No sensible, experienced funder has any interest in funding speculative claims that do not have good chances of success.

The facts and consequences of the *Excalibur* case are, above all, graphic illustrations of the risks of litigation funding, particularly for the sources of capital that may be attracted to funding on an *ad hoc* basis. *Excalibur*'s various inexperienced funders were found to be jointly and severally liable for adverse costs of nearly £32 million.

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ii Essar v. Norscot[13] on recovery of the funder's fee as 'other costs'

Before September 2016, when the *Essar* judgment was handed down, it was widely accepted that the cost of TPF, including a funder's fee, was ordinarily not recoverable as costs.

Essar involved an arbitration in which the arbitrator, Sir Philip Otton, was highly critical of Essar's conduct, both before and during the arbitration proceedings. He found that Essar tried to cripple Norscot financially by withholding payments due to it and through unjustified fraud allegations. Norscot contracted with a TPF provider, under which the funder's success fee amounted to about £2 million. The arbitrator found that Norscot had no alternative but to take TPF and, having heard evidence that the TPF terms were market standard, awarded Norscot costs on the indemnity basis, including the TPF costs as being 'other costs' by virtue of Section 59(1) of the Arbitration Act 1996.

Essar applied to the High Court to set aside the award and Judge Waksman upheld the arbitrator's decision as being within the arbitrator's general costs discretion.

TPF providers and lawyers running funded cases immediately filed this decision away as a pathway to recovery of the TPF success fee for a successful funded party, both in arbitration where it originated and in the High Court, where it was upheld. In the short term, it will almost certainly prompt parties using TPF to seek to recover the uplift payable to the funder, particularly in cases where the opponent's conduct has brought an award of costs on the indemnity basis, especially where the conduct of the unsuccessful defendant is so egregious as to resemble that of Essar in that arbitration.

It is important to bear in mind that this case originated in an arbitration under the ICC Rules. In litigation under the Civil Procedure Rules, Rule 44.1(2)(a) limits the recoverable costs of court proceedings to 'costs payable by a client to their legal representative'. Further developments in the principles of *Essar* will be eagerly analysed.

V CONCLUSIONS AND OUTLOOK

The obvious conclusion from this chapter is that further expansion of TPF in England and Wales will follow, fueled by more capital, growing awareness and greater uptake of the opportunities.

One particular development occurred on 1 October 2015, when a class action regime to facilitate private actions for anti-competitive conduct was introduced, via a combination of the Consumer Rights Act 2015 and supporting court rules of the Competition Appeal Tribunal (CAT). The regime enables a representative claimant to act on behalf of a class of unidentified persons whose grievances share common issues of fact or law with the representative claimant.

Since 2015, only two applications have been made for certification of claims by virtue of collective proceedings orders in the CAT under the new procedures. Both applications were for opt-out collective proceedings orders in follow-on damages claims – the first in relation to mobility scooters, and the second in relation to interchange fees on Mastercard credit cards. Each application was (in May and July 2017 respectively) refused, in each case on the basis that the CAT was not persuaded that the claims were suitable to be brought in collective proceedings. Although the specific reasons were different in each case, the CAT's essential objection on both occasions was that the methodology suggested by the applicants' economic

13 *Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm).

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experts for calculating the losses incurred by members of the group was not appropriate. In other words, the applicant was unable to satisfy the CAT that it had a robust method for estimating (even broadly) the aggregate amount of damages owed by the defendants to the members of the class.

The role of TPF in these collective proceedings has been expressly recognised and, no doubt, appeals will follow and fresh applications will be made in the area of opt-out classes.

Opt in class applications are also provided for under this legislation but, at the time of writing, none have been made. No doubt many such application are in the pipeline. This is one of the principal areas in which TPF could be expected to expand in the coming months.

In general, the expansion prospects for TPF seem assured. There is certainly no shortage of well-resourced would-be investors, seeking access to experienced investment managers with a TPF track record. The investment class is non-correlated to conventional investment markets, with an increasingly convincing record of high returns for investors who are willing to tolerate its illiquid character.

The future of TPF in England and Wales seems assured.

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Leslie Perrin is the chairman of Calunius Capital LLP, an office he has held since January 2009.

Since its establishment in November 2011, Leslie has also been the chairman of the Association of Litigation Funders of England and Wales, and in that capacity is deeply involved in the development of litigation funding as an international phenomenon. At around the time of this appointment, Leslie was named by *The Times* as one of 'those lawyers we believe to be the most influential in society right now'.

Leslie has more than 30 years' experience of litigation markets, having been successively head of litigation, managing partner and senior partner at international law firm Osborne Clarke. One of his cases still holds the record for a UK jury award of defamation damages against an insured defendant. In other cases, he became recognised as one of the pioneers of group actions in the UK.

For nine years until 2015, Leslie was also the senior independent director of DAS, the UK market leader in legal expenses insurance.

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ISBN 978-1-912228-03-4