“Blue on Blue” Litigation:

When the Funder and the Funded Fall Out

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The significant changes which the advent of third party funding of commercial litigation has brought to the London litigation scene – both in court and arbitration – are undeniable. In many ways, litigation funding has been the most significant change in the commercial litigation environment since I began practise in the late 1980s. Our collective journey “From Barretry, Maintenance and Champerty to Litigation Funding” was traced by Lord Neuberger in a 2013 lecture which in many ways marked the coming of age of litigation funding in this jurisdiction,[1] and the intervening decade has seen the UK litigation funding growing at a speed which few can have anticipated even then. It was estimated in 2022 that UK litigation funders held “war chests” of £2 billion, compared £1.3 billion in 2020[2] and £230m when Lord Neuberger confirmed the arrival of the litigation funding in the legal mainstream.[3] Figures for the US market are even more striking. In 2022, litigation funding investment amounted to US$13 billion, and 41% of civil legal actions were funded, with a projected market size of $57.2 billion by 2035.[4]

The third party litigation funding industry has facilitated litigation which might not otherwise have made it to the courts, and thereby provided access to justice for those otherwise unable or unwilling to meet the costs of an endeavour famously compared by Sir James Matthew to a stay at the Ritz Hotel.[5] Not all of these cases proved worthy of the time and funding devoted to them,[6] but we should remember that it was litigation funding which made the Post Office Horizon proceedings possible, thereby helping to uncover what may well be the most serious miscarriage of justice seen in this jurisdiction.[7]

We have seen a particular impact of litigation funding in class competition claims, ESG litigation and investment treaty arbitrations, among other categories of commercial dispute. This talk looks at another area of litigation which third party funding has brought into existence – cases in which the funder and the funded party end up in dispute.

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[1] Lord Neuberger, “From Barretry, Maintenance and Champerty to Litigation Funding”, Harbour Litigation Funding First Annual Lecture, Gray’s Inn, 8 May 2013.
[2] *The Legal 500: Litigation Funding – the UK and US Rankings* (2023).
[3] https://www.rpc.co.uk/press-and-media/litigation-funders-backing-class-action-lawsuits-as-they-put-22bn-war-chests-to-work/
[4] Research Nester, *Litigation Funding Investment Market by Size and Share* report 7 August 2023.
[5] Tracking this quote to its reputed origins is very difficult, but it appears as a secondary reference in RE Megarry, *Miscellany-at-Law* (1955).
[6] *Excalibur Ventures llc v Texas Keystone Inc (No 20* [2016] EWCA Civ 1144, [7], the funded claim meeting with “a resounding, indeed catastrophic, defeat.”
[7] Nick Wallis, *The Great Post Office Scandal: The Fight to Expose a Multimillion Pound IT Disaster Which Put Innocent People in Jail* (2022).

The relationships brought into existence by the third party funding of litigation are many and varied:

- The funder is an investor, who will generally have reached that decision to invest in reliance on information emanating from the funded party. For that reason, the agreement between the funder and the funded party is often termed "an Investment Agreement", and includes many of the terms which an investment agreement will contain, for example the funder's commitment to provide up to the specified amount of funds by reference to an agreed budget and timeline; representations and warranties and reporting and disclosure obligations on the part of the funded party; and rights of termination on the part of the funder for cause or in the event of a material adverse change in the prognosis of the litigation.

- The funder and the funded party will share a common interest in receiving legal advice from the appointed solicitors, and accessing documents prepared for the purpose of the funded litigation such as drafts of witness statement and expert reports, while ensuring that material remains confidential from others, and the contract between the parties will usually address this issue.

- The funded party – and the agreements will usually go out of their way to make this clear – will be engaged in the conduct of litigation, but the funder's interest in how that litigation is conducted will be reflected in a number of clauses intended to give it a position of influence, but stop short of making it the effective litigating party. Thus there may well be an obligation on the part of the funded party to give notice before certain steps are taken; to act reasonably and on legal advice in the conduct of the litigation; limiting its right to change its legal representatives and obliging it to report on offers of settlement received. Failure to follow legal advice may trigger an obligation by the funded party to repay the funding, or allow the funder to recover an amount calculated by reference to the value of a settlement offer which the funded party was advised to accept, but decided to reject. The funded party may even agree to be bound by advice as to whether or not to accept a settlement offer provided by an independent KC.[8]

- And finally, the funded party and the funder may stand in the position of putative trustee and beneficiary, with an agreement intended to ensure that the funder's rights in relation to litigation recoveries can take the form of a proprietary interest in the recovered fund, which is to be distributed in accordance with a contractual waterfall.

