

The new, new thing

A study of the emerging market in
third-party litigation funding

November 2010

About the report

This study has been commissioned by Fox Williams and undertaken by the legal research company Jures to further the debate on third party litigation funding.

About the author

Jon Robins is director of the legal research company Jures, freelance journalist and author. He has been writing about the law for the national and specialist legal press for over 14 years. Jon wrote the *Big Bang Report: Opportunities and threats in the new legal services market* (Jures, November 2009) and *Shopping Around: What consumers want from the new legal services market* (Jures, May 2010) and edited *Closing the Justice Gap: Some new thinking about an old problem* (Jures, March 2010). They are available at www.jures.co.uk. Jon also wrote *The Justice Gap* (Legal Action Group, May 2009 with Steve Hynes).

About Fox Williams LLP

Fox Williams LLP is a business law firm based in the City of London. It serves a diverse client-base ranging from multi-national corporations, PLCs, private companies, and financial institutions through to small businesses and individual entrepreneurs.

The firm's key specialisms include dispute resolution, corporate, employment, commerce & technology, partnership and real estate. Our dispute resolution team handles a broad range of heavyweight domestic and international commercial litigation and arbitration, including civil fraud, breach of directors' duties, shareholder disputes, corporate transactional claims, financial services regulatory disputes, intellectual property, employment and partnership disputes.

A distinguishing feature of Fox Williams is that it is often one of the first choices for referral of work from other law firms when City expertise is required.

About Jures

Jures is a new independent research company dedicated to the legal services market. It combines expertise from a number of different disciplines: journalism; research; PR and communications; as well as publishing in both traditional and new media. The people behind Jures are the journalist Jon Robins and Gus Sellitto and Richard Elsen, directors of the legal PR specialists the Byfield Consultancy (www.byfieldconsultancy.com).

The idea behind Jures is to become a leading source of considered, independent-minded and thought-provoking commentary on the law in a way that informs and influences debate within the profession and beyond.

Foreword

In the brave and still relatively new world of litigation funding these are uncertain times. At the time of writing this report, the government is consulting on Lord Justice Rupert Jackson's proposals contained in his landmark *Review of Civil Justice Costs*.

Whilst the *Jackson* review could well lead to a seismic shift in our litigation landscape which was radically reshaped a decade ago under the Access to Justice Act 1999, the message that he gave to the infant third party funding industry was largely positive. 'I remain of the view that, in principle, third-party funding is beneficial and should be supported,' declared Lord Justice Jackson.

However that endorsement also sounded a somewhat ambivalent note in the context of the wider package of recommendations and, in particular, the more persuasive case made by Sir Rupert for contingency fees and wholesale reform of conditional fee agreements as introduced under the 1999 Act (by scrapping the recovery of success fees and after-the-event insurance premiums).

This report has been commissioned by Fox Williams LLP and looks at the development of third party litigation funding and its future. 'Welcome to the world of third-party litigation funding,' declared an article in *American Lawyer* magazine in May this year. We have borrowed the title for our study from that feature ('The new, new thing') because, despite all the talk about third party funding over the last few years in the legal and business press, it is early days for the industry.¹ As discussed later, very few cases have actually been backed by funding so far.

As far as the legal profession is concerned, only a very small minority of firms have expressed interest in let alone have had direct experience of third party funding. Firms (such as Fox Williams) who have experience are convinced of its potential, not only to bring access to justice to clients who otherwise might struggle to afford legal advice, but to enhance the range of funding options we can offer our clients. The benefits of third party funding have yet to impinge in any meaningful way on the business community as an opportunity to provide access to justice. The purpose of our report is to provide an in-depth study of a unique and exciting area of legal practice where business, law and finance intersect at a critical time in the development of legal services.

The research draws on interviews with the main players conducted over the summer of 2010. Jures has spoken to funders both in the UK and abroad, insurers, leading litigators, academics and commentators and in this report they identify the factors that will drive and shape the market.

We hope that it is a positive contribution to a new and important development in the law.

Tom Custance
Head of Dispute Resolution
Fox Williams LLP

¹ *American Lawyer*, The new, new thing, May 17th 2010

Introduction

It is early days but the market in third party litigation funding has been relatively quickly established. The latest issue of the Law Society's *Litigation Funding* magazine lists 19 funders (this includes brokers and 'aspirational funders', as one of the contributors to this report puts it).² Many of those listed have been interviewed for this study. That list jumped up 20% following the publication of the *Jackson* review.

But the market is opaque and the level of activity has proved difficult to ascertain. It is unclear whether *Jackson* and the coalition government's reforms that flow from it will provide the springboard that the industry and the profession wants, or ultimately inhibit its development.

The new government with a crammed legislative agenda and a political imperative for public sector cuts has surprised the profession by joining the momentum created by the *Jackson* review. 'We are urgently assessing Sir Rupert's main proposals on the reform of conditional fee agreements and how they could be taken forward,' the civil justice minister Jonathan Djanogly told parliament over the summer.³

A consultation has been announced (taking place as this report is written) which looks at reform of conditional fee agreements; scrapping the recoverability of success fees and after the event insurance premiums; introducing a 10% increase in general damages for personal injury, defamation and tort claims; and qualified one-way costs-shifting in certain areas including personal injury and defamation. The backdrop to this (as identified in Djanogly's July ministerial statement) is 'serious concern, particularly in clinical negligence cases against the NHS Litigation Authority and defamation proceedings'. Lord Young of Graffham's review of health and safety laws and the so-called 'compensation culture' has just been published. The peer writes about the 'growing

fear' among the business community of having to pay out for even the most unreasonable claims. He attacks the 'advent of "no win, no fee" claims' for 'significantly' adding to 'the belief that there is a nationwide compensation culture'. Conditional fee agreements gave rise 'to the perception' that there was 'no financial risk to starting litigation', he said.⁴

Added to those pressures for change, ministers have revealed swingeing cuts to the legal aid budget amidst growing fears about access to justice. The Ministry of Justice budget will be cut over four years from £8.9 billion to £7.3 billion, a cut of 6% per year for four years. The Law Society reports that the MoJ expects to save £350m on legal aid.

The coalition government is on the search for (as Henry Bellingham, when shadow justice minister, put it) 'imaginative and radical ways of bringing new money into the legal aid fund from outside the public sector'.⁵ The Adam Smith Institute, the free market thinktank, has just published a paper calling for civil legal aid to be scrapped for most civil justice compensation claims,⁶ although it is fiercely opposed to Lord Justice Jackson's proposal of introducing one way cost shifting (as well as scrapping recoverability).

