The Law Gazette

Storm raging over investing in litigation

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Created *07/02/2012 - 11:15*

Third-party litigation funding (through which investors fund someone else's case in exchange for a percentage of damages if they win) does not normally receive much mainstream attention in the UK, given that it is a relatively small sector here.

But last week the House of Lords devoted considerable floor time [1] to debating the potential dangers of this method of funding, as peers discussed an amendment to the Legal Aid, Sentencing and Punishment of Offenders bill. The amendment, which was eventually withdrawn, sought to introduce statutory regulation into the sector, instead of a new voluntary code of conduct which was published in November.

The Lords were most worried about the prospect of third-party funding (which, at present, is almost entirely focused on commercial cases) being introduced into areas involving individual litigants, such as personal injury. Funders could potentially offer to finance a claimant's case in return for a cut of their personal injury compensation.

In that context, there is a clear argument for proper statutory regulation to protect an individual claimant who, unlike a corporate client, might be in a vulnerable position when negotiating a deal with funders. But in my view the practice should not be banned outright, given that, for some claimants, it might be the only way of bringing their case and obtaining access to justice. After all, under the Jackson reforms, solicitors will be able to take a share of personal injury claimants' damages, limited to 25% of the compensation.

But what about commercial cases?

One of the arguments frequently made against third-party funding in commercial litigation is that it fuels unmerited claims. Those who oppose litigation funding often point to the US as a dangerous example of the kind of litigation frenzy that would develop, if we allow funders to establish themselves here to the same extent as they have done across the Atlantic. Indeed, an allusion was made during the Lords debate to problems arising from 'the American type of litigation'.

But it is often forgotten that there is a fundamental difference between litigation in the UK and the US: namely, the adverse costs rule. While in the US, funders who lose a case do not face the prospect of paying the other side's costs if they lose, here they do. That in itself is enough to ensure

that third-party funding will not lead to a rise in weak cases being brought in the UK courts; and indeed many believe that it is the lack of an adverse costs rule, rather than the presence of third-party funders, that truly lies behind the litigation excesses of the US.

In the UK, far from taking a gung-ho approach to litigation, funders are remarkably cautious, and in fact most will not touch a case unless it has a 70% prospect of success. That's hardly fueling unmerited litigation. It would be interesting to know how many cases financed by litigation funding actually win; but that information is normally subject to client confidentiality.

Returning to the House of Lords debate, peers also noted that Lord Justice Jackson, in his final report, said that while a voluntary code of conduct should be established for third-party funding, this should be 're-visited' if and when the funding market expands. The voluntary code was published, and approved [2] by Jackson, only last November. But as the Lords debate drew to a close, Lord McNally suggested that: 'It is a question of whether [third-party funding] has now expanded to a point where the matter should be re-visited'.

I would suggest that, by approving the voluntary code less than three months ago, surely it can be inferred that Jackson does not believe the market has yet expanded to require more than self-regulation at the current time. Otherwise, surely he would not have only just put his weight behind self-regulation?

With third-party funding expected to begin playing a more central role once the civil justice reforms come into force in April next year, we can expect to hear plenty more views emerge on this developing and controversial funding sector in the coming months.

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