

Litigation funding explained



Alasdair Davidson, partner, litigation group at Bedell Cristin in Guernsey, considers commercial litigation funding

COMMERCIAL litigation can be challenging at the best of times and the costs involved can be daunting.

However, as with most things, it need not be that way. Litigation funding is now an established service in the UK and elsewhere and is something which is increasingly used in the Channel Islands.

If someone has suffered a financial loss as a result of wrongdoing, sometimes finding the actual funds (and indeed, the courage) to pursue a remedy can prove to be as challenging, if not more so, than actually winning the case itself. This is all the more so as any potential litigant needs to consider not only their own costs but also those of their opponent in the event that the litigation is unsuccessful.

And that is where litigation funding may come in useful by allowing some plaintiffs to take a more commercial approach to litigation and in assisting a cautious or impecunious plaintiff to pursue litigation they otherwise might not.

At its heart, litigation funding involves sharing (or entirely passing on to another) legal fees – as well as the risk of paying their opponent's costs if the claim is lost – in return for foregoing a slice of the proceeds if the claim is won.

Funding is certainly not an option for every plaintiff, but it may well be an option worth considering for significant claims where the prospects of success and recovery look good but the downsides of losing could be even more debilitating.

Litigation funding is not the same as a 'no win no fee' or other conditional fee arrangement under which a lawyer gets an uplift on his fees or share of the damages if a claim is successful.

There is a prohibition in Guernsey on an advocate having an interest in his client's claim by way of such an arrangement.

Litigation funding involves an agreement struck not between a litigant and a lawyer, but 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 a form of insurance to cover any adverse costs order 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.

Litigation funding has moved into the mainstream and has developed significantly in the past 10 years or so. Traditionally frowned upon and regarded as unlawful and being contrary to public policy, such arrangements are now seen as beneficial to the interests of justice and to be encouraged. In a recent high profile case in England, thought to have very good prospects of success, the claimant lost, leaving the professional funders to pick up significant legal fees on both sides of the proceedings whereas the claimant himself paid nothing. While this shows how unpredictable commercial litigation can be (even when pursued with utmost diligence and with the benefit of top level advice) it also demonstrates how any uncertainty can be hedged successfully.

There are now a number of UK-based litigation funders that will work on cases here in Guernsey. Bedell Cristin not only has experience of working with these funders but has also been involved actively in the establishment of litigation funds looking to invest in this market. Our experience so far has only been a positive one and the availability of professional funding now means that potential claimants do not need to remain cautious of taking up the fight to protect their interests.

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