Litigation Funding

Contributing editors
Steven Friel and Jonathan Barnes

2017

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Litigation Funding 2017

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Woodsford Litigation Funding

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Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2016
First edition
ISSN 2399-665X

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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First edition

Getting the Deal Through is delighted to publish the first edition of *Litigation Funding*, which is available in print, as an e-Book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print and online. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford Litigation Funding, for their assistance in devising and editing this volume.

GETTING THE DEAL THROUGH

London
November 2016

Australia

Gordon Grieve, Greg Whyte and Simon Morris
Piper Alderman

1 Is third-party litigation funding permitted?

Third-party litigation funding is permitted in Australia, however, not without complexity.

Maintenance and champerty are obsolete as crimes at common law (*Clyne v NSW Bar Association* (1960) 104 CLR 186, 203) and maintenance and champerty have been abolished as a crime and as a tort by legislation in New South Wales, South Australia, Victoria and the Australian Capital Territory. In Queensland, Western Australia, Tasmania and the Northern Territory, the torts of maintenance and champerty have not been abolished. Notwithstanding legislation, it remains the position in all Australian jurisdictions that general principles of contract law, pursuant to which a contract may be treated as contrary to public policy or as otherwise illegal, are not disturbed. This means that a third-party litigation funding agreement could be set aside by an Australian court if it were found to be inconsistent with common law public policy considerations.

The High Court in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 (*Fostif*) considered provisions of the New South Wales legislation abolishing maintenance and champerty as torts. The High Court held that third-party funding per se was not contrary to public policy or an abuse of process. The Court ruled that the fact a funder may exercise control over proceedings and bought the rights to litigation to obtain profit did not render the funding arrangements contrary to public policy. The Court held that profiting from assisting in litigation and encouraging litigation could only be contrary to public policy if there was a rule against maintaining actions (which in New South Wales had been abolished). Concerns raised about the possibility of unfair bargains and the potential for litigation funding to distort the administration of justice were rejected. The Court ruled that where these concerns arose they could be adequately dealt with through existing doctrines of contract and equity (unfair contracts), abuse of process (rules of court dealing with the administration of justice) and existing rules regulating lawyers' duties to the court and clients (conflicts, etc).

Importantly, *Fostif* did not consider the position in those Australian jurisdictions where the torts of maintenance and champerty had not been abolished.

The recent decision of *Bolitho v Banksia Securities Limited* (No. 4) [2014] VSC 582, is illustrative of the circumstances where courts, post *Fostif*, are prepared to intervene. In *Bolitho*, Ferguson JA found that lawyers connected with the litigation funder should be prevented from acting for the representative plaintiff in a class action in circumstances where the litigation funder was majority owned by entities controlled by the solicitor and the barrister acting in the matter. The Court ruled, in its inherent jurisdiction, that the lawyers should be restrained from acting. While the Court did not find that the solicitor and barrister had breached any common law, statutory or professional conduct obligation, the restraint was necessary to ensure the public perception of the due administration of justice and to protect the integrity of the judicial process.

See also the recent discussion on abuse of process and the tort of maintenance in Queensland in *Taylor & Anor v Hobson & Ors* [2016] QSC 226. In this case the plaintiffs sued the defendants for damages, claiming the defendants had made a number of misleading representations in relation to the purchase of a business. The first and second defendants were the vendors and the third and fourth defendants were the vendors' solicitors. The third and fourth defendants settled with the plaintiffs through their insurer, Lexon. The deed of settlements entered into between the plaintiffs, the third and fourth defendants, and Lexon provided for a payment of a sum of money and for Lexon to appoint its solicitors to undertake further carriage of the proceedings for the plaintiffs against the first and second defendants. These circumstances meant that Lexon assumed an interest in the litigation and in effect became a funder.