Lord Justice Jackson's support for third party funding is couched in terms of its ability to promote access to justice and his expectation,

² *Litigation Funding*, August 2010, Issue 68

³ *Hansard*, July 15th 2010

⁴ *Common Sense Common Safety*, Lord Young, HM Government, October 2010

⁵ *Closing the Justice Gap*, Jures, March 2010

⁶ *Access to Justice: Balancing the risks*, Adam Smith Institute, August 2010

whilst recognising that cases backed by such funding are pretty much exclusively commercial, is that the market will shift towards consumer claims.

For the time being, he argues, self-regulation is sufficient and the Civil Justice Council is currently consulting on a voluntary code of conduct for third-party litigation funders. This is both a recommendation by Sir Rupert and a major step towards the mainstreaming of third party funding.

However, as the profession is going through its own version of the kind of 'Big Bang' experienced by the City in the 1980s it is difficult, if not impossible, to identify where third party funding will take root in a newly liberalised legal service market – if, indeed, it will at all.

Jon Robins
Jures
November 2010

Definitions

Third party funding: The provision of funds by individuals or companies who have no other connection with the litigation. A funder may provide the full legal costs of the proceedings, part fund, or fund only disbursements. Protection from adverse costs is often (but not exclusively) provided, and in some circumstances the funder may provide no direct funding at all, but agree to cover a party's potential exposure to adverse costs. In return, the funder would expect to make a financial profit for their outlay and attendant risk to investment.

The third party funder may calculate profit in a number of ways. It may be assessed by a percentage contingency fee, perhaps in addition to any costs recovered from the other party. Other third party funding agreements may stipulate a return based on a multiplier of the investment provided (eg, if the funder puts in £x he may require £x multiplied by y as a return on his investment).⁷

Maintenance and champerty: The funding of litigation by third parties, who have no interest in the dispute, has traditionally been characterised as maintenance or champerty and such funding arrangements have been held to be unlawful. In recent years there has been a sea change

in the approach of the courts, both in the UK and elsewhere. It is now recognised that many claimants cannot afford to pursue valid claims without third party funding; that it is better for such claimants to forfeit a percentage of their damages than to recover nothing at all; and that third party funding has a part to play in promoting access to justice.

Although the Criminal Law Act 1967 section 14(1) abolishes criminal and tortious liability for maintenance and champerty, section 14(2) provides that such abolition 'shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal'.⁸

The case state is summarised in *London & Regional (St George's Court) Ltd v Ministry of Defence* [2008] EWHC 526 TCC. The 'mere fact' that funding has been provided in return for a promise in the share of the proceeds was not 'by itself sufficient to justify that promise being held to be unenforceable'; and in considering whether an agreement was unlawful the question was whether the agreement had 'a tendency to corrupt public justice and that such a question 'requires the closest attention to the nature and surrounding circumstance of a particular agreement'.

⁷ The definition comes from *The Future Funding of Litigation: Alternative Funding Structures*, the Civil Justice Council, June 2007

⁸ The definition comes from *The Review of Civil Litigation Costs: The preliminary report*, Lord Justice Jackson, May 2009

Third party litigation funding... at a glance

The funding of litigation by a third party has a long history⁹

Medieval period	Notions of 'champerty' and 'maintenance' introduced to prevent those who do not have the right to pursue a claim, from interfering in the court process.
1880	In <i>Seear v Lawson</i> [1880] 15 Ch D 426 funding was endorsed in the UK in the context of insolvencies
1955	In <i>Martell v Consett Iron Company</i> [1955] 1 Ch 363 it was held that a defendant should not be entitled to stay proceedings even if a funding agreement is deemed champertous
1967	'Champerty' was decriminalised in the UK (but remains to this day a tort if too much control is exerted by the funder)
1995	Conditional Fee Agreements, or CFAs, came into effect as a result of the Courts and Legal Services Act 1990
1995	After-the-Event Insurance emerged and was shortly afterwards coupled with CFAs
1997	Allianz established a litigation funding venture in Germany, followed by Austria and Switzerland
2000	The Access to Justice Act 1999 introduced reforms to the CFA model which allowed for the recoverability of insurance premiums and success fees
2001	IMF (Australia) Ltd, Australian Litigation funders were listed on Australian Stock Exchange
2002	IM Litigation Funding established by Susan Dunn and others
2003	In <i>Hamilton v Al-Fayed</i> (No 2) [2003] QB 1175 Neil Hamilton relied on the donations of well-wishers to fund the costs of his action but, when he lost, the Court of Appeal refused to make his friends liable for the costs on the grounds that it would prejudice access to justice for poor litigants
2005	In <i>Arkin v Borchard Lines Ltd & Ors</i> [2005] EWCA Civ 655 the Court of Appeal decision explicitly endorsed funding. The court also found that a funder was liable to the other side for costs only to the extent of its own funding
2007	The Civil Justice Council endorsed 'properly regulated' third party funding in its report Improved Access to Justice – The Future Funding of Litigation
2007	Law Society (England and Wales) Code of Conduct s2.03, required solicitors to discuss funding options with their clients
2007	In Australia in <i>Campbells Cash and Carry Pty Limited v Fostif Pty Limited</i> [2006] HCA 41, the High Court removed the final vestiges of champerty and maintenance and allowed funders to have an active role in the conduct of the litigation
2007	Allianz entered the UK litigation funding market
2007	Harbour Litigation Funding was established by Brett Carron, Susan Dunn and Martin Tonnby
2007	Juridica Investments listed on the Alternative Investment Market of the London Stock Exchange
2009	Third party funding made its first appearance with a dedicated chapter in the leading text Cook on Costs
2009	The US funder Burford floated on the London Stock Exchange
2010	Lord Justice Jackson's Review of Civil Litigation Costs
2011	Alternative business structures or ABSs to be introduced under the Legal Services Act 2007

⁹ This is a revised version of a table that appears on Harbour Litigation Funding's website (www.harbourlitigationfunding.com)

Appetite for the market...

As the burgeoning third party funding table in the back pages of the Law Society magazine *Litigation Funding* indicates, there is a growing number of players that have thrown their hat into the ring. However growing numbers don't necessarily reflect activity as (non-funding) contributors to this report frequently pointed out. According to the Civil Justice Council, since third party funding's emergence in England and Wales in mainstream litigation no more than 100 cases have been funded in this way. (In fact, the CJC added the following qualification: 'Some of these cases may have been pursued by other forms of funding, some may not have been brought at all.'¹⁰)

'I suspect there have been more than 100 cases in reality although it is difficult to get precise figures,' comments Robert Musgrove, who left his post as chief executive of the CJC over the summer. 'One of the things that I've sensed from some of the funders coming into the market is that they have been more nervous than the funding behind it. There is a lot of money behind it, more than the funders appear prepared to risk.'

