

Litigation Funding 2021

Contributing editors
Steven Friel and Jonathan Barnes



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent

adam.sargent@gettingthedealthrough.com

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London, EC4A 4HL, UK

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Litigation Funding 2021

Contributing editors**Steven Friel and Jonathan Barnes**

Woodsford

Lexology Getting The Deal Through is delighted to publish the fifth edition of *Litigation Funding*, which is available in print and online at 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.

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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, for their continued assistance with this volume.



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For further information please contact editorial@gettingthedealthrough.com

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New Zealand

Adina Thorn and Rohan Havelock

Adina Thorn

REGULATION

Overview

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

Third-party litigation funding is permitted. Although the common law torts of maintenance (assisting a party in litigation without justification) and champerty (assisting in consideration of a share of proceeds of the litigation) have not technically been abolished in New Zealand, the recent attitude of the New Zealand courts to third party-funding can be described as 'cautiously permissive' and, perhaps, increasingly receptive. To describe this approach, a distinction needs to be drawn between representative proceedings under Rule 4.24 of the High Court Rules (which allows one or more persons to sue on behalf of, or for the benefit of, all persons with the same interest in the subject matter) and ordinary non-representative proceedings.

Representative proceedings

A representative proceeding requires that the representatives sue with the consent of the other persons who have the same interest (Rule 4.24(a)), or the court directs this on an application (Rule 4.24(b)). The Court of Appeal has confirmed that the existing procedure does not require the court to give prior approval for a funding arrangement (*Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489 (*Southern*) at [79]). Instead, the court will ensure that in making a direction it is not facilitating an abuse of process. If a representative proceeding is based on clearly misleading funding arrangements or amounts to a bare assignment of claims, then the court will not grant leave knowing that its processes are being used to facilitate unlawful conduct. In this regard, the courts will exercise a greater supervisory role over the setting up of representative proceedings (ie, the funding arrangements and communications with prospective class members) than where a party bring an ordinary proceeding that is funded.

Non-representative proceedings

The Supreme Court of New Zealand has made it clear that it is not the role of the courts to act as general regulators of litigation funding arrangements or to give prior approval to such arrangements, outside its supervisory role in 'representative' proceedings (see above). Instead, the role of the courts is to adjudicate on any applications brought before them to which the existence and terms of a litigation funding arrangement may be relevant (*Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 (*Waterhouse*) at paragraphs 28 to 29). The Supreme Court has accepted that some measure of control by a third-party funder is 'inevitable' to enable a litigation funder to protect its investment (*Waterhouse* at paragraph 46).

Scope for intervention

Under the High Court Rules or its inherent powers, the High Court may intervene (for example, by imposing a stay of proceedings) in both representative or non-representative funded proceedings under the following circumstances.

Abuse of process

The High Court may intervene if there is a manifestation of an abuse of process on traditional grounds, such as where proceedings:

- deceive the court, are fictitious or mere sham;
- use the process of the court in an unfair or dishonest way, for some ulterior or improper purpose, or in an improper way;
- are manifestly groundless, without foundation or serve no useful purpose; and
- are vexatious or oppressive.

See *PriceWaterhouseCoopers v Walker* [2016] NZCA 338 (*PriceWaterhouseCoopers*) at paragraph 14(e).

Non-permitted bare course of action

A funding arrangement (including an assignment of a security agreement) amounts to an assignment of a bare cause of action to a third-party funder in circumstances where this is not permissible (ie, the exceptions to maintenance and champerty do not apply).

