

Advocate Lisa Springate, partner, Bedell Cristin, and Advocate Robert Gardner examine a new way to fund litigation



Advocates Robert Gardner and Lisa Springate, of Bedell Cristin

Case notes

It is a well-known feature of the Jersey legal system that not only are you expected to fund your own legal costs but that should you be unsuccessful in your claim, you are also likely to have to pay a substantial proportion of the other side's costs on either an indemnity basis (approximately 80% of the overall costs) or on a standard basis (approximately 65% of the overall costs).

This adds an extra dimension of risk to an already risky process and can tip the balance in any costs-benefit analysis when considering whether or not to pursue a claim in Jersey.

As with most things, it need not be this way. This is because a new source of funding has recently developed in Jersey known as litigation funding which offers those involved in substantial commercial disputes the chance to offset the costs risk entirely.

What is litigation funding?

Litigation funding involves an agreement between a litigant and a professional funder. In broad terms, the litigant will pass to the funder, some or all of the responsibility for the ongoing legal costs of taking a case to trial. The litigant may also purchase ATE (after the event) insurance to cover any adverse costs if the case fails.

The funder will take an active interest in the case but will not meddle in the litigation by getting involved in decision making. In return, the litigant will agree to share a percentage of the proceeds with the funder.

Position in the United Kingdom

In the United Kingdom and else-

where, litigation funding is mainstream and has developed significantly over the past few years. However, while it has long been recognised by litigation funders based in the UK that the Channel Islands have a well-established litigation market, there has been no established domestic market for funding.

This is because of the fact that until the recent landmark judgment was handed by the Royal Court in Jersey in the Matter of the Valetta Trust, the legality and enforceability of funding agreements remained untested.

The Valetta case

The Valetta case involves litigation commenced in 2011 by beneficiaries of a Jersey discretionary trust and its replacement trustee, against the former Jersey trustee, together with two individuals.

The only material asset of the trust was a minority shareholding in an underlying company which in turn owned certain rights to a product. The former trustee sold the trust shares in the company to itself as trustee of another trust which also held shares in the company.

The plaintiffs contend that the sale of the shares was done at a gross undervalue which was known to the former trustee. The plaintiffs therefore wished to institute proceedings against the former trustee for breach of trust as well as against certain other persons who are said to be knowingly concerned in the sale at an undervalue. The former trustee and other defendants strongly denied the allegations.

When considering their litigation options, the prospective plaintiffs turned to litigation funding and en-

tered into a funding agreement with a leading litigation funder, Harbour Litigation Investment Fund LP ('Harbour'), which is based in England. As the Royal Court was being requested to authorise the replacement trustee to enter into the agreement and this was the first time that the enforceability of funding agreements had been considered in Jersey litigation, it requested detailed submissions on whether such an agreement is permissible and enforceable under Jersey Law.

As a result of the arguments presented to it by Advocate Lisa Springate, of Bedell Cristin, the Royal Court concluded that a funding agreement is in the interests of justice and is to be encouraged, provided that it is properly structured.

Conditional fee arrangements

However, the Royal Court emphasised that its judgement is only applicable to litigation funding agreements and that conditional fee arrangements (agreements between a client and a lawyer whereby the client pays nothing or less if unsuccessful, but a full fee, usually with a success fee or uplift, if successful), remain outside the Jersey statute book and are prohibited in Jersey.

The importance of the Valetta decision to litigation funders and those contemplating litigation in Jersey is that litigation funding may now facilitate access to justice by plaintiffs who would not otherwise be able to afford to bring the litigation in question, as well as for those who wish to share the costs of litigation with a funder.

• Advocates Lisa Springate and Robert Gardner act on behalf of the plaintiffs in the Valetta Trust.

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