Whilst potentially a hugely significant development for the legal services market, third party funding remains a minority interest for the profession and their clients. As Kerry Underwood, chairman of Law Abroad Plc and costs expert, puts it: 'Only 100 cases have been funded in this way. There are 10,120 firms in the country. I would say that it is irrelevant to 10,110 of them.'

Others openly speculate as to whether the Jackson review could finish off an immature industry. 'Has reduced appetite for risk amongst investors following the recession, combined with proposals for restrictions on the activities of litigation funders supported by Lord Jackson, sounded the death knell of third party funding?' pondered Neil Mirchandani, a partner at Hogan Lovells in the *New Law Journal*.¹¹

Whilst there have been few high profile cases backed by funding, the one that everyone in the industry was following (*Stone & Rolls Ltd (in*

Liquidation) v Moore Stephens [2009] UKHL 39; [2009] 3 WLR 455) has been interpreted as a setback in some quarters. *Stone & Rolls* was a major negligence case that was struck out by the Law Lords in August 2009 at a cost of around £2.5m to IM Litigation Funding, and is considered later.

'We are still in pioneering stage with those pioneers trying to find their place in the market,' comments Robert Musgrove. 'Funders recognise there is a lot of scope to bring in commercial litigation funding whether that is in areas where there is no funding and access to justice is inhibited, for example, an SME dispute; or where funding is used as a hedge in a large litigation dispute where it's a matter of choice for a large corporation to do it that way.'

This report draws on new and in-depth interviews with funders listed in the *Litigation Funding* table both here and abroad. Susan Dunn and Brett Carron set up Harbour Litigation Funding in December 2007. She also co-founded the litigation funder IM Litigation Funding in 2002, which backed the professional negligence case against Moore Stephens as well as a \$1 billion fraudulent conveyance claim in the US. 'I have looked at a total of 875 cases and about 375 at Harbour. We fund about 8% of what we see because we find that they do not fulfil one of our criteria,' she says, adding that their minimum claim size is about £3 million and average claim size is about £10 million.

¹⁰ Consultation: a self-regulatory code for third party funding, Civil Justice Council, September 2010

¹¹ *New Law Journal*, Appetite for destruction, June 14 2010, Neil Mirchandani

'We anticipate at the moment that that will probably go up... so the amount we will deploy on the case will range anywhere from £500,000 to £6 million.' She also reports many claimants want to 'hedge' costs, as indicated by Robert Musgrove above. As Dunn explains, claimants have varying approaches to litigation funding. 'In some cases, they say: "The more I cover myself, the less I am going to have to pay a funder";' she explains. 'In other cases, they're saying: "I can afford to pay for everything but I don't litigate every day of the week and I'd rather co-fund because I like the certainty of knowing how much I'm going to spend".'

Dunn takes issue with the notion that there is reduced appetite on the part of investors in the wake of the economic downturn and the [Jackson](#) report. 'Just because you haven't heard about it, doesn't mean that it's not going on,' she says. 'A lot of the cases that we fund have been confidential. There have been lots of well-known cases that have actually been funded but people just do not know it.' Harbour has recently raised a £60 million fund (having targeted £50 million).

Calunius Capital was one of the first brokers to enter the UK third-party litigation funding market and is presently looking to launch a private fund. Calunius began looking to fund its own cases from January this year. 'We are in the process of fund raising at the moment,' says chief executive Mark Wells, adding that the process of raising private equity funds has been 'reasonably protracted'. 'We are engaged in due diligence with a number of institutional investors with a view to closing that fund once we can satisfy ourselves that we have the appropriate critical mass of investors together,' he reports. Calunius has been in operation for three and a half years and claims to be 'the first FSA authorised investment adviser and investment manager focusing on the financial risk of litigation'.

Therium is a team of three City solicitors – John Byrne, previously head of the London office of the US firm Dorsey & Whitney; George Brown, a litigation partner at the US firm Reed Smith; and Neil Purslow, a solicitor advocate and former

counsel to Marsh & McLennan. In February this year, the City of London Group took a 50% equity share in the company for £300,000 and plans to seed a fund to invest in litigation. According to their annual results, Therium has reviewed more than 100 investment opportunities. Neil Purslow explains that their money comes from primarily high net worth individuals. 'At the moment, it is still too early for the institutional investors in the UK to be looking at litigation funding,' he says.

What would be the attraction for investors? 'It is a new area and potentially the return is very strong,' Purslow replies. He calls litigation funding 'a completely uncorrelated asset class'. 'The great thing about it is that you can have two cases and the results will not correlate with each other, let alone with the stock market or the property market or anything else in your portfolio.'

'It is a hard sell to investors,' comments Richard Fields, chief executive of the US funder Juridica.

'It is new and it is complicated and they are investing in a pretty risky asset. The future of the industry depends on the success of those of us involved over the next few years.'

We also spoke to leading insurers. Insurers involved in the after-the-event insurance market have been watching with interest at the development of an industry which can either dovetail with their products (ATE insurance policies can be used to lay off the risks of exposure to adverse costs) or compete with their business model.

'Funders are asking investors to tie up their money for the best part of five years before there is any return,' comments Rocco Pirozzolo, solicitor and senior underwriter at QBE. 'There can't be many investors who are willing to shut away millions of pounds for no return for a long stretch time. It's a big ask in this economic climate.'

'Litigation funding has become one of the most fashionable alternative investments,' asserted a [Sunday Times](#) headline last year.¹² Not quite. Not yet.

¹² *Sunday Times*, Investors race to alternatives, October 25 2009

Jackson: conflicting interests?

'I remain of the view that, in principle, third-party funding is beneficial and should be supported.' Lord Justice Jackson, *Review of Civil Justice Litigation Costs*.

Lord Justice Jackson cited five reasons for supporting third party funding. They were as follows:

1. It provided an additional means of funding litigation ('... and for some parties the only means. Thus third party funding promotes access to justice...');
2. It was 'better for [a claimant] to recover a substantial part of damages than nothing at all';
3. It did not impose 'any additional financial burden upon opposing parties';
4. It would 'become even more important as a means of financing litigation if success fees under CFAs become irrecoverable'; and
5. It tended 'to filter out unmeritorious cases'.

Jackson cited *Stone & Rolls*, the negligence action against accountants Moore Stephens. In a majority verdict, the House of Lords found that the accountancy firm was not liable for failing to spot an extensive 'letter of credit' fraud by one individual who owned and controlled the firm. The ruling divided commentators and parties. Tim Strong, litigation partner at the City firm Barlow Lyde & Gilbert who acted for Moore Stephens, told the *Law Society's Gazette* that the case highlighted the risks of litigation funding and could have 'ramifications for the third-party funding industry by potentially pushing up the price or deterring funders'.¹³ Sam Eastwood, a partner at City firm Norton Rose who acted for Stone & Rolls, took the opposite view. He commented that the ruling 'vindicates the price of litigation funding' insofar as the 25 to 40% share of compensation which third-party funders normally take did not seem so high. It was reported that IM Litigation Funding

stood to gain more than £40m had the case succeeded. It did not take out after-the-event insurance to cover its adverse costs exposure. Jackson took the latter view. He noted that the funder had a portfolio of 10 to 12 ongoing cases with a success rate of 80%. 'These facts illustrate that third party funders can operate satisfactorily in the absence of ATE insurance and they can accept liability for any adverse costs orders,' he observed. The risk undertaken by the funder was reflected in the percentage of damages which the funder was entitled to receive in the event of success, he added.