All of those legal relationships are ripe for legal disputes, and they are increasingly occupying the courts, and arbitral tribunals as well. In the course of this talk, I am going to look at some of the issues which have arisen, and how they have been resolved.

What happens when the Approved Budget is not enough?

Budgeting for the costs of commercial litigation is not an exact science. Some doubt it is a science at all, but something closer to a finger in the air exercise. Rather like fitting a kitchen, the scope for error seems to operate only in one direction. Nonetheless, most litigation

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[8] Akin to the now-KC clause often found in professional indemnity policies: see *West Wake Price & Co v Ching* [1957] 1 WLR 45.

funding agreements involve a commitment by the funder which is capped by reference to a budget prepared at the outset. What happens if the budget runs out before settlement or judgment?

Must the funded party pay?

One possibility is that the funded party is obliged to provide the extra. That was the argument advanced by the funder in *Harbour Fund III LP v Kazakhstan Kagazy Plc*,[9] relying upon obligations in clause 8.1 of the Investment Agreement requiring the funded party to instruct the Legal Representatives "to conduct the Proceedings reasonably and with due regard to the overriding objective", "to take all commercially reasonable steps to avoid or minimise Adverse Costs," and, perhaps promisingly in sub-clause (e), "to devote adequate resources in terms of finance and manpower and otherwise act in good faith to enable the Legal Representatives to conduct the Proceedings efficiently." However, Moulder J held that clause 8.1 had to be interpreted in the context of a clause which was generally concerned with the giving of instructions and information to the legal advisers, and was an unlikely contractual location for a clause imposing a significant and open-ended funding obligation.[10] Never underestimate the importance of contractual geography.

Further, an obligation on the part of the funded party to fund the proceedings when the Agreed Budget proved to be inadequate does not sit easily with the purpose or structure of a litigation funding agreement – the funding party is seeking third party funding precisely because it either does not want or is unable to fund the litigation. While the contribution of the funder is returned manyfold in the event of success, and the right to that return sits on top of the distribution waterfall, investment agreements are unlikely to accord similar privileges to the financial contribution of the funding party. Absent clear language, it is unlikely that an investment agreement will give rise to such an obligation.

The position if the funder choses to increase its funding

The amount of the funder's legal commitment will be capped as a matter of contract. But the funder may choose to provide additional funding rather than see the proceedings fall over at the final hurdle. Where this takes the form of a negotiated increase to the Agreed Budget, no difficulty arises – the Investment Agreement will function as anticipated, with the funder benefiting from a return on its greater investment. What, however, of the position where no agreement can be reached – perhaps because the funded party is unwilling to give up any more of its winnings, or because it has passed into different hands, who are less keen on the litigation?

The funder's rights in this scenario will depend on the terms of the Investment Agreement. In the *Kazakhstan Kagazy* case, Harbour had advanced additional funding beyond the Agreed Budget, and the variations to the Investment Agreement which had been entered into to address the increased contribution were held not to be binding, as they were concluded with the original management after liquidators had been appointed. Harbour argued that these additional amounts fell within the definition of "Claimants' legal costs": the "amount of all costs and expenses (including legal fees) incurred … in connection with the enforcement of, or the preservation of any rights under, this Agreement." However, the judge held that this

[9] *Harbour Fund III LP v Kazakhstan Kagazy Plc* [2021] EWHC 1128 (Comm).
[10] *Harbour Fund III LP v Kazakhstan Kagazy Plc* [2021] EWHC 1128 (Comm), [179].

definition had to be construed narrowly, and that it did not extend to allowing the funder to step in and fund the proceedings, and then treat amounts in excess of the budget as attracting the benefit of the multiplier on the investment amount and the waterfall priority which the Investment Agreement conferred.[11]

Non-contractual claims?

