

Litigation Funding and Access to Justice

A Parliamentary Briefing from the Association of Litigation Funders of England & Wales

Overview

Litigation funding has become an important resource in support of Access to Justice, particularly where SMEs with meritorious claims against economically much more powerful opponents are otherwise unable to fund their claim or unwilling to take the significant financial risk of doing so.

The Litigation Funding market is still young, and statutory regulation would be disproportionate at this early stage. However, on 23 November 2011, a Code of Conduct for Litigation Funders (Code) regulating the emerging Litigation Funding industry was published by the Civil Justice Council (CJC). On the same day, the Association of Litigation Funders (ALF) was formed, whose members will agree to abide by the Code. Membership of ALF will become the kite mark for ethical behaviour amongst litigation funders.

Lord Neuberger has also welcomed the Code as Master of the Rolls, Chairman of the Civil Justice Council and as Head of the Court of Appeal.

In our view, the Litigation Funding briefing for parliamentarians recently circulated by the US Chamber of Commerce demonstrates a surprising ignorance of the differences between the US litigation system and litigation in this jurisdiction and unfairly maligns Litigation Funding and its protagonists.

Litigation Funding

- Litigation Funding is an arrangement through which litigants obtain the financing of their legal costs from a third party commercial investor who has no other direct interest in the proceedings. In return, and assuming the case is won, the funder receives an agreed share of the proceeds. The funding contract is a form of “no win no fee” arrangement; if the case is lost, the Funder has no recourse against the litigant.
- The Jackson Review expressly approved Litigation Funding as promoting Access to Justice without imposing financial burdens on defendants, whilst simultaneously acting as a filter against unmeritorious cases. Lord Justice Jackson called for a Voluntary Code to be established and for the CJC to be involved in its creation, which is precisely what has happened.
- The Litigation Funding market in England & Wales has, in recent years, experienced reasonably strong demand not just from SMEs seeking Access to Justice, but also from large, uber-solvent commercial entities, who see Litigation Funding as an invaluable and otherwise unavailable risk management tool with which to hedge the uncertainties and costs risks of large-scale commercial litigation.

Providing Access to Justice

- It is now accepted that properly structured Litigation Funding can operate within the framework provided by common law principles of maintenance and champerty. These public policy concepts remain relevant and set principles of proper conduct that are acknowledged and respected by funders and are enshrined in the Code.
- There is no evidence supporting the view that, in England & Wales, funders seek to take control of the litigation or of settlement negotiations. Funders leave the day-to-day conduct of the litigation to the litigant and its legal team, claiming the right simply to be kept informed of progress.
- The US Chamber of Commerce is the largest lobbying organisation in the world, the mouthpiece for US big business. The concerns raised by the US Chamber are essentially reflective of their experiences in the US, and such concerns are largely unfounded in England & Wales. The US Chamber alleges a risk of increasing numbers of spurious claims with the potential to harm the British economy. In commercial litigation in England & Wales, the loser pays the winner’s costs. This is a highly potent disincentive to spurious law suits that is wholly absent in the US and of which the US Chamber appears to be wholly unaware. Furthermore, the US Chamber’s references to the proliferation of spurious class actions are clearly made by an organisation that

has little familiarity with the practical limits on class actions here, let alone the inbuilt limitations on damages awards that derive from the absence in England & Wales of anything like US juries awarding punitive damages in civil cases.

The Code of Conduct

- The Code was published by the CJC, an independent public body funded by the Ministry of Justice, that oversees and co-ordinates the modernisation of the Civil Justice system in England and Wales. The working party charged by the CJC with producing the Code considered the specific issues of regulation of Litigation Funding that were raised in the Jackson Report, in the overall context of that Report's strong approval of Litigation Funding.
- The working party was chaired by CJC Council member, Michael Napier CBE, QC (Hon) and included CJC Council member, Professor Rachael Mulheron (Queen Mary University of London); Timothy Mayer (Allianz ProzessFinanz); Susan Dunn (Harbour Litigation Funding); Leslie Perrin (Calunius Capital LLP); Duncan Campbell of the CBI and Rocco Pirozzolo of the insurer, QBE.
- The development of the Code of Conduct was specifically driven by three main concerns voiced in the Jackson Report, each requiring a balancing act between the interests of the litigant and the interests of the Funder;
 - Capital Adequacy of Funders; Jackson sought "a reasonable balance between practicality and client protection" and the Code has responded by requiring Funders to maintain demanding solvency standards both in their P&L and balance sheet;
 - The rights of the litigant and the Funder around Termination and approval of Settlements and the management of conflict in those situations; Jackson wanted to see "a fair balance between the interests of funder and client" and the Code requires Funder behaviour where Terminations and Settlements are concerned, to be reasonable and gives the Claimant the option of going to an independent QC for a binding opinion if the reasonableness of the Funder's behaviour comes into question;
 - Protection of public policy principles; the Code responds by forbidding any Litigation Funder from seeking to take control of the litigation and by requiring the professional duties of the Claimant's lawyers to be respected by the Funder.

Voluntary Regulation of Litigation Funding

- The Legal Aid, Sentencing and Punishment of Offenders Bill 2011, currently proceeding through the House of Lords, did not address Litigation Funding at all. Nevertheless, the US Chamber of Commerce seems to have persuaded Lord Thomas of Gresford to table amendments to the Bill which seek to restrict Litigation Funding and impose statutory regulation on Litigation Funders.
- The Code of Conduct for Litigation Funders is the result of several years of independent, careful and thoroughly scrutinised consultation and deliberations, which have given Litigation Funding the proper, searching analysis it deserves. The Code that resulted from this process has been unanimously welcomed by relevant stakeholders, including the most senior elements of the Judiciary.
- Lord Thomas of Gresford has tabled amendments to Clause 53 of the Bill which seek to introduce unnecessary restrictions on Litigation Funders. We hope Peers will vote against the amendments.

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