Whilst Jackson endorsed third party funding, he raised a number of issues that he expected the industry to resolve, such as:

1. The need for voluntary regulation:

His view was that, as third party funding is largely an issue for 'commercial or similar enterprises with access to full legal advice', a voluntary code of conduct would suffice. But he made clear that was a short term solution, no doubt mindful of the consumer scandals that blighted the personal injury market for the first half of the last decade following the introduction of the Access to Justice Act 1999. That legislation opened the claims market to non-lawyer, unregulated claims companies.

If the market 'expands', Jackson reasoned, then full statutory regulation might be required. Jackson then critiqued the Civil Justice Council's draft voluntary code of conduct. Things have moved on since then and in March 2010 funders (including Harbour, Calunius Capital, the Australian funder IMF and Allianz Litigation Funding) announced an industry body to oversee the voluntary code of conduct.

¹³ *The Law Society's Gazette*, August 6 2009

The initiative came out of a Civil Justice Council forum and the code is currently being consulted upon.

- 2. Withdrawal of a funder:** Jackson was critical of the code's proposal that a funder could back out of an action and terminate a funding agreement on 21 days' notice. 'In my view, the funder should be obliged to continue to provide whatever funding it originally contracted to provide unless there are proper grounds to withdraw,' Jackson said.
- 3. Capital adequacy:** Jackson's initial view was that capital adequacy (in other words, funders' ability to demonstrate that they have the funds to meet the entire costs) was 'a matter of such pre-eminent importance that it should be the subject of statutory regulation' by the FSA. Although, again, he noted that given that most clients were commercial parties, he didn't think there was a case at the moment for calling upon FSA regulation (nor did he see any desire on the part of the FSA to widen its jurisdiction).
- 4. Liability for adverse costs:** Jackson argues that third-party funders should be exposed to liability for all adverse costs. He argued that it was 'wrong in principle' that a litigation funder (which stood to recover a share of damages in the event of success) should 'be able to escape part of the liability for costs in the event of defeat'. He quoted Lord Phillips then Master of the Rolls in *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655 which held that a professional funder should be potentially liable for the costs of the opposing party only to the extent of the funding provided (rather than the entire costs). Jackson did note different approaches elsewhere including the High Court of Australia (*Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43) in which, by a majority, the funder was held not liable to pay adverse costs.

Jackson took the view that going against the *Arkin* principle would not inhibit the growth of an immature industry. 'There is no evidence that full liability for adverse costs would stifle third party funding or inhibit access to justice,'

he argued. Experience in Australia was 'to the opposite effect', he countered, adding that IMF (as of April 2009) had funded approximately 200 cases in Australia and in only five of those cases costs orders were made against their clients. It was 'perfectly possible' for litigation funders to have business models which encompassed full liability for adverse costs. 'This will remain the case, even if ATE insurance premiums cease to be recoverable under costs orders,' he said, adding that such a conclusion was evidenced by *Stone & Rolls*. 'In my view, it is wrong in principle that a litigation funder, which stands to recover a share of damages in the event of success, should be able to escape part of the liability for costs in the event of defeat,' he concluded. 'This is unjust not only to the opposing party (who may be left with unrecovered costs) but also to the client (who may be exposed to costs liabilities which it cannot meet).'

- 5. Maintenance and champerty:** Whilst talking of the 'uncertain ambit' of the law of maintenance and champerty casting 'doubt as to the precise boundaries of proper conduct in relation to litigation funding', he didn't call for the repeal of the Criminal Law Act 1967, section 14(2). Instead he called for it to be made clear 'either by statute or by judicial decision that if third party funders comply with whatever system of regulation emerges from the current consultation process, then the funding agreements will not be overturned'.

Jackson made three recommendations on third party funding:

1. To establish a satisfactory voluntary code 'to which all litigation funders subscribe', including a provision for effective capital adequacy and withdrawal from an action;
2. To revisit the question as to whether there should be statutory regulation of third party funders by the FSA when the market expands; and
3. To provide that funders should potentially be liable for the full amount of adverse costs, subject to the discretion of the judge.

Life after Jackson

So where does Jackson leave this nascent industry? Commentators are divided as to whether the Jackson review has cleared the ground for the mainstreaming of litigation funding or muddled the field.

'Massively positive' is the view of Harbour's Susan Dunn. 'What we lacked, other than the decision in *Arkin*, was a clear discussion about funding.' Devoting a chapter of the final report put the topic more firmly on the landscape, she argues.

'It's all good news,' agrees Selwyn Seidel, chairman of the US funder Burford Group. 'I am not at all concerned about any of the issues raised. I think that they are all capable of being addressed. They are all manageable.'

On the other side of the debate, Kerry Underwood views the Jackson proposals as 'ill thought out and illogical', not least when he approaches the issue of third party funding. According to the costs expert, third party funding in an age of non-recoverability of success fees risks 'a re-run of the scandals of The Accident Group and Claims Direct' at the beginning of the last decade in the accident market where accident victims were left penniless and many unmeritorious cases were pursued. 'Solicitors are subject to all of the professional discipline that third party funders are not,' he notes. Underwood believes that it's easy to see claims companies jumping on the third party model (combined with the potential for external investment as a result of the Legal Services Act 2007) with the same enthusiasm with which they took advantage of the Access to Justice Act 1999 – and, he argues, with the same threat to consumers.

Evolution not revolution

Many commentators reflect upon the apparent tension between appearing to endorse both third

party funding and contingency fees, with greater weight placed on the latter in the report.

'Third-party funders are starting to make a noise in commercial litigation. They want the big cases. At the same time solicitors are going to offer contingency fees. So we should expect a debate about whether you need third-party funding, or will they combine?' Argued David Greene on Jackson.¹⁴

Funders are bullish though. Calunius's Mark Wells argues that contingency arrangements (or CFAs, for that matter) aren't likely to be attractive in commercial litigation because 'lawyers think that billing arrangements don't reward them sufficiently for the financial risk and the taking of financial risk across multiple accounting years is challenging to a number of partnerships - and quite rightly so'.