If the Investment Agreement does not apply to any additional contribution, are there non-contractual claims the funder can fall back on? In *Re Smith*,[12] I had to consider an argument by a funder that if the investment agreement did not apply, it should be granted an equitable allowance in respect of the amount funded on the basis that the funding had helped secure an asset in the form of the litigation recoveries. The funder – once again Harbour – sought to draw an analogy with the allowance recognised in *Berkeley Applegate (Investment Consultants) (No 2)*,[13] in which Edward Nugee QC permitted a liquidator to recover fees incurred in collecting in and safeguarding assets from those beneficially entitled to them, where "he has added to the estate in the sense of carrying out work which was necessary before the estate could be realised for the benefit of the investors" and "the beneficial interests of the investors could not have been established without some such investigation as has been carried out by the liquidator". However, I was not persuaded that the jurisdiction could be invoked. I rejected the argument that "Harbour is entitled to an allowance to be enforced by way of granting it an interest in any property recovered to any extent greater than the rights it obtained as a matter of contract, or which follow in law from any interference with those rights", and also the argument that "it is appropriate to extend the categories of person who can seek Berkeley Applegate relief from office-holders or those exercising some form of management or stewardship over other people's assets to a commercial funder of litigation (who enjoys personal rights against those whose litigation it has funded)."[14]

In the *Kazakh Kargazy* case, an attempt to recover the additional amounts spent via a claim in unjust enrichment also failed.[15] The funder, acting to preserve the value of its own rights, incurred expenses which also benefited the funded party further down the waterfall. English law does not afford a remedy for incidentally conferred benefits of this kind. The approach is well-captured in a comment in a Scottish case, Lord President Dunedin noting:[16]

> "One man heats his house and his neighbours gets a great deal of benefit. It is absurd to suppose that the person who has heated his house can go to his neighbour and say – 'Give me so much for my coal bill because you have been warmed by what I had done, and I did not intend to give you a present of it."

Or, perhaps closer to the issue in hand, where a life insurance policy had been repeatedly mortgaged in *Falcke v Scottish Imperial Insurance Co*, the owner of the ultimate equity of redemption who paid a premium to avoid it lapsing could not claim a contribution from those with higher rights, Bowen LJ remarking that "liabilities are not to be forced upon people behind their backs any more than you can confer a benefit on a man against his will".[17]

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[11] *Harbour Fund III LP v Kazakhstan Kagazy Plc* [2021] EWHC 1128 (Comm), [183], [191].
[12] *Re Smith* [2021] EWHC 1272 (Comm).
[13] *Berkeley Applegate (Investment Consultants) (No 2)* [1989] 1 Ch 32, 51.
[14] *Re Smith* [2021] EWHC 1272 (Comm), [480].
[15] *Harbour Fund III LP v Kazakhstan Kagazy Plc* [2021] EWHC 1128 (Comm), [271]-[272],
[16] *Edinburgh and District Tramways Ltd v Courtenay* 1909 SC 99, 105.
[17] *Falcke v Scottish Imperial Insurance Co* (1886) 24 Ch D 234, 248.

The position after judgment

Obtaining a judgment is, alas, only part of the story. As Lord Bingham observed in *Société Eram Shipping Co Ltd v Cie Internationale de Navigationi*:

> "As many a claimant has learned to its cost, it is one thing to recover a favourable judgment; it may prove quite another to enforce it against an unscrupulous defendant, But an unenforceable judgment is at best valueless, at worst a source of additional loss".[18]

The Investment Agreement may impose an obligation on the funded party to take enforcement steps, and the funder may have "step-in" rights to take over enforcement if it does not do so. While the "step in" right may provide for a right of reimbursement, it does not automatically follow that costs incurred in enforcement benefit from the stipulated investment return, although they may be payable from the amounts recovered before any distribution to the funded party. On the wording before her, Moulder J rejected the suggestion that enforcement costs met by the funder benefited from the multiplier, stating:

> "HF3 takes the risk of funding proceedings and if such proceedings are successful, HF3 is entitled both to the reimbursement of the amounts expended and a return on that investment to reflect the risk that they have taken in funding the proceedings. The risk that HF3 takes and for which it receives a return is the pursuit of the claim in the proceedings. Once judgment has been obtained and the proceedings move to the enforcement stage, the proceedings have in my view been successful even though there may be associated risks with enforcement. In my view therefore the interpretation which would be consistent with the commercial rationale is that whilst HF3 is entitled to be repaid Enforcement Costs where they are incurred pursuant to Clause 10.3, it was not intended that they should receive a return on those expenses."[19]

Funded parties who wish to keep all the proceeds

Funder-funded disputes which arise from the fact that the funded party wishes to keep the proceeds of the litigation, and not pay a sizeable chunk to the funder, have been occupying the court for a while, principally in the context of applications for injunctions. That was the position in *Therium (UK) Holdings Limited v Brooke*,[20] in which Mr Brooke, the principal of the litigation vehicle, had arranged for the settlement proceeds to be paid to him directly, in breach of a term in the funding agreement requiring them to be paid into the solicitor's client account. Therium obtained a panoply of injunctive relief, including various disclosure orders, which were not complied with, and in August 2016, they applied to commit Mr Brooke for contempt. Mr Brooke did not attend that hearing and was found to have been in contempt in a number of respects.

However, before sentence was imposed, he gave an interview to *The Sunday Times*. The article described Mr Brooke as "a man on the run", who had been interviewed "in the courtyard of a five-star hotel somewhere in Europe." In the interview Mr Brooke explained

[18] *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2004] 1 AC 260, [10].
[19] *Harbour Fund III LP v Kazakhstan Kagazy Plc* [2021] EWHC 1128 (Comm), [203].
[20] *Therium (UK) Holdings Limited v Brooke* [2016] EWHC 2421 (Comm).

how he had “spent the past five months dodging a litigation funder, having slipped out of the UK with his long-term girlfriend.” Brooke told the reporter that “for €4m I can take a few problems” and that “Therium 'will need a good bloodhound' to find the millions”, adding “with a smile. 'Or Sherlock Holmes.'” Inevitably, the article was referred to Mr Justice Popplewell at the sentencing hearing which, once again, Mr Brooke did not attend. Mr Brooke was sentenced to 21 months’ imprisonment.[21]

A similar issue arose before me in *Re Smith*, in which it was argued that the trust which the Investment Agreement had been intended to create had not come into existence, because the proceeds of a litigation settlement had been paid to someone other than the funded parties – in that case a Marshall Islands company.[22] I now know that the equitable doctrine of Marshalling refers to the transfer of trust assets to a Marshall Islands company In the event, I held that the Marshall Islands company had received the proceeds on bare trust for the funded parties, and that the equitable interest of the funded parties was itself subject to the trust which the investment agreement provided for.[23] I also suggested that, even if this had not been the case, the funder may well have had a proprietary remedy, pointing to cases in which solicitors’ liens on proceeds had been held to benefit from “the protection of equity not simply in respect of an asset received by its client, but also when there is an identifiable ‘fund in sight’ which would be subject to the lien once it reached the client's hands but which is diverted from the client in an attempt to defeat the lien.”[24] I noted that “it is not necessary to determine whether any similar relief would have been available in respect of a collusive arrangement intended to defeat the Harbour Trust, but the point is clearly seriously arguable.”

The terms of investment and funding agreements will generally contain numerous provisions which seek to accord contractual and equitable protection to the funder’s economic interest in litigation recoveries. However, a recent major development in the law relating to funded litigation has opened up a new front in disputes between the funder and the funded party in relation to litigation proceeds. I refer, of course, to the decision of the Supreme Court in *R (PACCAR) v Competition Appeal Tribunal*[25] which held that third party litigation funders whose remuneration was by way of a share of damages recovered were providing “claims management services” within s.58AA(3) of the Courts and Legal Services Act 1990, with the result that agreements which do not satisfy the requirements of s.58AA(4) of the Act are unenforceable. Among the many hares set running by *PACCAR* is whether any parts of a funding agreement which fell foul of a.58AA(3), including those intended to create a proprietary interest for the funder, remained enforceable. A prominent issue in that debate is that status of a previous decision of the Court of Appeal – *Zuberi v Lexlaw Ltd*.[26] In that case a Damages-Based Agreement which was contrary to Regulation 4 of the Damages-Based Agreements Regulations 2013 included a provision requiring the client to pay costs and expenses in the event of early termination of the funding agreement. The Court held that the invalidity of the DBA aspects of the agreement did not bring down the termination clause. Only those parts of the agreement which dealt with the payment out of recoveries amounted to a DBA for the purposes of the Regulations. Arguments have also been raised as to the