The first and second defendants applied to stay the proceedings or to have the solicitors restrained from representing the plaintiffs on the grounds of an abuse of process. Boddice J noted that Lexon's funding of the proceeding was not enough to warrant a stay of the proceedings, citing the increased recognition of litigation funding as improving access to justice. However, the possibility for the insurer to control the proceedings against the first and second defendants, even if it were exercised reasonably, gave rise to a real possibility that Lexon would impermissibly intermeddle in the conduct of the proceedings to protect its own interest. His Honour concluded that the intermeddling arose in circumstances where the interests of the plaintiffs and of Lexon did not coincide in all material respects. Boddice J ultimately stayed the proceedings for abuse of process.

2 Are there limits on the fees and interest funders can charge?

There is no legislation or regulation in Australia that limits the fees funders can charge.

The High Court in *Fostif* held that contract law considerations about illegality, unconscionability and public policy may still arise in relation to a litigation funding agreement but there is no objective standard against which the fairness of the agreement may be measured. Accordingly, whether a particular clause in a litigation funding agreement may contravene public policy will be answered having regard to the circumstances of the particular case.

Theoretically, Australian courts could set aside a litigation funding agreement where the funder's interest constituted an equitable fraud in the sense that it involved capturing a bargain by taking surreptitious advantage of a person's inability to judge for himself or herself by reason of weakness, necessity or ignorance.

Australian courts exercising equitable jurisdiction can set aside bargains where terms are harsh or unfair. The High Court in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 restated the principles relating to unconscionable conduct. A court may set aside a bargain as unconscionable if one party, by reason of some condition or circumstance, is placed at a special disadvantage compared to another and the other party takes unfair or unconscientious advantage of the special disadvantage. In those circumstances, the innocent party may be relieved of the consequences of the unconscionable conduct. In *Kakavas v Crown Melbourne Limited* [2013] HCA 25, a gambling addict sought to avoid losses with a casino, arguing that the casino had taken unconscionable advantage of his vulnerability. The Court in rejecting his claim ruled that inequality of bargaining power was relevant, but not essential to establish unconscionability and that a party must rely upon standards of personal conduct known as 'the conscience of equity'. The High Court drew a clear distinction between the equitable principles of unconscionable conduct and undue influence.

Prohibitions against unconscionable and misleading conduct that may apply to dealings between litigation funders and funded litigants are also reflected in general consumer protection provisions in the Competition and Consumer Act 2010 (Cth) and provisions in the Australian Securities and Investment Commission Act 2001 (Cth).

3 Are there any specific legislative or regulatory provisions

applicable to third-party litigation funding?

Third-party litigation funders in Australia have no mandatory licensing or prudential supervision.

In *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed) and Ors* [2012] HCA 45 (*Chameleon Mining*), the High Court was asked to determine whether a litigation funder, International Litigation Partners (ILP), was required to obtain an Australian Financial Services License (AFSL) on the basis that litigation funding was a financial product. The Court held that the litigation funding arrangement was a credit facility but as the Corporations Act 2001 (Cth) excludes credit facilities from the definition of financial products ILP was not required to hold an AFSL. The requirement to hold an AFSL would have resulted in litigation funders being regulated by the Australian Securities and Investments Commission (ASIC) as providers of financial services. AFSL holders are required to satisfy fitness and propriety requirements and, depending on the particular financial product engaged in, capital adequacy standards. AFSL holders have specific obligations subject to ASIC oversight relating to conduct and disclosure, the manner in which the financial services are provided, the training, competence, knowledge and skills of persons providing the services, ongoing compliance of the adequacy of your financial, technological and human resources, and systems designed to ensure compliance with the financial services laws such as management of conflicts of interest and risk management.

After the *Chameleon* decision the federal government clarified the regulatory position by exempting litigation funding from all forms of regulation that apply to providers of financial services and credit facilities. However, the federal government did impose regulations that required that litigation funders must have adequate processes to manage conflicts of interest. Criminal sanctions apply for non-compliance with the conflict requirements. The conflict requirements are policed by ASIC.