'If you have a very large relatively flat partnership model and you have one department – say, the litigation department - that wants to move to a different model basically betting on contingent outcomes of litigation then there is going to be an inherent conflict in terms of divvying up profits,' he argues. 'The litigation guys have a whole lot of new deals but they have not had any realisations, do they get no draw? Partnerships generally generate money in one year and then distribute money. They are not really investment vehicles.'

Although as Wells points out the advent of alternative business structures as of October 2011 under the Legal Services Act 2007 might bring a

¹⁴ *New Law Journal*, January 22 2010

different style of operation allowing 'for a greater degree of capital risk-taking within law firms.' Although he notes that there is something of a cultural hurdle to overcome.

'Litigation funding is not litigation ...in the same way that investing in real estate is not bricklaying,' Mark Wells

Wells also argues that contingent arrangements are less attractive when it comes to covering disbursements ('... it is okay for solicitors to act on a fully deferred or contingent basis but not so for counsel. Experts, for legitimate ethical reasons, have to be paid in cash on a non conditional basis...').

Susan Dunn doesn't see a mutually exclusive conflict between the two methods of funding. 'My view (on Jackson endorsing contingency fees) is that he is saying they are another part of the landscape thereby giving people the option and they can then choose the most appropriate one for the case.' She points out that litigation funding thrives in the United States, 'where they have had contingency fees for 100 years'. 'It's not one or the other,' she adds.

It is a point echoed in comments made by Wayne Attrill of the Australian funder IMF. In the US, contingency fees have been available 'for 100 years or so' and there is 'a very well-developed plaintiffs' bar' operating on a contingency basis. 'And yet we have found significant interest in the kind of litigation funding coming out of the United States,' he reflects. 'So even if contingency fees were brought in for the UK, I do not think that that would be the end of the litigation funding industry.'

'There's a surprising amount of interest coming out of the US for litigation funding given that they have such a well-developed contingency fees system and lawyers are quite happy to run cases on a contingency basis,' reports Attrill. He compares this to the UK where he detects 'a degree of conservatism in the market'. 'Also the

UK industry itself is small and there is a limit to how much the relatively small number of funders can achieve in terms of publicising their products and increasing general awareness.' Funded litigation 'rarely makes the headlines in England', he says. 'Here in Australia almost every week you will find multiple references to our funded cases in the Australian media.'

Juridica's Richard Fields argues that the lack of contingency fees was in itself an impediment. The 'big problem in the UK market from an investor's point of view', according to Juridica's Richard Fields, is 'the absence of a risk culture in the legal profession'. 'Lawyers in the UK haven't been able to work on contingency fees and the CFA model isn't very attractive to them. Most firms are used to working by the hour and that creates a misalignment of interests with the clients. If you're working on a contingency fee your incentive is to get the maximum result for the smallest possible investment.' That misalignment leads to cases being brought 'that are not particularly attractive to capital market investors'. That said, he notes that the recession has 'put pressure on the legal profession to charge in different ways'.

Fields continues: 'Having lived in London for many years and going back and forth between the two countries over the past 25 years, I know that things happen slowly there and generally that is a good thing as far as the culture is concerned.' He adds that he isn't expecting 'a sea-change notwithstanding Lord Justice Jackson's report any time soon'. 'In my experience changes to the legal profession in the UK are evolutionary not revolutionary.'

Risk adverse

Rocco Pirozzolo, solicitor and senior underwriter at QBE, believes that the report delivers 'a very confused message'. 'Jackson gave his blessing and appeared very keen to promote TPF and then proceeded to undermine the business model by saying how much he disliked *Arkin* where funders' exposure to opponents' costs was capped.' It is a 'very odd situation although, I understand why,

from a purist perspective, he may have found the [Arkin](#) decision unattractive.’ ‘But it’s a strange way of encouraging the market particularly as third-party funders are already renowned for being cautious,’ Pirozzolo says. ‘Indeed, whilst it is tempting to say that funders can get a greater reward for being exposed to a greater risk (the unknown, full amount of the opponent’s costs), how much higher can funders go above 50% of the recoveries before they are accused of “controlling” the litigation because they would have more of a financial interest than the client? This then exposes the funder to allegations of maintenance and champerty.’

Pirozzolo makes the points that of the 100 or so cases that have been funded in this way over the last eight years, they have predominantly been in high value commercial cases where the funder has been satisfied that the claim has 70% chances of success. ‘An ATE insurer will typically look for 60% prospects in a one– off commercial case whereas the third-party funder will typically say they are looking for 70%, not just a straightforward 70% though, but where a barrister from a commercial set puts the prospects at 70%.’ No disrespect, he adds but commercial barristers ‘rarely think that something is a 70% prospect’. In Lord Jackson’s preliminary report published in May 2009 (which draws on meeting with 25 people ‘actively involved in the third party funding of litigation’), Sir Rupert notes that some ‘quantify good prospects as a 70% chance of success’ and one reported a 78% success on the strength of 53 cases which it had backed. It’s a point echoed by David Greene.

‘Funders are looking for high-value claims as uncomplicated as possible and as predictable as possible with a high percentage risk of success, but then again, aren’t we all?’

Peter Smith, managing director of the legal expenses insurer First Assist explains the symbiotic relationship between insurers and the third party funding industry. ‘We see our role as supporting the development of funding and therefore access

to justice for people who otherwise would get frozen out by being able to provide after-the-event insurance (ATE) which removes from the client and from the funder the exposure to the opponents’ costs if the case fails and also give security to the firm for any disbursement funding that they themselves have risked on the case.’

So what happens if the government scraps recoverability as a result of the Jackson review? As Smith explains it as long as ATE premiums are recoverable, ‘then the cost of protecting the funder’s risk is zero’ because the premium is not payable if the case loses, the policy picks the risk up if the case wins and the premium is recovered from the other side. Smith asks: ‘The big question is how the ending of recoverability will affect the third-party market?’ He argues that to a certain extent third-party funding is ‘underpinned’ by ATE insurance and if that was ‘no longer to enjoy the advantage of recoverability’ then that’s going to have ‘an impact on the development of the third-party funding market and the dynamics of funding model’.

Voluntary regulation?

Unsurprisingly, many of those involved in the funding industry support the Jackson line that there is no case for statutory regulation given the relative infancy, size of the market and its commercial client base. The business community is at the moment not overly alarmed at the prospect of a new stream of external funding stoking up unmeritorious claims – at least not on this side of the Atlantic (see ‘Views from abroad: US’).