In assessing whether litigation funding arrangements amount to an assignment that is not permitted, the court will have regard to the level of legal (rather than de facto) control able to be exercised by the funder, the profit share of the funder and the role of the lawyers acting (*Waterhouse* and *PriceWaterhouseCoopers*). Even where such concerns arise, the provision of appropriate undertakings by a funder may be effective to allay them. In *PriceWaterhouseCoopers*, a funding agreement was in place between the plaintiff company (in liquidation) and the litigation funder (SPF No. 10 Ltd), in conjunction with an assignment under a security agreement to the funder of the plaintiff's right of action against the defendant (being its only valuable asset). The defendant argued that this arrangement was an impermissible assignment of a bare cause of action to the funder, which amounted to an abuse of process. The majority of the Supreme Court held (paragraphs 77 to 91) that the belated provisions of the following undertakings given by the funder to the court satisfied concerns as to the permissibility of the assignment:

- to not rely on clauses in the security agreement giving it greater control than it had under the funding agreement; and
- to pay a proportion of proceeds of a successful claim for the benefit of unsecured creditors (where the funder was otherwise entitled to all of these under the security agreement).

Misleading statements given to the court

Where a representative action has been promoted to prospective litigants using misleading statements, the court may also intervene, either

by refusing a direction under Rule 4.24(b), or to correct the harm done by the distribution of the material (Southern at paragraphs 78 and 82).

Funding of arbitration

Given the private nature of arbitration, the treatment of third-party litigation funding in domestic arbitration in New Zealand is largely unknown. The relevant legislation (the Arbitration Act 1996) does not contain any provisions relating either directly or indirectly to litigation funding (or even class arbitrations). Instead, an arbitrator has the power to conduct the arbitration, or to control the conduct of the arbitration, subject to the agreement between the parties and the rules of natural justice (article 19, Schedule 1). An arbitrator may also order 'any party to do all such other things during the arbitral proceedings as may reasonably be needed to enable an award to be made properly and efficiently' (Clause 3(1)(j) of Schedule 2). These broad powers would encompass the ability to regulate funded domestic arbitrations with respect to those referred to in the following questions.

In addition, the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request assistance from the High Court or a district court in the exercise of the powers conferred on the arbitral tribunal relating to the conduct of arbitral proceedings (Clause 3(2) of Schedule 2). This ability would allow either the arbitral tribunal of its own motion, or one of the parties with its approval, to request assistance from the High Court or a district court in the event of an issue arising in the context of a funded domestic arbitration.

Litigation funding is becoming more commonly used in New Zealand, although is not as commonly used as in other common law jurisdictions (such as the United Kingdom and Australia). In recent years, a variety of proceedings funded by third parties have been brought, with allegations in relation to:

- losses on share investments resulting from misleading statements in a share prospectus (*Saunders v Houghton* [2014] NZHC 2229) or in initial public offering materials (*Fullarton & Ors v Arowana International Ltd v Ors* CIV-2020-404-551);
- building products (*White v James Hardie New Zealand* [2017] NZHC 2112 and *Paine v Carter Holt Harvey Ltd* [2019] NZNC 1614);
- losses resulting from kiwi fruit being affected by the entry of disease into the country (*Strathboss Kiwifruit Ltd v Attorney-General* [2018] NZHC 1559 (Strathboss Kiwifruit));
- illegitimate fees charged to consumers by banks (*Cooper v ANZ* [2013] NZHC 2827);
- insurance claims arising out of earthquakes (*Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2017] NZCA 489, [2018] 2 NZLR 312); and
- breaches of directors' duties owed to companies (*Walker v Forbes* [2017] NZHC 1212 and *Mainzeal Property and Construction Ltd (in liq) v Yan* [2019] NZHC 255).

Restrictions on funding fees

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

There are no limits prescribed by either legislation or the common law. In the context of a non-representative funded action, the Supreme Court of New Zealand has said that it is not the role of the courts to assess the fairness of any bargain between a funder and a plaintiff, presumably including funder remuneration (Waterhouse, paragraph 48). In the context of a representative funded action, the High Court was not persuaded that the terms of the funding agreement (including an entitlement to terminate the funding agreement without cause on five days' notice and a power to veto in relation to settlement) were inappropriate for a representative action (*Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at paragraph 70).