The purpose of the conflict of interest regulations is to ensure that conflicts – ordinarily where the interests of funders, lawyers and litigants of the funded litigation diverge – are managed by the litigation funder. ASIC's Regulatory Guide sets out ways in which funders can meet their conflict of interest management obligations under the regulations, but otherwise do not prescribe the required mechanism for compliance with the regulations. For example, there is a requirement that litigation funders maintain a conflict of interest policy, however, regulations do not prescribe the the content of the policy or the processes that a litigation funder must have in place to respond to a conflict of interest.

In its Access to Justice Report released in 2014, the Productivity Commission, the Australian government's principal review and advisory body on microeconomic policy and regulation, recommended reforms to promote access to justice and remedy a system that it says is 'too slow, too expensive and too adversarial'.

The Report recommended the removal of prohibitions on lawyers and law firms charging contingency fees and the implementation of a licensing regime to regulate third-party litigation funders.

The Commission made a number of recommendations, including implementing a mandatory licensing regime for third-party funders to require that all funders be licensed as financial service providers under the Corporations Act, that funders hold adequate capital to meet financial obligations to consumers and other parties (including costs liabilities), and comprehensive disclosure obligations.

The federal government has not acted on the recommendations of the Productivity Commission.

4 Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

There are no specific professional or ethical conduct rules that apply to the role of legal professionals in funded proceedings.

Australian legal practitioners are regulated by state-based regimes proscribing professional obligations and ethical principles when dealing with their clients, the courts, their fellow legal practitioners, regulators and other persons.

The interposition of a third-party litigation funder into the lawyer–client relationship raises ethical issues around conflicts, loyalty, independence of a lawyer's judgement and confidentiality. Legal practitioner conduct rules in all Australian jurisdictions deal with each of these concepts. The conduct rules reflect a lawyer's fiduciary duty towards his or her client.

A practitioner (which includes a law practice) will have a conflict of interest when the practitioner serves two or more interests that are not able to be served consistently, or honours two or more duties that cannot be honoured compatibly.

5 Do any public bodies have any particular interest in or oversight over third-party litigation funding?

See question 3 with respect to the ASIC regulation of the conflicts' rules. Outside of ASIC regulations of the conflicts rule, there is no formal regulatory framework applying to litigation funders.

There are some specific examples where the terms of litigation funding agreements are supervised by the courts.

In an insolvency context, it is common for a liquidator to enter into a funding agreement with a third-party funder. Under the Corporations Act, a liquidator is required to seek the court's approval, where the terms of a contract that he or she enters into involve performance that exceeds three months. This means that in almost all cases where a liquidator enters into a litigation funding agreement, court approval is required.

When reviewing a litigation funding agreement for approval, the courts take account of a range of factors, including:

- the liquidator's prospects of success in the litigation;
- the interests of creditors other than the proposed defendants;
- possible oppression in bringing the proceedings;
- the nature and complexity of the cause of action;
- the extent to which the liquidator has canvassed other funding options;
- the level of the funder's premium;
- the liquidator's consultations with creditors; and
- the risks involved in the claim, including the amount of costs likely to be incurred in the proposed litigation and the extent to which the funder is to contribute to those costs, to the costs of the defendant in the event that the action is not successful, or towards any order for security for costs.

The decisions involving approval of funding agreements demonstrate that the courts do not simply rubber stamp whatever is put forward by a liquidator, and that the approval of the court is not intended to be an endorsement of the proposed funding agreement or the proposed claim, but merely a permission for the liquidator to exercise his or her own commercial judgement in the matter.

The case management of class actions commenced in the Federal Court involving litigation funding require at or prior to the initial case management conference that each party disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order. Any funding agreement disclosed may be redacted to conceal information that might reasonably be expected to confer a tactical advantage on the other party.

