

Crypto Currencies, Crowdfunding and Litigation Funders: costs recovery against non-party funders

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In terms of professional negligence claims, accountants and in particular auditors have benefited from the low volume of corporate insolvencies, the 2008 financial crisis notwithstanding. They have also seen the heyday of CFA funded litigation pass, with success fees under CFAs entered into post April 2013, no longer recoverable against unsuccessful defendants. However, litigation funders represent an increasing threat since funders factor in the solvency of professional defendants and the availability of PI insurance in their assessment of whether to advance funds to claimants.

At the innovative end of the litigation funders market lies crowdfunding, and potentially, crypto currencies.

Both will face regulatory hurdles and neither looks to be an obvious vehicle for claimants seeking funding, but the litigation against West Bromwich Building Society by the Property 118 action group was successfully funded through crowdfunding.

Bitcoin remains the best-known crypto currency, however, new currencies will emerge through initial coin offerings (ICOs) - which involves selling cryptographic tokens to investors. Investors seeking a cause to support, or an innovative high risk investment may be attracted by the prospect of purchasing a share in the proceeds of litigation.

The point is that electronic media and its ability to influence and organise large numbers of prospective claimants will play a part in future group litigation, and this extends to arranging funding of high value or group litigation.

As for litigation funders, in case you have not noticed, the litigation funder, Burford Capital, has seen its share-price triple over the last 12 months. We are regularly contacted by new entrants to the market. In short, litigation funding has properly arrived in the UK and will play a significant part in shaping the litigation landscape over the next 10 years.

Which leads us onto consider the current position on costs recovery, including security for costs orders against funders. A defendant may apply for a security for costs order against a non-party which contributes to the claimant's costs in return for a share in the litigation proceeds, but the court has a very wide discretion.

The decision in *The RBS Rights Issue Litigation [2017] EWHC 1217 (Ch)* of Hildyard J is a useful benchmark for defendants considering security for costs applications, and indeed costs orders generally, where litigation funding is present.

The legal context

The RBS Rights Issue Litigation involved applications for security against two different funders. It was a long-running case, involving exceptional levels of costs (£19.3m was sought as security), a very late application and multiple claimants with several (not joint) liability for costs under a Group Litigation Order, making enforcing a costs order highly problematic.

The court held the following principal factors will be relevant when assessing whether an order under (CPR 25.13(1)(a) is "just":

1. Is the Litigation funder to be treated as "the real party" because of its interest in the litigation?

The courts will be readier to order security where the third party is in the business of litigation funding. The courts recognise funders can fund for other, sometimes altruistic, purposes. The courts seek to balance the desirability of promoting access to justice (which requires funding), against the injustice in leaving defendants unable to recover their costs.

The two non-party funders were situated outside of the jurisdiction (BVI and Isle of Man). The first respondent, Hunnewell Partners (BVI) Limited ("Hunnewell") had contributed to the claimants' costs in return for a share of any recovery and was treated by the courts as "the real party".

By contrast, the second respondent, London and Northern Capital Partners Limited ("LNCP") was treated as a "pure funder". LNCP did not ordinarily provide litigation funding and its primary motivation was not one of profit, but instead providing resources to allow the claimants to bring their claim. The decision shows the courts recognise motivation for funding may be nuanced and although the funding was provided on a basis which would give LNCP a commercial return (if the case succeeded), that was not enough for the court to treat it as "the real party". LNCP's motives for funding were not purely profit driven.

2. Is there a risk of non-payment of any costs order by the third party?

The court found Hunnewell had failed to provide sufficient financial evidence to support its position that it would be able to pay any adverse costs order. Mere assertions in witness statements that it had large revenue streams were not enough.

3. Is the non-party aware and / or has it been warned of the risk of a liability for costs?

The court found that Hunnewell had accepted the risk of liability for adverse costs because it was a professional litigation funder and adverse costs orders were an inherent part of its business. By contrast, LNCP could not be considered to have accepted the risks of an adverse costs order which were not inherent in its business, and that was especially so given that it had provided funding at a late stage of the litigation process.

Comment

Litigators take note, if costs orders, including security for costs, may be sought against funders later in the litigation, warnings to that effect in inter-partes correspondence are likely to prove important. The non-party's awareness of its potential liability to an adverse costs order will be taken into account by a court considering making a costs order against the non-party.

Further factors the court will consider include - (i) whether there is some causal link between the funder's conduct and the costs incurred by the defendant; and (ii) factors, such as delay in making an application for security for costs, which lead to unfairness and which might tip the overall balance against the making of the order.

The courts may now be prepared to order security for costs against third parties funding litigation for commercial reasons but it comes down to judicial discretion and whether the courts consider it is fair to expose them to the risk of costs orders. It will be more difficult to obtain an order for security where a third party is funding litigation not purely on a commercial basis, but also to enable access to justice in what it perceives to be a case worthy of adjudication. We can see some interesting arguments may emerge on behalf of funders where funds have been raised for "a cause", and not purely for a commercial return.

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