[21] *Therium (UK) Holdings Limited v Brooke* [2016] EWHC 2477 (Comm).
[22] *Re Smith* [2021] EWHC 1272 (Comm).
[23] *Re Smith* [2021] EWHC 1272 (Comm), [168].
[24] *Addleshaw Goddard LLP v Wood* [2015] EWHC B12 (Costs), [99-122]; *Re Fuld* [1968] P 727, 736; *Clifford Harris & Co v Solland International Ltd* [2005] EWHC 141 (Ch), [21(iv].
[25] *R (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28. For discussion, before the Supreme Court decision, of the range of issues under discussion see Rachael Mulheron, “The Funding of the United Kingdom’s Class Action at a Cross-Roads” (2023) King’s Law Journal, https://doi.org/10.1080/09615768.2022.2161350
[26] *Zuberi v Lexlaw Ltd* [2021] EWCA Civ16.

severability of any unenforceable clauses from the remainder of the contract, an issue in which the Court of Appeal's decision in *Zuberi* has been contrasted with that in *Diag Human v Volterra Fietta*.[27]

Now interesting as all of these issues are, they are, I am afraid, a little too topical for a judicial extra-curricular talk. However, those issues formed the backdrop to an injunction application in the Commercial Court in *Therium Litigation Funding A IC v Bugsby Property LLC*.[28] In that case, there was an arbitration agreement in the funding agreement, and the funder was seeking an injunction under s.44 of the Arbitration Act 1996 in support of its proprietary claim, to be met with a response that, post-*PACCAR*, the agreement was unenforceable. Mr Justice Jacobs held that both the arguments that only some of the provisions of the funding agreement fell within s.58AA, and that any invalid provisions were severable, were seriously arguable, but their ultimate merits were matters for the arbitral tribunal. That was also true of the argument that any proprietary injunctive relief should be limited to the extent of the funder's potential interest under the trust. Clearly at some point soon, it is probable that a court will have to determine these issues on a final basis.

The trust consequences of the funding agreement

Most funding agreements contain provisions intended to create a trust over the litigation proceeds, the purpose being to provide the funder with some form of proprietary protection in relation to the recovered fund. However, to what extent does that trust engage the full range of trustees' powers and duties? That was an issue which came before me in another instalment of the Smith litigation, *Re Smith*.[29]

In that case, the funding agreement was entered into with two natural persons and a Jersey company – Orb Arl or "Orb" – who were claimants in proposed legal proceedings against Mr Andrew Ruhan. Orb became en désastre (effectively entering a form of insolvent liquidation) under Jersey law, and ceased to be able to act as a trustee .

At a subsequent stage of the litigation, the other funded parties, in their capacities as trustees and potential beneficiaries of the trust created by the funding agreement, sought relief from court:

- seeking to confirm that they had validly exercised the power to appoint a replacement trustee under s.36(1) of the Trustee Act 1925, the replacement trustee being a professional trustee whose remuneration would have been an expense to be met from trust assets;

- asking for a declaration that it formed part of the functions of the trustees (i.e. the funded claimants) to exercise "those powers usually attributable to trustees under the general law", including those arising under the Trustee Acts 1925 and 2000 and the Trusts of Land and Appointment of Trustees Act 1996;

[27] *Diag Human v Volterra Fietta* [2023] EWCA Civ 1107.
[28] *Therium Litigation Funding AIC v Bugsby Property LLC* [2023] EWHC 2627 (Comm).
[29] *Re Smith* [2022] EWHC 3053 (Comm), [31]-[33].

- asking for a declaration that the trustees were entitled to an indemnity from the trust fund for their liabilities, costs and expenses properly incurred and a lien over trust assets.

The trustees contended that their duties included commencing proceedings to secure or collect trust assets, effectively entitling them to conduct litigation at the expense of the funds recovered to date, with a view to recovering more.