That said, in assessing whether litigation funding arrangements amount to an assignment that is not permitted, the courts will have regard to the profit share of the funder.

Specific rules for litigation funding

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

There are no provisions specifically applicable to third-party litigation funding, but there are general provisions that have application.

As providers of financial services and products in trade, litigation funders are subject to the provisions of the Fair Trading Act 1986. This contains consumer protections against misleading and deceptive conduct, unsubstantiated representations, and false or misleading representations. It provides redress against such conduct by funders in, for example, marketing funding, negotiating with prospective plaintiffs, or in relation to acts or omissions while a funding arrangement is in place. The Consumer Guarantees Act 1993, which imposes statutory guarantees in relation to services, may also have application.

Funders with a place of business in New Zealand, and who provide a 'financial service' (typically, this is because they act as a creditor under a credit contract, as defined in section 5 of the Financial Service Providers (Registration and Dispute Resolution) Act), must register as a financial service provider. Those providing services to 'retail clients' (as defined in section 49 of the Financial Service Providers (Registration and Dispute Resolution) Act) must also belong to a dispute resolution scheme. All financial service providers are subject to the 'fair dealing' provisions in the Financial Markets Conduct Act 2013, which prohibit misleading conduct, false or misleading representations and unsubstantiated representations in relation to financial products and services. The regulatory authority, the Financial Markets Authority, can take civil action against financial service providers whose conduct breaches these provisions. Possible civil orders include declarations of contravention, pecuniary penalties and compensatory orders.

Legal advice

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

No specific rules apply. The general professional and ethical rules in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 apply.

In *Houghton v Saunders* (2011) 20 PRNZ 509, the High Court, at paragraph 75, found the following guidelines 'helpful':

- There should be a direct client-solicitor relationship between the members of the represented group and the lawyer acting for the represented group in the litigation.
- The lawyer acting for the represented group must be responsible for advising the named claimants and members of the represented group about the merits of the case and all material developments in the case. That advice must be prepared and provided without interference by the litigation funder.
- The litigation funder must not provide expert evidence in the litigation. Expert witnesses must be instructed directly by the lawyers acting in the litigation and the litigation funder should have no direct involvement in that process.

Regulators

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

No public bodies have specific interest in or oversight over third-party litigation funding, apart from the courts and the Financial Markets Authority to the extent that litigation funders are subject to the relevant legislation.

FUNDERS' RIGHTS

Choice of counsel

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

It does not appear that this issue has come before the courts to date. It is very unlikely that third-party funders have such a legal entitlement, because choice of counsel is the exclusive right of the client (ie, the plaintiff). This right is reflected in the professional and ethical rules in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Participation in proceedings

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

There is no restriction on representatives of funders attending hearings or settlement discussions, unless excluded by order of the court. Funders do not have a right to participate in hearings, and attempts to do so might raise concerns as to inappropriate control or abuse of process. Funders may participate in settlement negotiations, but cannot influence or make settlement decisions unless this is provided for under the funding agreement. Such an entitlement might also raise concerns as to inappropriate control or abuse of process.

Veto of settlements

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

Only if such rights are provided for under the funding agreement. The courts take a fairly liberal approach to such veto rights. In *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at paragraphs 70 to 73, the High Court was not persuaded that the existence of a power of veto in relation to settlement was inappropriate for a representative action. This was for the following reasons:

- in most scenarios, the claimants and the funder should continue to have aligned interests in relation to what would constitute an acceptable settlement;
- to the extent the action requires positive input from all the claimants, the funder will need to maintain their goodwill to carry on with the action; and
- where the funding agreement contemplates the involvement of independent third parties with appropriate expertise to resolve disputes, reputationally this will provide a fetter on the funder's ability to act unreasonably.

Termination of funding

9 | In what circumstances may a funder terminate funding?