All settlements reached in class action proceedings must be court approved. Where a settlement involves a funder's interest being deducted from funds otherwise available to class members, those terms are subject to judicial scrutiny as to reasonableness.

6 May third-party funders insist on their choice of counsel?

Yes. It is a permissible level of control over the litigation process for a third-party funder to insist on the identity of the lawyers retained. Commonly, the funder will, pursuant to the funding arrangement, appoint the lawyers to provide the legal work, and the retainer agreement between the lawyers and the funded client will be pursuant to terms required by the funder.

7 May funders attend or participate in hearings and settlement proceedings?

Yes. It is a permissible level of control over the litigation process for the litigation funding terms to provide that the funder has the right to give instructions to the lawyers concerning the conduct of the litigation, subject to the funded client having the right to override the funder's instructions.

Commonly, save in respect of settlement (see discussion below), in circumstances where a conflict arises between the lawyer's duty to his or her client and the funder, the lawyer is required to prefer the interests of and to take instructions from his or her client.

In a settlement context, in recognition of the funder's interest in the resolution of litigation, where there is a difference of opinion between the funded client and the funder in respect of settlement terms, the standard

practice in the Australian experience is that the difference of opinion is referred to the most senior lawyer acting in the matter. In the class action context, any settlement reached on behalf of the representative client will be subject to court approval.

There are no decisions of Australian courts interfering with this practice. It is submitted that this level of control over the litigation process is consistent with the principles in *Fostif* and are not contrary to public policy.

8 Do funders have veto rights in respect of settlements?

See above.

9 In what circumstances may a funder terminate funding?

Commonly litigation funding agreements entered into in Australia allow a funder to terminate the funding relationship at its discretion without cause and on the giving of notice.

Usually the termination of a funding agreement will relate to the commercial viability of the claim and be about the legal merits or quantum. Circumstances may also arise where the funder considers that there is an irreconcilable and unavoidable conflict of interest in its continuing to be a party to the funding agreement.

Contract law principles that apply to the termination of contracts generally will apply.

10 In what other ways may funders take an active role in the litigation process?

It is recognised and accepted that litigation funders play an important role in providing access to justice. Especially in the class action context, decisions of Australian courts following *Fostif* are philosophically supportive of the role that lawyers and third-party funders have in the identification of and the initiative of litigation.

11 May litigation lawyers enter into conditional or contingency fee agreements?

'No-win-no-fee' conditional costs agreements are permitted in Australia.

There are prohibitions on legal service providers obtaining an interest in any financial profit derived from a settlement or judgment beyond those that are properly agreed as professional service fees. While the regulations differ from state to state, lawyers are prohibited from entering contingent fee agreements, but are permitted in a conditional fee agreement to charge an 'uplift' of up to 25 per cent if successful in the proceedings on standard hourly rates.

The Productivity Commission's Access to Justice Report recommended lifting the ban on contingency fee arrangements on the basis that they promote access to justice by addressing imbalances between individual litigants in complex matters and well-resourced defendants.

The recommendation was conditioned in that it was subject to the maintenance of the prohibition on contingency fee arrangements for criminal and family law matters, comprehensive disclosure obligations (as to the percentage of damages to be recovered by law firms and responsibility for liability for disbursements and adverse costs orders) and capping the percentage limit on a sliding scale (to prevent law firms gouging, or earning windfalls on high-value claims).

As a safeguard against contingency fees leading to unmeritorious claims, the Commission referred to the existing powers of courts to make adverse costs orders against non-parties, the regulation of the legal profession and lawyers' ethical and professional obligations.

The Commission noted the inconsistent treatment of lawyers entering into contingent arrangements, given the regulation of the legal profession, and the acceptance of third-party litigation funding, which is largely unregulated.

12 What other funding options are available to litigants?

After-the-event insurance (ATE), while having long been available in the UK market is relatively new in Australia. It can be purchased after a dispute has arisen or a proceeding is contemplated and covers adverse cost orders.

