THE FUTURE OF LITIGATION FUNDING

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ONE-ON-ONE INTERVIEW

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Jonathan Barnes’ family business was cotton spinning in the north-west, but he started his career in the law. He specialised in commercial property and was a partner at two City law firms. In 2006 Mr Barnes joined former client Woodsford Consulting as a director and led the successful sale of Europa Park, Central Europe’s premier single location logistics and distribution centre, against the backdrop of a deepening credit crunch. Mr Barnes was a key player in Woodsford’s decision to enter the litigation funding market, and has been instrumental to the success of the venture.
**CD:** Reflecting on the last couple of years, could you provide an overview of the litigation funding landscape? What do you consider to be the key developments shaping the market?

**Barnes:** The market continues to grow and become mainstream. Claimants and their lawyers are becoming more familiar with litigation funding, and in turn the demand for funding from those with good claims is increasing. To meet that demand, new capital has found its way into the sector at all levels. There are a number of new entrants looking to fund a higher volume of smaller claims. In the market for higher value claims, the professional regulated funders compete with others that fund on a more ad hoc basis, although it remains to be seen how the well-publicised loss of over £30m in Excalibur will affect the appetite for ad hoc funding. It may be that at least some ad hoc funders will withdraw from the market, alternatively seek to deploy their capital through the professional regulated funders. In any event, the winners will be those who allocate significant capital sums most prudently over the long-term.

**CD:** What are the potential advantages of litigation funding? Are there any drawbacks that parties might need to consider?

**Barnes:** Litigation funding facilitates access to justice and for some claimants the main advantage is that they are able to bring a meritorious claim that would otherwise flounder. For those with good claims and financial resources, the attraction is risk management. They can determine, at the outset, exactly how much financial resource they are prepared to put into a claim, in return for sharing a successful outcome. Provided the legal team is also willing to meaningfully share financial risk, another significant advantage is the alignment of the parties’ financial interests. The traditional, hourly rate, billing approach can lead to a misalignment between lawyers and client. By definition, disputes are stressful. Claims evolve and there are up and downs. Funding involves introducing at least one more party into the equation. Get that wrong and, as with any ‘partnership’, cracks start to appear – a potential drawback.

**CD:** What types of litigation funding solutions are on offer to parties?

**Barnes:** The ‘traditional’ model uses a combination of discounted legal fees, often with an uplift on success, own costs cash funding from a funder, for legal and experts fees, and after-the-event (ATE) insurance for the potential adverse cost liability, if the claim fails. Some funders have developed ‘hybrid DBAs’ – a contractual arrangement that allows the lawyers to share the
funder’s success fee and which can unlock certain claims. Many funders will consider funding a basket of claims through an individual law firm, which can be used to fund smaller individual claims and diversify the funder’s portfolio of claims. Some will also give a contractual indemnity for adverse costs as an alternative to ATE insurance. The attraction for the claimant is that there are no insurance policy conditions to fall foul of should the indemnity be called on.

**CD:** Are there any scenarios where the use of litigation funding may not be relevant or suitable?

**Barnes:** Litigation funding is not suitable for unmeritorious claims, or claims where the likelihood of financial returns is obviously outweighed by the risks and costs involved in the claim.

**CD:** What general advice can you offer to parties seeking litigation funding? What steps should they take when embarking on this course of action?

**Barnes:** Parties seeking funding need to do their due diligence. Make sure that your funder really understands litigation and is itself well funded. There are currently seven members of the Association of Litigation Funders (ALF) and which have, therefore, signed up to the voluntary code of conduct approved by the Civil Justice Council. Most claimants need look no further. In particular, ALF members must meet a minimum capital adequacy requirement, of at least £5m from 2016, and may not withdraw from a funded claim without good reason. Funders come from different backgrounds – broadly, the law, insurance or finance – and can have distinct tastes. Make sure that your funder understands the underlying asset – litigation – and has a successful track record funding claims like yours. Be aware that litigation can include a very broad range of claims, from simple English High Court contractual disputes to environmental or securities class actions in the US, the Netherlands or Australia, Bilateral Investment Treaty arbitrations against sovereign states in Washington or Stockholm, and everything in between. The right funder will have valuable in-house expertise and experience and can be a real ally for the claimant and his team.

**CD:** To what extent are you seeing a rise in alternative fee arrangements between corporations and law firms? Can you outline some examples?

**Barnes:** ‘Magic Circle’ law firms maintain that their clients continue to enter into open-ended commitments to pay hourly rates. For a corporation that might be put out of business by a particular claim, this might be appropriate. However, the reality for almost all companies and law firms is that
alternative fee arrangements are the norm. Clients are increasingly expecting their lawyers to come to them with a creative funding solution that goes well beyond discounted headline rates. External funding can fit nicely into the equation by giving the client certainty in relation to the overall cost of the claim and help the law firm by paying at least part of its work in progress as the litigation proceeds. We have recently seen a US law firm grab a significant chunk of a discreet new business area by offering potential clients a range of options.

**CD:** To what extent have recent regulatory developments impacted on the litigation funding space? Can we expect to see any rule changes in the near future?

**Barnes:** The US Chamber of Commerce’s anti-litigation funding campaign on behalf of its big corporate members continues. It seems to have prompted interest and questions from two US senators and, in turn, a robust defence from funders. The position is much the same as in 2009 when Lord Jackson’s Review of Civil Litigation Costs found that most litigation funding agreements were between well advised commercial entities and formal regulation was unnecessary. In any event, if a regulator can be persuaded to take an interest in the sector, most professional funders don’t anticipate compliance issues so are sanguine about the prospect.

**CD:** How do you expect litigation funding to unfold over the next 12 months or so? Are there any particular trends you expect to see?

**Barnes:** In the UK, we will see a funded competition claim following the Consumer Rights Act 2015. This Act introduces US-style opt-out class actions to the UK for the first time. Follow-on claims, after a Competition Authority infringement decision, involving a relatively large number of claimants and, therefore, a high total claim value, will be attractive to funders if law firms can evidence the will to not let costs get out of control. Beyond the UK, we will see an increase in the number of jurisdictions that

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recognise the access-to-justice benefits of litigation funding, and therefore a growth in hospitable markets. There are some jurisdictions that continue to struggle with the English medieval legal doctrines of maintenance and champerty, but ultimately the tide is turning in favour of litigation funding. In Hong Kong, for example, a recent Law Reform Commission has recommended the law be changed to facilitate arbitration funding. Should the law become more straightforward in Hong Kong, places like Singapore will take note. CD