‘We recognise there is an access to justice issue given the cost of litigation which can be absolutely huge,’ comments Duncan Campbell, legal adviser at the Confederation of British Industry (CBI). ‘The key issue is how best to control potential abuse. We don’t want third party funding to fuel unmeritorious litigation. We want a regime that prevents abuse as well conflict, as to whether the lawyer is acting in the client’s best interest or simply fuelling their own business.’ Campbell recognises that the CBI has a broad spread of

Views from abroad: US

'Welcome to the world of third-party litigation funding,' declared *American Lawyer* magazine in May this year in an article called 'The new, new thing'.¹⁵ The concept of third party litigation funding has 'spread around the world through Australia, Europe, and now the United States'. 'After finding success in the UK, third-party litigation funding has begun to gain steam in the U.S,' began an article in another US legal journal *Inside Counsel*.¹⁶

The new-fangled idea was 'probably spreading a little faster' due to the economic downturn, Jeffrey Weil, chair of the commercial litigation practice at Cozen O'Connor argued in the *Inside Counsel* article. Businesses were 'stressed' with 'limited funds to bring litigation'. 'The hedge funds, as they look at the array of possible investment opportunities, have decided that, if carefully chosen, litigation is a fairly good investment and that the opportunity for a positive return is better in that venue than it is in a lot of investment venues now.' The lawyer said he 'would be surprised' if more than 25 to 30 commercial cases a year used such an external funding source, 'but the practice is catching on'.

'Much ado about nothing,' was the blunt assessment of John 'Jack' Baughman, a litigation partner at Paul, Weiss, Rifkind, Wharton & Garrison in *American Lawyer*. It was small market, he added ('I doubt that it's going to drastically replace the contingent fee lawyer'). Peter Calamari, a litigation partner at Quinn Emanuel Urquhart & Sullivan in New York, was more 'bullish': 'I don't think they'll see explosive growth, but I do see space.'

'The industry's biggest enemy is the lack of awareness,' reckons Selwyn Seidel, chairman of the US funder Burford Group. 'Once the information is out there people can understand it and accept it or not as they see fit. I see a very real growth in the industry and traction in the important jurisdictions that are accepting it.' Third party is 'here to stay' and would make 'a major contribution not just in terms of commercial opportunities but also access to justice'.

Burford floated on the London Stock Exchange raising £80 million last October, the second funder to list after Juridica Investments which raised £80 million in December 2007 on AIM.¹⁷ Burford's main focus is US commercial disputes and international arbitration in the immediate future. It also has the UK in its sights. According to recent quarterly trading figures, it had committed approximately half of its capital (spending \$24 million in four new investment opportunities with a \$64 million in total commitments across 14 investments).

How important is the UK market to Juridica? It's a long-term goal rather than a short-term priority, replies Richard Fields, chief executive of Juridica; adding that 'long-term strategic matters' have to be balanced with the 'obligation to get the best results than I can for shareholders as fast as I can get them'. 'London is a centre for global law firms and those law firms are firms that I have a relationship with in the US. We want to be able to service their needs in the UK as well.'

The UK market was attractive because 'even though the deal sizes tend to be smaller, the time of return is a little bit more predictable and reliable', Fields says; adding that they are funding US cases that have been live for almost 10 years.

Continued overleaf

¹⁵ *American Lawyer*, The new, new thing, May 17th 2010

¹⁶ *Inside Counsel*, Hedging Bets, December 1 2009

¹⁷ *Law Society's Gazette*, October 16 2009

Selvyn Seidel points to a wave of interest from law schools on both sides of the Atlantic. Litigation funding represents 'the intersection of law, business and finance,' he says. 'I see this as the future for legal services integrating with other disciplines and becoming part and parcel of those disciplines rather than being bifurcated and having strict Chinese walls.'

'That's especially true in the UK with the 2007 legislation. It's an important part of legal education to provide young lawyers with a better understanding of how to use litigation funding as an instrument for justice and good.'

Funding class actions is 'a hot button issue', Seidel wrote recently.¹⁸ 'The US Chamber of Commerce and some lawyers argue that funding should be flatly and fully banned. Others have forcefully challenged these positions.'

In October 2009, the US Chamber's Institute of Legal Reform released a paper by John Beisner, partner at law firm Skadden, Arps, Slate, Meagher & Flom and a veteran litigator of collective actions. It was argued that third party funding could pose 'significant legal and ethical risks, including the prolonging of litigation and the weakening of traditional attorney-client relationships'. 'Although third party funding is not widespread in Europe, it is playing an increasingly visible and potentially harmful role in European litigation,' Beisner claimed. '... Europe is at a critical junction. The time to decide third party funding's future is now.'

According to the paper, since a third party funder's primary goal is to profit from the legal action, litigation decisions could be made to benefit the investor, rather than to promote justice for the claimant. Combined with proposals to expand collective litigation in Europe, third party funding would 'encourage abusive litigation, causing serious economic damage to the EU and its member states and to the non-EU members of the European Free Trade Association'.

'The concern is related to some fairly basic premises that class actions are stirring up unworthy litigation, that litigation funding is doing that as well and therefore the combination of the two is that it makes it even worse,' Seidel comments. The lawyer argues that the critics are 'painting with too broad a brush' and 'without the required analysis needed to be made on a case-by-case, principle-by-principle basis. Class action practice in the US has 'demonstrated that there are worthy class actions'. 'I look at this issue on a micro level. What is the case? Why is the funding needed?'

¹⁸ *Litigation Funding*, April 2010

members, including law firms, SMEs, insurance companies, private equity, and takes 'a measured view' as to a future regulatory regime. 'One that supports Jackson's recommendations which begins with self regulation then as the market takes off there might be the case for the FSA to get involved.' He also points out that the CBI is 'very strongly in favour of ADR. That was a point we made in our response to Jackson and we recognise that in mediation, TPF also has a role to play.'

The preliminary findings from a research project by academics at Oxford and Lincoln Universities (made available for this report) recorded, perhaps inevitably, that consumer groups took the view self-regulation was 'inadequate'. The researchers were specifically looking at how third party funding might impact on access to justice. One particular concern was that voluntary industry-led regulation could lead to the larger firms 'unduly monopolising the market and preventing new entrants, who may offer a consumer-focused product, from being able to enter into the market'.¹⁹

Their research suggested that there was 'no clear consensus on the form that such regulation should take'. 'Some respondents believe it should be the responsibility of the Ministry of Justice in harmony with claims management regulation, some consider it should be the role of the FSA and one consumer group indicated that third party funding agreements and settlements should be subject to scrutiny by an Ombudsman.'²⁰

Earlier this year a Civil Justice Council forum backed the formation of a trade association to oversee the code of conduct. The code was drafted by a group that included Harbour's Susan Dunn, Christian Stuerwald of Calunius Capital, Wayne Attrill of IMF and Timothy Mayer of Allianz Litigation Funding.

