

# Litigation Funding 2020

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**Contributing editors****Steven Friel and Jonathan Barnes****Woodsford Litigation Funding**

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Litigation Funding*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology 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 Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Italy and the United States of America.

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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.

Lexology 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 continued assistance with this volume.



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# Bermuda

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## REGULATION

### Overview

#### 1 | Is third-party litigation funding permitted? Is it commonly used?

Litigation funding is fairly common in Bermuda and there is judicial authority to support the now commonly held view that such funding agreements are valid as a matter of Bermuda law.

In *Stiftung Salle Modulable and Rütli Stiftung v Butterfield Trust (Bda) Ltd* [2014] Bda LR 13 (*Salle Modulable*), Bermuda Chief Justice Ian Kawaley (as he then was) held that a litigation funding agreement with Harbour Litigation Funding (which was governed by English law) was not only valid but also suggested that use of such funding arrangements in civil litigation should be encouraged.

In that 2014 decision, it was held that the constitutionally protected rights of access to the court implicit in the Bermuda Constitution, as read with the relevant section of the European Convention on Human Rights, suggest that 'such funding arrangements should be encouraged rather than condemned'.

'I see no reason why Bermuda's common law should adopt the antiquarian approach contended for by the [defendant],' he added, rejecting the argument advanced by the defendant that common law prohibitions against such arrangements were still good law in Bermuda.

While *Salle Modulable* scrutinised the legality of funding from a professional funder, there have been a number of cases tried by the Bermuda courts where funding for the litigation was provided more generally by third parties, including by related entities.

Although there are no known Bermuda judicial decisions dealing directly with this point in the context of an arbitration, it is likely that the position would be the same.

### Restrictions on funding fees

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

There are, at present, no statutory limitations on the fees or interest that funders may charge; however, draft legislation has been submitted to the Bermuda government for consideration and review, which, if adopted, could put a percentage cap on the amount that funders may claim (see question 5).

It should also be noted that, while the Bermuda court has expressly validated third-party litigation funding for civil matters, the question of whether the costs of litigation funding can be recovered from the losing party as damages remains open.

In *Salle Modulable*, Chief Justice Kawaley (as he then was) said: 'The present case is not one where the issue of recoverability of litigation is truly engaged head on and so the weight to be attached to my findings on this issue in future cases is clearly limited.'

That case related to a contractual dispute and the proper law of the contract was deemed to be Swiss law, under which litigation funding expenses are regarded as legal costs. Chief Justice Kawaley held, however, that the procedural law of the forum (Bermuda) would govern recovery of legal costs, writing that: 'Litigation expenses, absent new statutory rules, properly fall to be dealt with under the taxation of costs regime under Bermuda law as the procedural law governing the present proceedings.'

All indications are that how this may be dealt with by Bermuda's taxation regime is still to be tested.

### Specific rules for litigation funding

#### 3 | Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

No. At present there are no specific Bermuda legislative or regulatory provisions applicable to third-party litigation funding. (See questions 2 and 5.)

### Legal advice

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

No. Lawyers are not, at present, able to participate alongside third-party litigation funders by entering into separate conditional fee arrangements with the client. This is because contingent and conditional fee arrangements are prohibited in Bermuda, subject to a very few exceptions. Lawyers who deal in undefended debt collections, for example, may enter into contingent fee arrangements, as set out in the Bermuda Barristers Code of Professional Conduct 1981.

### Regulators

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

A subcommittee of the Bermuda Bar Council – the regulatory council governing the legal profession – has submitted draft legislation to the Bermuda government that would not only legislate the use of third-party litigation funding but also allow lawyers in Bermuda to enter into conditional fee arrangements in respect of most civil litigation matters.

The push to introduce some form of conditional fee agreement was presented to the Ministry of Justice in late 2014 and there has been little in the way of development since. The prospect did, however, garner praise from Bermuda's then Chief Justice who stated, in the 2016 Bermuda Judiciary Annual Report, that the efforts by the Bar Council to introduce such arrangements was 'close to his heart' as a way to promote enhanced and affordable access to justice.

## FUNDERS' RIGHTS

### Choice of counsel

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

It is not unusual for counsel to be instructed on a matter prior to a funder becoming involved but, where the funder becomes involved from an early stage, it is plausible that the funder could have a greater degree of influence over the course of proceedings, including the choice of counsel. It should also be noted that leading counsel will typically be instructed to act in cases of considerable complexity or legal importance and it is fairly common for the funder to help determine the choice of leading counsel.

### Participation in proceedings

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

While funders do not typically attend Bermuda court hearings, nor is it common to become directly involved in settlement negotiations, there would be nothing to prevent a funder, for example, attending proceedings in open court to observe. The need to do so, however, is no doubt moderated by it being a common feature of funding agreements to provide the funder with timely updates on proceedings (including as to any settlement discussions).

### Veto of settlements

#### 8 | Do funders have veto rights in respect of settlements?

The funding agreement will dictate the extent to which a funder will be able to influence the course of the proceedings, including as to settlement. In our experience, however, it is uncommon for a funder to have veto rights per se, but to have the right to terminate the agreement if a reasonable settlement offer is refused by the client.