My first thought was, "what is this doing in front of me?", and I began my judgment by noting:

"In the preface to the fourth edition of *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* (2002), the editors suggested of one jurisdiction that the prospect of "any principled development of equitable principles seems remote", a state of affairs they sought to attribute to the "misguided endeavours" of one judge. They observed:
'That one man could, in a few years, cause such destruction exposes the fragility of contemporary legal systems'.

This is now the fourth occasion in this litigation in which, as a commercial lawyer sitting in the Commercial Court, I have found myself neck-deep in the doctrines and principles of trusts law and equity, and I am concerned that my own endeavours (misguided or otherwise) may be provoking a similar reaction."[30]

I was unpersuaded by the trustees' arguments, noting that "at first sight, the trust created by the Harbour [Investment Agreement] appears to be of the most limited kind, its purpose to provide some form of security interest for Harbour in relation to the amounts recovered through the funded litigation."

I noted that the trustees did not hold the funded causes of action on trust (they remained free to pursue them, or not), merely any proceeds received, and that Harbour's funding obligations were limited to the amounts in the "Agreed Budget and Timeline" for the relevant stage of the Proceedings and in total. For the trustees to have a power and duty to take steps to "get in" trust property, and the right without Harbour's consent to use trust funds to do so would be fundamentally incompatible with the nature of the bargain which the funding agreement represents, both in relation to the funder and the funded parties:

- It would replace the claimants' absolute entitlement to pursue Proceedings "in relation to the Causes of Action" with a fiduciary power (with concomitant fiduciary obligations) to pursue claims to assets.

- It would replace the cap on Harbour's financial exposure in the form of the "Agreed Timeline and Budget" with a further obligation to provide funding from assets to which Harbour had the first claim.

- It would involve the application of funds held on the terms of the trust otherwise than in accordance with the distribution waterfall.

[30] *Re Smith* [2022] EWHC 3053 (Comm), [1]-[2].

- It would take the decision as to which litigation Harbour should fund out of the hands of Harbour and its investment committee and place it into the hands of the trustees and, in the event directions were sought, the court.

The issue as to whether the existing trustees had power to appoint a replacement was more difficult.[31] Section 36 of the Trustee Act 1925 provides:

“Where a trustee … is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is an infant, then, (a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or (b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee; may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, or being an infant as aforesaid".

Harbour had not identified themselves as “person or persons nominated for the purpose of appointing new trustees” in the investment agreement – something the drafters of funding agreements might wish to address - leaving the surviving two trustees to claim that they were permitted by s.36(b) to appoint another trustee. I concluded that that power of appointment was impliedly excluded because the existing trustees held their offices only because they were the parties bringing the funded claims, rather than because it was intended that they would have powers of stewardship and management. They stood to benefit from any recoveries once the prior claims under the Investment Agreement had been discharged but were to receive no remuneration for the discharge of their role as trustees and there was no provision for them to have a right of indemnity from the trust fund. The commercial deal on the basis of which they had assumed the role of trustees had granted various contractual and security rights to Harbour. The appointment of a professional trustee who was not in contractual privity with Harbour “would involve a very significant departure” from that state of affairs.

The relationship between the funder, the funded party and the legal representatives

It has been noted that there are two models of relationship between claim holder and litigation funder.[32] The first involves delegation of complete control of the claim to the funder, an approach which bears some similarities to the position where an indemnifying party is able to pursue a claim in the name of the indemnified party through rights of subrogation, with the funder retaining and instructing the legal representative charged with pursuit of the claim. In this context, the funder will be the legal representative’s client, and the legal representative will generally owe duties to the funder and the funded party in relation to the conduct of the litigation.[33]

[31] *Re Smith* [2022[EWHC 3053 (Comm), [51]-[54].
[32] Vicky Waye, “Conflicts of Interests between Claimholders, Lawyers and Litigation Entrepreneurs” (2008) 19Bond Law Review225.
[33] See by analogy *Groom v Crocker* [1939] 1 KB 194 and *K/S Merc-Scandia XXXXII v Lloyd’s Underwriters* [2001] 2Lloyd’s Rep 563, 566.