13 How long does a commercial claim usually take to reach a decision at first instance?

While there is no fixed timetable that can be applied uniformly to all commercial proceedings, the case management principles of the states, territories and Federal Court (which in most instances are uniform) provide guidelines which the courts are obliged to follow in managing cases.

All Australian civil courts adhere to procedures, court rules and written practices of case management directed to the efficient and expeditious administration of justice. Cases must be brought under court management soon after their commencement. Different kinds of cases require different kinds of management. The number of court appearances must be minimised. Realistic but expeditious timetables must be set and trial dates set as soon as possible. Unless there is good reason, the timetable must be adhered to. A key objective is to identify the issues in dispute really early in the proceedings. Alternative dispute resolution is encouraged and sometimes mandated. Monitoring of the caseload must provide timely and comprehensive information to judges and court officers involved in management. Communication and consultation within the court and with others involved in the litigation process is an ongoing process.

The Productivity Commission's report into Government Services 2016 set out the clearance rates for Australian courts. While this figure encompasses all civil matters – not merely commercial proceedings – the overall picture is that the clearance rate in both lower and superior courts (from which data was available) suggests that courts are, on average, clearing around 90 per cent of all civil matters listed in a given calendar year. This statistic discloses only that courts are close to disposing of as many proceedings as are commenced in any given calendar year, however, complex commercial matters are unlikely to be resolved within one year of commencement. That said, case flow management is an important component of the administration of justice in Australian courts.

14 What proportion of first-instance judgments are appealed? How long do appeals usually take?

Nationally, in 2014–2015, 1,920 notices of appeal were lodged in state intermediate appellate courts, and 910 cases were filed in the Federal Court. Despite variance in completion rates, and accepting that the caseload of the appellate courts was referable to proceedings on appeal that had been on the Court lists outside 2014–2015, 1,920 appeals were determined by the intermediate state courts in 2014–2015. The Full Federal Court (Productivity Commission Report on Government Services 2016 (Table 7.21)) determined 770 appeals. While there is no average number disclosing a median number of appeals determined in any given year, the clearance rate is 94.65 per cent. Accordingly, it is appropriate to conclude that most appeals are determined within 12 months of the filing of a notice of appeal.

15 What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

There is no objective data measuring the proportion of judgments requiring contentious enforcement processes.

Enforcement of judgments in the Australian context can be undertaken through insolvency mechanisms. Non-compliance with a judgment is a recognised basis for the appointment of a liquidator or a trustee in bankruptcy. Judgments may also be enforced with the assistance and supervision of the Court through the issuing of writs of execution. A judgment creditor may obtain a garnishee order directing a third party who holds funds on behalf of the judgment debtor, or owes the judgment debtor funds, to pay the funds, or a proportion of the funds, to the judgment creditor. In some jurisdictions, judgment creditors have a right to secure the judgment against property through the registration of a security interest.

Perceived procedural hurdles in the process of enforcing rights against insurers were cleared away by the High Court in *CGU Insurance Limited v Blakeley & Ors* [2016] HCA 2. The High Court held unanimously that a person who commences proceedings against an insolvent company or a bankrupt individual can join that defendant's insurer to the proceedings and seek a declaration that the insurer is liable to indemnify the defendant.

16 Are class actions or group actions permitted? May they be funded by third parties?

Yes, class actions are permitted in Australia and are becoming increasingly common.

In the 12 months prior to June 2015, there were 33 new class actions filed in the Federal Court and Supreme Courts in Victoria and New South

Wales. This was almost double the number of class actions filed in the previous year. Out of the 33 class actions referred to above, 13 had third-party litigation funding in their early stages.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation?

Yes, the courts have powers to order that an unsuccessful party pay the costs of the successful party, although the recovery rate varies from court to court. Costs are at the discretion of the court. Unless it appears to the court that some other order should be made, costs follow the event. The usual adverse order for costs requires the unsuccessful party to pay the successful party's reasonable legal costs.

