A “sea change” in attitudes towards third party litigation funding in Jersey

Service area / Dispute Resolution and Litigation
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What is litigation funding and why is it attractive?

Third party litigation funding offers an opportunity for an otherwise-disinterested investor to provide finance or effectively underwrite the costs of litigation, in return for a pre-agreed share of the proceeds. Also known as legal finance or litigation finance, third party funding – historically – was considered an improper or corrupting influence on litigation. These old offences of champerty and maintenance were first decriminalised in England in 1967. Since then, attitudes have shifted further, and third party funding in now broadly seen in a positive light as it increases access to justice, especially in light of the ever-increasing costs of litigation.

A third party funding mechanism provides an opportunity for parties to pursue claims, which they may not have otherwise, or at least not had the funding, to otherwise pursue. Litigation funding is also attractive for those who may wish to share the risk of the litigation with a third party funder. Ultimately, third party litigation funding provides a more cost effective route to litigation. It is this added benefit of litigation funding, particularly in ‘David versus Goliath’ cases, that has swayed the court to approve of and even encourage the funding mechanism. This also holds particular relevance today, in light of the COVID-19-induced market volatility, which has limited many businesses sources of organic litigation funding.

Litigation funders will generally prefer to engage with cases after the pre-action correspondence stage, to establish that the proceedings are not purely speculative. Where a case requires ‘seed funding’ at an earlier stage, this may be provided by a litigation funder. However, a higher level of return will likely be expected. Importantly, these arrangements can be structured so that there is no impact on the client-lawyer relationship, with the plaintiff retaining control over the proceedings, and the funder generally acting as a passive investor. If a claim does not succeed, the funded party will not need to provide any collateral for the funder, as the funder’s fee will typically be contingent upon recovery of sufficient damages to pay that fee (subject to the terms of the particular agreement).

The current Jersey law on third party litigation

While attitudes have been shifting in England and elsewhere for some time, the current position in Jersey derives from a landmark decision in 2012, *In Re Valetta Trust*. There, the Royal Court granted permission for trustees to enter into a funding agreement with a funder. The Court held, relying largely on policy considerations regarding improving access to justice, as set out in the Jackson Review in the UK, that such funding was permissible. Therefore, despite the historic rules of champerty and maintenance that were then thought to apply in Jersey, *Valetta* clarified the law in Jersey surrounding litigation funding. The court also noted that the “sea change” in judicial attitudes was in line with that of English courts.

The Bailiff reasoned that, while there is no material difference between Jersey and English law in this area, any such decision of admissibility of a funding agreement will be made on a case-by-case basis. At [30] to [31], *Valetta* set out the following guidelines on what would constitute a permissible litigation funding arrangement:

- The plaintiffs and lawyers retained full control over the proceedings;
- The plaintiffs retained a substantial portion of the proceeds; and

- The funding agreement did not prejudice the defendants as any potential adverse costs order would be met by the funder.

Shortly after, in 2013, the *Valetta* decision was confirmed in *Barclays Wealth Trustees (Jersey) Limited & Anor v Equity Trust (Jersey) Limited & Anor*, another similar case involving the approval of a trustee entering into a funding agreement.

Fast forward to today, and there is no doubt that litigation funding is seeing increasing popularity among high value, commercial litigation cases, particularly where there is a large class of plaintiffs. We also see insolvency practitioners becoming increasingly attracted to litigation funding where creditors of the insolvent are unwilling or unable to provide the funding to attack delinquent directors or other conduct. The litigation funding market in offshore jurisdictions specifically has seen significant growth recently, with various new funders entering the market. As a result, funding is in addition available in construction, divorce and also personal injury cases.

Permissible funding arrangements in Jersey are relatively limited compared to England. English law permits the use of conditional fee agreements (CFAs), or damages-based agreements (DBAs), which are broadly akin to 'no-win, no-fee' arrangements (a detailed analysis of which is perhaps beyond the scope of this briefing). The court in *Valetta*, however, held that such agreements will create a conflict of interests between a lawyer's personal interests i.e. their profits from the successful claim, and their fundamental duties to the court. Furthermore, neither a CFA nor a DBA address the initial costs of the litigation funding, unlike third party litigation.

Ultimately, Jersey continues to see a buoyant market for litigation since the landmark decision of *Valetta*. Litigation funding may not yet be common practice as such, and careful drafting of a funding agreement is advisable to ensure validity under Jersey law. Nevertheless, such arrangements may prove desirable for would-be litigants wishing to manage their cash flows and/or mitigate risk from a costs perspective. If this is something that a potential plaintiff wishes to explore, Carey Olsen has extensive experience in both structural and regulatory aspects of third party litigation, and is familiar with many of the reputable litigation funders.

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