### Termination of funding

#### 9 | In what circumstances may a funder terminate funding?

The circumstances in which a funder may terminate funding will vary according to the terms of the agreement between the parties, but typically the funder will, for example, protect its right to be able to withdraw from funding a claim in certain circumstances, including in respect of a settlement offer (see question 8), or if there is a material change to the prospects of the claim succeeding.

### Other permitted activities

#### 10 | In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

The level of involvement the funder takes in the litigation process is likely to be prescribed by the terms of the funding agreement. However, the degree of involvement is usually limited to what would be required for the funder to monitor its financial exposure.

## CONDITIONAL FEES AND OTHER FUNDING OPTIONS

### Conditional fees

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

No, except in very limited circumstances (see question 4).

### Other funding options

#### 12 | What other funding options are available to litigants?

Although uncommon, it may be possible to get a bank loan for this purpose. After-the-event insurance may also be obtained, although this type of coverage is typically purchased in conjunction with third-party funding in order to limit exposure to an adverse costs order.

## JUDGMENT, APPEAL AND ENFORCEMENT

### Time frame for first-instance decisions

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

It is fairly common for a substantive commercial claim to take two years or more to be tried and decided. In cases where there is either a greater degree of complexity or the need for a preliminary trial of certain issues, for example, the time to reach a decision at first instance may be extended beyond that period by a year or more.

### Time frame for appeals

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

Although the number of first-instance judgments is reported each year in the Bermuda Judiciary's annual report, as are the number of matters decided by the Court of Appeal, the proportion of first-instance judgments that are appealed in any year fluctuates. Between 2013 and 2016, the number of published civil appeals represented between 11 and 18 per cent of the total civil judgments published during the same period.

Bermuda's Court of Appeal generally sits three times a year, usually for a period of about three weeks each session. In urgent circumstances, the Court of Appeal Registrar may request that the Court of Appeal have a special sitting to hear a matter outside of the normal calendar, but this is exceptionally rare because the majority of the Court of Appeal justices also sit as Court of Appeal judges in other jurisdictions and therefore have limited time in which to accommodate extra sittings.

Under normal circumstances, an appeal can usually be heard within six to nine months, or sooner if the issues on appeal are of particular public importance.

### Enforcement

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

There is no official information as to the number of judgments that require contentious enforcement proceedings. In circumstances where enforcement does become necessary, however, there are a number of ways to pursue the judgment debtor, although this is much more straightforward if there are assets within the jurisdiction.

## COLLECTIVE ACTIONS

### Funding of collective actions

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

Under Bermuda's Rules of the Supreme Court 1985, a plaintiff or a defendant is able to not only represent themselves but others with the same interest. While we did not find any decisions directly on this point, given the reasoning of the Chief Justice in *Salle Modulable* about constitutionally protected rights of access to the court, we think it likely

that funding of litigation in a representative capacity would be considered favourably by the Bermuda court, bearing in mind that there is a distinction between a party suing or being sued in a representative capacity and a nominal plaintiff.

## COSTS AND INSURANCE

### Award of costs

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

As a general rule, costs will be awarded to the successful party. As to the payment of the litigation funding costs of the successful party, see question 2.

### Liability for costs

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

The court does have the jurisdiction to make a third-party costs order.

### Security for costs

- 19 | May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

See question 20.

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

It is likely to be a factor that is taken into consideration by the court. In *Phoenix Global Fund Limited and another v Citigroup Fund Services (Bermuda) Limited and the Bank of Bermuda Limited* [2007] Bda LR 61, the Bermuda Supreme Court ordered the third-party funder to put up security for costs. Security for costs was also paid into court by the funder in the *Salle Modulable* case.

### Insurance

- 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, although it is typically purchased in conjunction with litigation funding (see question 12).

## DISCLOSURE AND PRIVILEGE

### Disclosure of funding

- 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?

That a litigant has entered into a litigation funding agreement is likely to have to be disclosed but the exact terms of the funding agreement may be privileged and protected from disclosure. In *Stiftung Salle Modulable and Rütli Stiftung v Butterfield Trust (Bda) Ltd* [2011] Bda LR 53, litigation privilege was held to have been waived because the agreement was referred to in the pleadings without the necessary qualification. Even so, the court held that certain redacted information in a copy of the funding agreement provided to the defendant did not have to be disclosed as it

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was either of limited relevance or it would be prejudicial to the plaintiff's right to a fair trial to have to disclose that information.

### Privileged communications

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

Yes. These communications will be protected by litigation privilege although care should be taken not to waive that privilege. See the decision in *Stiftung Salle Modulable*, referred to in question 22.

## DISPUTES AND OTHER ISSUES

### Disputes with funders

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

No.

### Other issues

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

No. The main issues are covered above.

## UPDATE AND TRENDS

### Current developments

- 26 | Are there any other current developments or emerging trends that should be noted?

There are no updates at this time.

\* *This chapter was correct at the time of writing in November 2018.*

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