There are differing regimes for the assessment of what are the reasonable legal costs that an unsuccessful party is obliged to pay.

18 Can a third-party litigation funder be held liable for adverse costs?

Yes. That a court can order costs against a non-party was confirmed by the High Court in *Knight v F P Special Assets* (1992) 174 CLR 178 (*Knight*). In this case, Mason CJ and Deane J stated that there was a general category of cases in which an order for costs should be made against a non-party. The category consists of circumstances where the non-party has played an active part in the conduct of the litigation and where the non-party has an interest in the subject of the litigation. In these circumstances, an order for costs should be made against the non-party if the interests of justice require that it be made.

In a third-party litigation funding context, the *Knight* case was cited in *Gore v Justice Corp Pty Ltd* [2002] FCA 354, where Justice Corp was held liable to pay the appellants' costs in this appeal and the costs of and incidental to the hearing of the appellants' notice of motion in the court below.

In *Ryan Carter and Esplanade Holdings Pty Ltd v Caason Investments Pty Ltd & Ors* [2016] VSCA 236, the Court of Appeal of the Supreme Court of Victoria upheld a non-party costs order against a litigation funder Global Litigation Funding Pty Ltd (Global), Global's sole director and company secretary of Global and shareholder. The decision arose in a context where the amounts ordered by way of security for costs were insufficient to cover the defendant's actual costs. Arguments that making a costs order against the company director was 'piercing the corporate veil' were rejected. The Court of Appeal determined that the trial judge had exercised his discretion appropriately, there was not a miscarriage of justice and the appeal was dismissed.

Legislation also confers power on the courts to make adverse costs orders against non-parties. For example, section 98 of the Civil Procedure Act 2005 (NSW) confers a general power to make costs orders against parties and non-parties alike.

Non-party costs orders are rarely made in a litigation funding context because in almost all third-party funded cases the funded litigant will be ordered to provide security for the defendant's costs.

19 May the courts order a claimant or a third party to provide security for costs?

The court has the power to order a plaintiff to give security for the defendant's cost of defending the plaintiff's claim. The court can order a stay of proceedings until security is given and if there is non-compliance, the court may dismiss the claim. The power to order security for costs comes both from statutory rules and from the inherent jurisdiction of the court. Security is sought in circumstances where there is a concern that the plaintiff may be unable to satisfy an adverse costs order made against them in the disposal of the proceedings.

The existence of a litigation funding agreement will be relevant in an application for security for costs. In most instances, the litigation funding agreement would be tendered in any response to an application for security, and consideration will be had to the ability of the funder to meet its indemnity obligations in respect of adverse costs.

If recourse to the third-party funder's balance sheet is not accepted as satisfactory evidence of the funder's ability to meet its indemnity obligations, recognised forms of security include the payment of money into court, bank guarantees and, in more recent times, ATE insurance and deeds of indemnity from insurers securing direct recovery rights to the defendants in the event of an adverse cost order.

The relatively recent availability of ATE insurance in the Australian market may explain the difficulty the Victorian Supreme Court recently had in recognising an ATE insurance policy backed by a Deed of Indemnity as constituting adequate security. On appeal, the Victorian Supreme Court approved security for costs being provided by way of deed of indemnity from an ATE insurer (see: *DIF III Global Co-Investment Fund LP (formerly Babcock & Brown DIF III Global Co-Investment Fund LP) v BBLP LLC (formerly Babcock & Brown LP)* [2016] VSC 401).

The amount of security is calculated by reference to the anticipated costs of defending the action. This will be a matter for evidence. In complex claims, it is usual that security orders will be staged by reference to identified phases in the litigation.

20 If a claim is funded by a third party, does this influence the court's decision on security for costs?

If the matter is funded, the court will generally order security for costs. It is a relevant consideration in the granting of security that a third-party litigation funder intends to benefit from any recovery (*Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744).