'The code is going to be an important step along the path to establishing a mature funding market in the UK,' comments Attrill. 'One important consequence of the code is that it will increase

knowledge about the availability of funding and increase its acceptability both within the legal profession, amongst the judiciary and hopefully the public at large. One of the big issues with funding in the UK is that very few people know about it. It is really quite surprising.' A 2008 Ipsos-Mori survey of the UK's largest 350 publicly-listed companies found that only a third had even heard of third party funding and only a tiny fraction (2%) had any direct experience.²¹

Robert Musgrove, formerly of the Civil Justice Council, believes that the third party funders, through their draft voluntary code of conduct, have risen to the various challenges set by Jackson especially on the 'big three issues' (capital adequacy; adverse costs; and termination). 'The end product is a code that will address those tricky issues,' he says. 'It is very apparent that he was concerned about regulation.'

The CJC's view was 'a pragmatic one', Musgrove explains. 'We had talked to prospective regulators. There hadn't been any interest. Nobody was prepared to do it and there was no indication from government that anyone would fund it.' Voluntary regulation is 'the most pragmatic solution that anyone can find', he adds.

What's at stake...

'You can't predict where the market is going to go and even if you could predict it you cannot control it,' comments Crispin Passmore, strategy director at the Legal Services Board. 'When a funder becomes something other than neutral in a case, then regulators need to think that through.' Passmore is speaking in a personal capacity (the new regulator does not have a policy on third party funding).

Passmore notes a range of potential models 'some quite neutral and others more activist in terms of taking over the case. One could imagine a corporate using third-party funding to close off risk on a big litigation against itself. In that instance, there seems to be a real issue: who is the lawyer and who is the client?'

¹⁹ A report briefing for the International Conference on Litigation Funding, May 19 2010, drawing on preliminary findings from research by Dr Christopher Hodges from the University of Oxford, and Professor John Peysner and Dr Angus Nurse, from the University of Lincoln

²⁰ The report briefing for the International Conference on Litigation Funding, May 19 2010

²¹ Addleshaw Goddard, *Litigation Funding - Understanding the strategies and attitudes of Corporate UK*, 2008

He draws a parallel between TPF and another form of funding, legal expenses insurance. 'The insurer has under its policy some sort of stake in the claim. We need to find ways of making sure that the lawyer is clear who they're acting for and that they are acting in the client's best interest. But I don't think these issues are insurmountable.'

Passmore doesn't see the need for drawing up a complex regulatory framework for third party funding especially in the context of the Solicitors Regulation Authority's new policy of 'outcomes-focused regulation'.²² 'The outcome that needs to be delivered for clients is the same whether they are funded by themselves, an insurer, third-party or whatever. Lawyers need to bear that in mind and I suspect most do. I'd be hesitant about the need for drawing up detailed rules'.

Passmore shares Kerry Underwood's view that there is the potential for the third party funding market to gravitate swiftly from commercial claims to consumer litigation, especially with the alternative business structures (ABSs) regime coming in next October. 'There is a tendency to think of ABSs in terms of one model [for example, Tesco Law]. An ABS is what it says... anything "alternative" to the standard partnership model of delivering legal services. That could play out in all sorts of different ways including investment firms, claims companies or third-party funders involved in family law and disputes over assets.'

As noted before, the Oxford/ Lincoln academic study is the first of its kind in looking specifically at whether third party funding could give 'people with limited means greater access to the justice system'. It reported its preliminary findings earlier this year. According to the researchers, most of the claims levels currently involved in cases paid for by a litigation funder were 'well in excess of £100,000' and consequently ordinary consumers would be unlikely to use this model.

'Our findings show that although funding has increased access to justice for companies, individuals do not benefit,' comments Dr Angus

Nurse from the University of Lincoln. Litigation funders operating in the UK are 'primarily corporate entities working with large funds rather than smaller funders'. 'Their focus as funders is on handling a small number of cases with high return which dictates that litigation funding is primarily a commercial product aimed at corporate clients as commercial cases are more attractive to funders due to the higher funds involved and the predictability of the outcomes.'

Dr Nurse reckons that models currently being developed by funders are 'thus unlikely to be used by ordinary consumers'. 'A new, different model of litigation funding needs to develop for the ordinary person in the street to benefit,' he says. Is that likely? The academic believes so. 'There is scope for extending the availability of litigation funding through an expansion of the before-the-event (BTE) market and this could develop over time possibly driven by brokers and insurers,' he argues. He reports that there is anecdotal evidence that brokers and non-corporate funders are considering funding smaller cases with a view to developing 'a high volume, small to medium litigation funding market'. 'Our research is currently investigating this issue but a consumer litigation funding product seems almost inevitable in the future,' he adds.

Passmore argues that third party funding could promote access to justice in the context of a diminishing legal aid scheme. 'The more that the market can find access to justice for people that otherwise cannot afford hourly rates or fixed fees, then the less we have to worry about the state of legal aid,' he says.

'Legal aid is there to give access to justice to people who otherwise cannot get it. That has always been the presumption of it. If you have alternative means of funding then you have solved the problems faced by legal aid by enabling the market to deliver low-cost or no cost products.'

²² 'Outcomes-focussed regulation' is a regulatory regime that focuses on the principles and outcomes that should drive the provision of services for clients, Solicitors Regulation Authority

Views from abroad: Australia

Australians are the pioneers of third party funding and it has been part of their civil justice scene for the last decade. 'My perception of the English market is that there is only a handful of what I would regard as serious contenders,' comments Wayne Attrill, investment manager at the Australian funder IMF. 'There has been a lot of talk about litigation funding in the UK and very little action.'

IMF is Australia's largest litigation funder and has been operating for 10 years. It is listed on the Australian Securities Exchange. 'One of the problems that we have had in trying to understand the UK market is that it is fairly opaque,' he says. 'Compare this with Australia where there are two funders listed on the Australian Securities Exchange. We produce a wealth of public information.'

IMF's claims portfolio is 'about Aus\$1.4 billion' (in terms of estimated claims value) mainly relating to group actions in Australia. Although IMF is involved in funding cases in New Zealand, South Africa, the United States and the United Kingdom. 'But insolvency is where IMF started and that is where litigation funding started in the UK as well.' As he points out, liquidators have a statutory power of sale and 'they could sell the causes of action that were held by the companies in liquidation and so they got around some of the maintenance and champerty issues in Australia'.

One reason why the industry is 'much further down the track than the UK' is the 2006 ruling of the High Court of Australia in *Fostif* which, explains Attrill, 'effectively gave High Court approval to litigation funding not being an abuse of process and not being inherently champertous'.