In the first instance, this will depend on the terms of the funding agreement (which often provides for termination upon notice). In the unlikely event that the funding agreement does not make express provision for termination, the Contracts and Commercial Law Act 2017 will apply by default. A funder would be able to cancel (prospectively) a funding agreement in the following circumstances:

- for misrepresentation by the plaintiff(s) prior to the agreement that has induced the funder to enter the agreement;
- if a term of the funding agreement is broken by the plaintiff(s); or
- if it is clear that a term in the funding agreement will be broken by the plaintiff(s).

In all these situations, the funder may exercise the right to cancel if, and only if:

- the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term, is essential to the funder; or
- the effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be:
 - substantially to reduce the benefit of the contract to the funder;
 - substantially to increase the burden of the funder under the contract; or
 - in relation to the funder, to make the benefit or burden of the contract substantially different from that represented or contracted for.

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?

Funders may not take any active role in the litigation process if that would amount to an abuse of process.

That said, it should be noted that, in the context of a funded representative action, the High Court has stated that concerns as to champertous pursuit of claims have to be tempered by the reality that funded arrangements are commercial arrangements and it 'would be somewhat naive to expect that he who pays the piper will not have some ability to call the tune' (*Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at paragraph 66).

There are no ways in which funders are required to take an active role.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

Litigation lawyers may enter into conditional or contingency fee agreements, but only of a certain type. 'Conditional fee agreements' (where payment depends on whether the outcome of the matter is successful) are permissible under sections 333 to 335 of the Lawyers and Conveyancers Act 2006 if the fee arrangement amounts to:

- the normal fee that would have been charged for the services provided; or
- the normal fee accompanied by a premium that:
 - compensates counsel for the risk of not being paid at all;
 - compensates counsel for waiting to be paid until proceedings have been concluded; or
 - is not calculated as a proportion of the amount recovered by the proceedings.

However, conditional fee agreements are prohibited for criminal proceedings, immigration proceedings and family law proceedings.

Conditional or contingency fee agreements that fall outside this statutory permission may be illegal or unenforceable, especially where the payable fee is calculated as a proportion of the amount recovered (and therefore amounts to the tort of champerty).

Other funding options

12 | What other funding options are available to litigants?

Government-funded legal aid for litigants who cannot afford lawyers is available through the Ministry of Justice for certain civil disputes (including debt recovery, breaches of contract, defamation, and bankruptcy proceedings). A litigant must apply for such aid. Whether aid is granted depends on a number of factors including:

- any arrears from a previous legal aid debt;
- the income of the litigant;
- the assets of the litigant; and
- the merits of the legal case.

Legal aid is considered a loan and a litigant may have to repay some or all of the legal aid, depending on how much they earn, the property they own and whether they receive any money or property as a result of the case.

Litigants may explore other funding options, including specialised insurance products. Such products are not yet widely available (or even promoted as being available) in New Zealand.

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?

This will depend on the nature and complexity of the claim, the number of parties, the level of court in which it is filed and the workload of that court. Given the typical quantum of funded claims, almost all of these will be filed in the civil jurisdiction of the High Court.

In the civil jurisdiction of the High Court, the statistics for the past four years available are as follows:

- 1 January to 31 December 2019: the average age at disposal was 764 days;
- 1 January to 31 December 2018: the average age at disposal was 699 days;
- 1 January to 31 December 2017: the average age at disposal was 759 days; and
- 1 January to 31 December 2016: the average age at disposal was 669 days.

Time frame for appeals

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

This can be estimated as a function of the number of cases disposed of and the number of appeals brought.

In the civil jurisdiction of the High Court, the statistics for the past four years available are as follows:

- 2019: 2,360 cases were disposed;
- 2018: 2,308 cases were disposed;
- 2017: 2,352 cases were disposed; and
- 2016: 2,360 cases were disposed.

New civil appeals to the Court of Appeal:

- 2019: 211, which means that 8.94 per cent were appealed;
- 2018: 239, which means that 10.36 per cent were appealed;
- 2017: 234, which means that 9.95 per cent were appealed; and
- 2016: 214, which means that 9.07 per cent were appealed.