21 Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

ATE insurance is permitted. ATE insurance is a relatively new product in Australia but has a growing appreciation and application.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Generally, no; however, for class actions commenced in the Federal Court, claimants are required to disclose the litigation funding agreement. The commercial terms may be redacted.

23 Are communications between litigants or their lawyers and funders protected by privilege?

A claim of privilege can be made to object to the production of, or access to, documents in response to a subpoena to produce, notice to produce or order to give discovery. In addition, privilege can be claimed to object to answering interrogatories.

Client legal privilege protects confidential communications made, and confidential documents prepared, for the dominant purpose of a lawyer providing legal advice or a lawyer providing legal services relating to litigation. Professional confidential relationship privilege protects communications to preserve the confidential nature of certain relationships that could be undermined by disclosure. Settlement negotiations privilege protects communications or documents created in connection with an attempt to settle a dispute.

Each of these privileges was derived from the common law but is now given a statutory basis in the Uniform Evidence legislation.

In *IOOF Holdings Ltd v Maurice Blackburn Pty Ltd* [2016] VSC 311, the claimant sought production of certain documents created in connection with investigations carried out by law firm Maurice Blackburn in anticipation of the commencement of representative proceedings. Maurice Blackburn claimed client legal privilege over the majority of the documents sought by IOOF Ltd. The court accepted, for the most part, the client legal privilege claims made by Maurice Blackburn. However, the court stopped short of accepting in their entirety similar claims from the litigation funder, Harbour Litigation Funding Ltd, who separately claimed privilege over certain documents relating to communications with Maurice Blackburn.

Despite the fact that there was no 'traditional client/lawyer relationship' between Harbour and Maurice Blackburn, the court accepted that Harbour sought legal advice from Maurice Blackburn (despite not formally retaining them) and could claim privilege over that advice. Where documents that could be subject to a claim for litigation privilege by Maurice Blackburn's client had been confidentially shared with Harbour, the court accepted that this may not amount to a waiver.

Harbour was, however, required to produce certain communications with Maurice Blackburn that related to proposed funding agreements for the class action as these were found to be 'commercial negotiations between ... two arm's length parties' and not for the dominant purpose of legal advice. This finding is noteworthy because it distinguished previous authority that had held that litigation privilege could apply to a funding agreement and related documents on the basis that, in this case, there was

no evidence that any client had sought to claim privilege over the documents in question and Harbour could not claim litigation privilege in its own right (as it was not a potential party to the class action).

In *QPSX Limited v Ericsson Australia Ltd* (No. 5) [2007] FCA 244, the court considered whether the applicant was permitted to disclose copies of discovered documents provided by Ericsson to IMF, the applicant's litigation funder. The court dismissed the application and held that a general licence to disclose documents to IMF on the broad basis that it has a legitimate interest in the proceedings was not a sufficient basis for such disclosure.

24 Have there been any reported disputes between litigants and their funders?

There are numerous decisions involving challenges to the funding relationship brought by defendants to the funding litigation, but very few reported decisions in disputes between plaintiffs and their funders.

The two reported cases arose in the context of the termination of a litigation funding agreement.

The *Chameleon* decision, which is significant for clarifying that a litigation funder did not require an AFSL, arose in a context where the funded litigant purported to terminate the funding agreement by withdrawing the funder's authority to instruct the engaged lawyers on the basis that the funder did not hold an AFSL. The court held that the funder was not required to hold an AFSL and the funded party could not avoid the financial contractual consequences of terminating the funding agreement.

Trafalgar West Investments Pty Ltd v LCM Litigation Management Pty Ltd [2016] WASC 159 considered whether a litigation funder was obligated to satisfy a staged security for costs order made prior to termination. The court dismissed the claim and determined that LCM was not obliged to satisfy the remaining stages of the order.

25 Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

No.

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