The case (*Campbells Cash and Carry Limited v Fostif Pty* [2006] HCA41) concerned Firmstones, a firm of accountants, who offered to fund litigation on behalf of tobacco retailers protecting them from adverse costs if they lost the claim in return for one third of any recovery plus recovered costs. Firmstones instructed solicitors to 'front' the action and, through the instructions, limited access to the clients so that they were to all intents and purposes represented by the accountants. The defendant attempted to defeat the claimant, arguing abuse of process because of the degree of control exercised by Firmstones. The first instance judge decided that the funding arrangements were contrary to public policy and the case went to the Court of Appeal of New South Wales where it was successfully overturned. On further appeal, it went to Australia's final appellate court, the High Court, which addressed the issue of third-party funding. In a majority verdict, Justices Gummow Hayne and Crennan wrote: 'The difficulties thought to inhere in the prosecution of an action which, if successful, will produce a large award of damages but which to defend would take a very long time and very large resources is a problem that the courts confront in many different situations... not just when named plaintiffs receive financial support from third-party funders. The solution to that problem... does not lie in treating actions financially supported by third parties differently from other actions.'

Attrill describes *Fostif* as 'a real turning point for litigation funding' in Australia. 'It is something that still hasn't happened in the UK. There is no superior court decision that goes anywhere near as far,' he says. 'A lot of the issues around litigation funding in the UK in my view remain to be considered by the senior courts.'

The Standing Committee of Attorneys-General (which includes Attorneys-General for the Australian Commonwealth States Territories and of New Zealand) has been looking at regulation of litigation funding since 2005 and announced last November that the government should consider the possibility of regulation by the Australian Securities and Investments Commission.

Capitally adequate...

The funders we spoke to felt that the Jackson 'belt and braces' approach on capital adequacy claimed that it was not a problem for their business model. The voluntary code in its latest draft has been beefed up to reflect Sir Rupert's final report. 'Our view was that we always made provision for the full extent of the other side's costs in any event where we are asked to do so and so the point that he made about [Arkin](#) from our point of view made no difference at all,' comments Harbour's Susan Dunn. She adds that it is 'incumbent upon the claimant's representatives to make themselves happy that the funder is good for the money. That's their role.'

'It is very simple from our view ... we have to have the cash,' comments Therium's Neil Purslow. 'So when we enter into a commitment with the client saying that we will back you in terms of funding up to £x, we have £x there. We cannot enter into that commitment and run out of money that is what we are there for.' Matthew Amey, director of the risk transfer broker The Judge, backs regulation to give 'funded parties comfort that the litigation funder will not run out of money'. 'We do need to have a clear understanding of who has money and who hasn't. The problem is that if the litigant ends up engaging with a funder who runs out of cash he can end up paddling down the creek without his paddle.'

Amey is concerned that there are a number of names on the [Litigation Funding](#) table that 'wouldn't necessarily be able to commit in the long-term to large-scale litigation'. 'The potential awards of these big cases are so enticing. You can see that it would be tempting for a funder that hasn't got the money to sign up.' He also recognises that too strict capital adequacy requirements could 'damage the market' itself.

He acknowledges that Jackson's proposal to remove the [Arkin](#) cap is both logical and 'difficult'. 'It does mean that any funder has unlimited potential exposure and so they have to reserve not just what they need for their own side's costs; but also factor in for a potential unlimited third-party costs order. The problem is that's going to restrict the number of funders coming into the market.' Although Amey adds that it might well be better to restrict the market 'to a very small handful of credible funders with a significant amount of cash'. Amey reports that most of the leading players have 'always assumed that the [Arkin](#) judgment might not stand and the cap might not be the extent of their liability'.

Views from abroad: South Africa

‘It is really an emerging industry here,’ begins Martin Bauwens, managing director of Litigation Funding SA based in Johannesburg. In fact, he points out that there is only one major case in South Africa known as ‘the potato case’. In *PricewaterhouseCoopers Inc and others v National Potato Co-operative Ltd* [2004] (6) SA 66, the Supreme Court of Appeal of South Africa held that the need for the rules of maintenance and champerty had (in Bauwens’ words) ‘diminished, if not entirely disappeared’ as a result of the right of access to justice enshrined in the Constitution of South Africa, section 34, and the Contingency Fees Act 1997 which made speculative litigation possible by permitting ‘no win, no fee’ agreements. ‘Since 2004 the Supreme Court has fully endorsed TPF provided it is a *bona fide* case,’ explains Bauwens. ‘And so if the claimant isn’t just being funded in order to harass somebody then it is fine.’ He points out that there have been two further rulings in the same case further bolstering the infant market – the first saying that the funded claimant should not be considered a lesser breed of claimant in 2009, and the second saying that the funder is ‘a party and therefore liable for costs including security for costs’ earlier this year.

Bauwens believes that the market could be driven by the resistance to ‘no win, no fee’. ‘In South Africa CFAs aren’t popular amongst lawyers,’ he says. ‘They just want to be paid. They do not want to take the risk.’ He is currently negotiating agreements to co-fund cases with international funders ‘where they have deeper pockets and they are more aware of the concept of litigation funding’.

Litigation Funding SA has fielded a lot of inquiries; however ‘it has been difficult in terms of taking a case on because most claimants overestimate the merits of the case or overestimate the value of the case’. ‘That has been our initial experience,’ he adds.

Martin Bauwens reflects that access to justice has a special resonance in South Africa. As he puts on a continent like Africa ‘where access to water and electricity is already a problem’ people understand the importance of access to justice.

Final thoughts

This report draws on new interviews with leading players in the litigation funding market including many of the major funders, leading litigators, legal insurance companies as well as other commentators. The third party litigation funding industry is still very much in its infancy and the changing regulatory landscape flowing from the *Jackson* review as well as the seismic changes to the profession under the Legal Services Act will determine its significance in the legal services landscape.

We flag up the following issues as critical to its development:

- **A growing profile within the legal profession...** The success or not of third-party litigation funding depends upon the degree to which it is embraced by the legal profession. The industry's biggest enemy is the lack of awareness, as one of the leading funders readily acknowledges in our report.
- **A growing profile within the financial community...** For all the talk of litigation funding as an emerging 'asset class', investors have yet to be convinced that it is going to be a compelling alternative investment.
- **The Jackson three...** It remains to be seen how a regime of voluntary self-regulation can deal with Lord Justice Jackson's big three issues (capital adequacy; adverse costs; and termination).
- **A different model...** much of the debate around third-party litigation funding and indeed the *Jackson* review chapter on the subject relates to commercial claims. It seems inevitable that the market will gravitate towards consumer claims and the model of third-party litigation (in particular when combined with alternative business structures under the Legal Services Act) could lead to a very different model of litigation funding.

For further information please contact:

Roshan Khan
Fox Williams LLP
Tel: +44 (0)20 7614 2638
rkhan@foxwilliams.com

Gus Sellitto
Jures
Tel: +44 (0)7966 444131
gus@jures.co.uk



foxwilliams

www.foxwilliams.com



www.jures.co.uk