The length of time an appeal takes depends on the nature and complexity of the appeal, the number of parties and the workload of the Court of

Appeal. On average, an ordinary civil appeal might take at least one year to be disposed of, from the date of filing until the date of judgment.

Enforcement

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

There are no statistics available on this issue. Whether enforcement proceedings are required will primarily depend on the defendant's financial position in each case.

In the High Court, following the sealing of judgment, a range of enforcement options are available against the judgment debtor and the judgment debtor's personal or real property (Part 17 of the High Court Rules). These are as follows:

- order for examination of the debtor;
- attachment orders over salary or wages due and payable by an employer;
- charging orders over real or personal property;
- sale orders over land and chattels;
- possession orders over land and chattels;
- arrest orders;
- sequestration orders over rents and profits from real and personal property; and
- imprisonment until security deposited or bond executed.

Generally, an enforcement procedure in respect of real property (such as a sale order) is the most difficult to implement.

COLLECTIVE ACTIONS

Funding of collective actions

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

The High Court Rules allow for 'representative actions' rather than 'class actions' or 'group actions' per se. Rule 4.24 provides:

One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding:

- with the consent of the other persons who have the same interest; or
- as directed by the court on an application made by a party or intending party to the proceeding.

The threshold for the 'same interest' requirement is low: there must be a common issue of fact or law of significance for each member of the class represented (see *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at paragraphs 53 and 151). In addition:

- all members of the class must have been able to claim as plaintiffs in separate actions in respect of the event concerned, with no defences applicable to only some of the class;
- the action must be beneficial to all of the class; and
- the action must cover the whole or virtually the whole of the class of potential plaintiffs and consent of all represented members of global damages to the representative plaintiff must be given (*Credit Suisse*, paragraph 151).

Sub-paragraph (a) allows a group of identified plaintiffs with the 'same interest' to sue together if they consent to this. The plaintiffs are then listed together in the same statement of claim.

Sub-paragraph (b) requires the party or intended party to make an application to the court for a representative order. In granting a representative order, it is standard practice for the court to impose a final 'opt-in' date for qualifying members of the class (*Cridge v Studorp*

Limited [2017] NZCA 376 at paragraph 41). This has the benefit of protecting members of the represented group against a limitation bar arising after the date of their election to opt in to the proceeding (*Credit Suisse*, paragraphs 65 to 66 and 129).

Representative actions may be funded by third parties, although there are greater restrictions on these than on non-representative actions. In *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at paragraph 79, the Court of Appeal concluded (in the context of a representative action) that litigation funding arrangements will not be tortious or otherwise unlawful maintenance and champerty where:

- the court is satisfied there is an arguable case for rights that warrant vindicating;
- there is no abuse of process; and
- the proposal is approved by the court.

Funding arrangements have been approved in earlier cases (*In re Nautilus Developments Ltd* [2000] 2 NZLR 505 (HC) and *In re Gellert Developments Ltd (in liquidation)* (2001) 9 NZCLC 262,714). It remains unclear whether such approval must, as a matter of course, be obtained in advance of proceedings, or simply in the event that the proposal is challenged by the defendant.

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?

Yes. The courts may order the unsuccessful party to pay the costs (and certain disbursements) of the successful party in litigation. All matters of costs are at the discretion of the High Court (Rule 14.1), but one of the default principles is that the party that fails with respect to a proceeding or an interlocutory application should pay (scale) costs to the party who succeeds (Rule 14.2(a)).

Generally, costs are assessed by applying a notional daily recovery rate (normally, two-thirds of the daily rate considered reasonable for each step of the proceeding) to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application (Rule 14.2(c) and (d)).

According to Rule 14.6(3), the court may award increased costs where:

- the nature of the proceeding, or the step it is in, such that the time required by the party claiming costs would substantially exceed the time allocated under the highest scale band;
- the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by:
 - failing to comply with the rules or with a direction of the court;
 - taking or pursuing an unnecessary step or an argument that lacks merit;
 - failing, without reasonable justification, to admit facts, evidence or documents, or accept a legal argument;
 - failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under the rules; or
 - failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under Rule 14.10 or some other offer to settle or dispose of the proceeding;
- the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or

- some other reason exists that justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

According to Rule 14.6(4), the court may award indemnity (ie, actual) costs where:

- the party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a proceeding or a step in a proceeding;
- the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party;
- costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding;
- the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to it;
- the party claiming costs is entitled to indemnity costs under a contract or deed; or
- some other reason exists that justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

Litigation funding costs do not constitute either 'costs' or 'disbursements' within the meaning of the above costs regime. The only basis on which the High Court might order the unsuccessful party to pay the litigation funding costs of the successful party would be pursuant to its inherent jurisdiction; there does not appear to be precedent for this.

Liability for costs

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

In exceptional circumstances, funders may be liable for adverse costs as non-parties, even in the absence of any abuse of process (*Waterhouse* at paragraph 52) or impropriety (*Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 (*Dymocks*) at paragraph 33). Further, the level of such costs is not limited to the amount of funding provided (*Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at paragraph 53).

According to the leading case on costs against non-parties (*Dymocks* at paragraph 25):

Where . . . the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes.

In this case, a non-party had funded unsuccessful litigation by an insolvent company. The Privy Council did not have litigation funding specifically in contemplation. Given that a litigation funder always stands to benefit financially from the proceedings and will ordinarily exercise at least some control over the proceedings, the above proposition must be read down. It seems likely, therefore, that for a funder to be liable for adverse costs, something more is required. One situation might be where the funder exercises control over the proceedings to the effective exclusion of the plaintiffs. Another might be where the funder withdraws funding part way through the litigation, leaving the defendant or defendants to face a plaintiff who is impecunious or insolvent. A third, and very rare, instance might be where it should have been clear at the time of filing that the funded claim was simply

not tenable and litigation should have been avoided (*Poh v Cousins & Associates* Unreported, HC Christchurch, CIV 2010-409-2654, 4 February 2011 at paragraph 61).

Indemnity or increased costs will not be awarded merely because a litigation funder with a profit motive stands behind the losing party (*Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67 at paragraph 135).

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?)**

Yes. Under Rule 5.45 of the High Court Rules, on the application of a defendant, a judge may order the giving of security for costs if:

- a plaintiff is resident outside New Zealand;
- a plaintiff is a corporation incorporated outside New Zealand;
- a plaintiff is a subsidiary (within the meaning of section 5 of the Companies Act 1993) of a corporation incorporated outside New Zealand; or
- there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.

The evolving practice is for funders of funded representative actions to provide security for costs that tend to be quantified on a relatively generous basis in favour of defendants (*Saunders v Houghton* (No 1) [2009] NZCA 610, [2010] 3 NZLR 331 at paragraph 36 and *Walker v Forbes* at paragraphs 92 to 94).

Calculation of the sum is a matter for the court to assess in all the circumstances.

Those circumstances include the:

- amount or nature of the relief claimed;
- nature of the proceeding, including the complexity and novelty of the issues, and therefore the likely extent of interlocutory procedures;
- estimated duration of trial; and
- probable costs payable if the plaintiff is unsuccessful, and perhaps also the defendant's estimated actual (ie, solicitor and client) costs.

Insofar as past awards of security are a legitimate guide, they generally represent some discount on the likely award of default scale costs.

The sum ordered must either be paid into court or security for such sum must be given to the satisfaction of the judge or registrar. Where the litigation funder is overseas, an appropriate form of security will be a bank guarantee directly enforceable by the defendant.

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

Yes. A third-party funded claim does have an influence, and may justify increased security for costs. In *Houghton v Saunders* [2015] NZCA 141, the Court of Appeal stated at paragraph 11:

The fact a party is supposed by a litigation funder may justify increased security on the ground that courts should be readier to order security where a non-party who stands to benefit from the litigation is not interested in having rights vindicated but rather is acting in pursuit of profit. Security allows the court to hold the funder more directly accountable for costs. It is consistent with the court's jurisdiction to award costs against a non-party which is sufficiently interested in the litigation. Security is all the more

appropriate where the funder can avoid liability for future costs by terminating the funding agreement by notice before the litigation concludes.

In that case, the Court of Appeal ordered security (for the appeal) in the sum of NZ\$100,000 (increased from NZ\$86,000) because the overseas litigation funder retained the right to terminate its indemnity to the representative plaintiff for costs on notice and the scale costs of the proceeding were unusually high.

It was confirmed by the High Court in Highgate on *Broadway Ltd v Devine* [2013] NZHC 2288, [2013] NZAR 1017 at paragraph 22(d) that the fact the plaintiff is funded is a ground for the order of security.

Insurance

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

Yes. ATE is permitted in New Zealand. In our experience, it is commonly used by funders.

Generally, the only types of parties who would use other types of insurance to cover legal (defence) fees would be company director defendants (directors and officers' insurance) and professional defendants, such as lawyers, accountants, architects and engineers (professional indemnity insurance).

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?**

Upon the commencement of funded proceedings, a litigant must disclose the following matters to the other party or parties:

- the fact there is a litigation funder and the funder's identity;
- the amenability of the funder to the jurisdiction of the New Zealand courts; and
- the terms of withdrawal of funding, but only if those terms in some way give legal control over the proceedings to the funder (eg, the ability to withdraw finding if the funded party refuses to obey instructions given) (*Waterhouse*, paragraphs 67 to 69 and 72).

The litigation funding agreement itself must be disclosed to the opposing party and court where an application is made to which the terms of the agreement could be relevant, such as applications for a stay on the basis of abuse of process, applications for third-party costs orders, and applications for security for costs (*Waterhouse*, paragraphs 73 to 74).

In relation to the latter type of application, the Supreme Court has said that it is 'strongly arguable' that the courts have power to order disclosure of at least the existence of a litigation funder and the relevant terms of the funding agreement (*Waterhouse*, paragraph 63).

Disclosure to the opposing party is subject to redactions being made to preserve confidentiality, litigation-sensitive matters, and privilege.

In domestic arbitrations, an arbitral tribunal may order the discovery and production of documents or materials within the possession of power of a party (Schedule 2, Rule 3(1)(f) to the Arbitration Act 1996). This is broad enough to encompass a litigation funding agreement, although an arbitral tribunal would be cognisant of the need to protect confidentiality and privilege.

Privileged communications

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

Yes. The Evidence Act 2006 provides that the following communications and materials are protected by privilege of three kinds:

- 1 a communication between the party and any other person;
- 2 a communication between the party's legal adviser and any other person;
- 3 information compiled or prepared by the party or the party's legal adviser; or
- 4 information compiled or prepared at the request of the party, or the party's legal adviser, by any other person; and
- 5 privilege for communications with legal advisers that are intended to be confidential and are made in the course of, and for the purpose of, the person obtaining professional legal services from the legal adviser or the legal adviser giving such services to the person (section 54);
- 6 privilege for a communication or information (section 56), where a person who is, or on reasonable grounds contemplates becoming, a party to the proceeding, has a privilege in respect of:
 - privilege for settlement negotiations or mediation (section 57), where a person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication was:
 - intended to be confidential; and
 - made in connection with an attempt to settle or mediate the dispute between the persons.

(In all cases described under points (1) to (4) above, the communication or information must be made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding.)

A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute (section 57(2)).

DISPUTES AND OTHER ISSUES

Disputes with funders

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

There do not appear to be any such disputes reported as at the time of writing.

Other issues

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

It appears that some funded litigation has occurred in the main Pacific Islands. The civil procedure rules of the Cook Islands, Fiji and Samoa all permit 'representative actions', rather than 'class actions' or 'group actions' per se.

UPDATE AND TRENDS

Current developments

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

Reform

On 10 May 2018, the Law Commission (an independent law reform agency established by statute) announced that it is to review the law relating to class actions and litigation funding, with a view to making reform recommendations to the Minister of Justice.

The task of the Law Commission is 'to assess whether the potential benefits of class actions and litigation funding can be realised in a manner that outweighs any costs and disadvantages they might give rise to' (www.lawcom.govt.nz/sites/default/files/The%20Future%20of%20Class%20Actions%20Symposium%20Paper.pdf).

The terms of reference for the review include the following issues in relation to litigation funding (https://www.lawcom.govt.nz/sites/default/files/projectAttachments/Law%20Commission%20-%20CAL-LIF%20TOR_0.pdf).

- 1 Whether and to what extent the law should allow litigation funding, having regard to the torts of maintenance and champerty;
- 2 The role of the courts, if any, in overseeing litigation funding arrangements;
- 3 Whether and to what extent litigation funders or funding arrangements should be regulated, for example, in relation to:
 - the nature and extent of the litigation funder's recovery;
 - the powers and responsibilities of litigation funders;
 - the potential for conflicts of interest; and
 - disclosure requirements.

As of 17 August 2020, the Law Commission is preparing a consultation document to seek views on a range of issues relating to class actions and litigation funding in New Zealand. An expert advisory group, representing a range of perspectives, has been established to provide technical expertise and advice to the Law Commission.

Ultimately, the Law Commission will make recommendations in a final report to the Minister of Justice. As at the time of writing, no final completion date for the review has been set.

Once completed, the government will decide whether to accept or reject some or all the recommendations. If some or all are accepted and legislation is required, a bill is prepared and introduced to Parliament in the ordinary way. Unless urgency is required, the process can take several parliamentary sessions over one or more years before legislation is enacted.

Case law

In relation to the existing procedural rules, a significant development in 2019 was the judgment of the Court of Appeal in *Ross v Southern Earthquake Services Ltd* [2019] NZCA 431, recognising the ability of the court to make an 'opt-out' order as part of a direction under Rule 4.24 of the High Court Rules, and that this should be the default position. Such an order means all members of the relevant class are automatically included in the action, unless they expressly 'opt out'. Where actions are tried in two stages (a trial on liability followed by a trial on quantum), class members will still need to 'opt in' at the quantum stage, to have an opportunity to prove their loss and enjoy a share of recovery.

This marks a significant change to the New Zealand law relating to representative actions, enabling funded actions to be brought more easily. It remains to be seen whether and to what extent the New Zealand courts will grant 'common fund orders' or 'equalisation' orders for the benefit of funders, as has occurred in Australia.

Coronavirus

27 | What emergency legislation, relief programmes and other initiatives specific to your practice area has been implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

There is no emergency legislation, relief programmes or other initiatives specific to our practice area (civil and commercial litigation) implemented to address the pandemic.

At the general level, the COVID-19 Public Health Response Act 2020 was passed as standalone legislation to provide a different legal framework for responding to covid-19. The Act allows the Minister of Health (or the Director-General of Health in specified circumstances) to make orders under section 11 to give effect to the public health response to covid-19 in New Zealand.

Pre-existing legislation also applies, including the Epidemic Preparedness Act 2006.

ADINA ♦ THORN LTD
LAWYERS

Adina Thorn

adina@adinathorn.co.nz

Rohan Havelock

rohan@adinathorn.co.nz

Level 2, 40-42 Eden Crescent
Auckland 1140
New Zealand
Tel: +64 9 304 0661
Fax: +64 9 309 6091
www.adinathorn.co.nz

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