The second, and dominant, model, is one under which the claim holder retains control of the conduct of the claim, and directly instructs and retains the legal representative. In this context, the argument that the legal adviser owes duties to the funder is much more challenging. In *John Hall v Saunders Law Limited & Others* the funder complained that the solicitor had failed to pass on pessimistic views expressed by counsel as to the prospects of success. Clearly the suggestion that any counsel would ever give pessimistic advice is wholly implausible. In the absence of an express contractual duty, the claim failed. There was no basis for implying such duties because the funding agreement did "not lack commercial or practical coherence without them", not least because the funded party's reporting obligations "already provide protection to the Funder."[34] Further, absent a contractual duty, there could not realistically be a duty in tort or a fiduciary duty to keep the funder informed.

Complaints about the level of settlement

There are those who suggest if we want to know what kinds of litigation will be occupying the courts in 5-10 years' time, we should look at what is happening in the US now. If so, the litigation which flared up, before settling, between Sysco and Burford Capital may be instructive. Burford provided $140m of funding for a portfolio of anti-trust or competition claims. Sysco required Burford's consent before settling those claims. Sysco was later to challenge that settlement veto on public policy grounds, claiming that Burford was forcing it to continue litigating against its will. Burford obtained an injunction from an LCIA arbitral tribunal to prevent Sysco settling claims for what Burford alleged was a significant undervalue,[35] which Sysco applied to vacate.[36] In its attempt to do so, it was supported by the US Chamber of Commerce whose *amicus* filing involved a wholesale attach on the litigation funding industry.

The dispute illustrates the disputes which may arise where the funder is given either a veto on any settlement of the litigation, or the right to settle without the funded party's approval, or indeed directly to control the litigation. The Code of Conduct of the Association of Litigation Funders of England and Wales ("the ALF") seeks to anticipate and avoid any such difficulties, members agreeing "not to seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder".[37] The Code requires litigation funding agreements to "state whether (and if so, how) the Funder … may …. provide input to the Funder Party's decisions in relation to settlement."[38]

The other potential avenue for disputes is where the litigation funding agreement gives the funder the right to terminate the funding if it forms certain views. For example, the funder may be permitted to withdraw funding if the funder concludes that there has been a material adverse decline in the prospects of success or the value of the claim, or there has been an increase in the litigation budget. The ALF provides for litigation funding agreements to include rights of termination where the funder "reasonably ceases to be satisfied about the merits of the dispute", "reasonably believes that the dispute is no longer commercially

[34] *Hall v Saunders Ltd* [2020] EWHC 404 (Comm), [49]-[50].
[35] *Glaz LLC, Posen Investments LP and Kenosha Investments v Sysco Corporation*, LCIA No 226508.
[36] *Sysco Corporation v Glaz LLC, Posen Investments LP and Kenosha Investments LP* Case 1:23-cv-01451.
[37] Paragraph 9.3 of the Code of Conduct of the Association of Litigation Funders (2018) https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf
[38] Paragraph 10.1.

viable" and "reasonably believes that there has been a material breach of the LFA".[39] The litigation funding agreement is not to contain a discretionary right to terminate the litigation funding agreement in other circumstances.[40] However, the resolution of disputes of this kind will usually be subject to independent assessment by an independent KC to be nominated by the chair of the Bar Council, with the KC's opinion to be binding[41].

That process may well raise a number of interesting questions - whether the issue for the assessor is whether the view the funder had formed was one reasonably open to it (which would engage the legal principles governing the exercise of contractual discretions) or whether the assessor must form the same view; and, where the funder acts on independent legal advice in reaching its view, whether the reasonable selection of the adviser is sufficient, or whether the opinion obtained must itself be a reasonable one. The court applied the latter test, without the point being argued, in *Harcus Sinclair v Buttonwood Legal Capital Limited*[42] when the funding was repayable if "in the reasonable opinion of the Lender the Borrower's prospects of success in the Proceedings are 60% or less."

The issues which can arise when the funded party enters into a settlement which the funder regards as adverse to its interests featured in *Simon v Simon and Integro Funding Limited*,[43] a case which, in Lady Justice King's words, arose "out of long, bitter and extortionately expensive divorce proceedings" and gave rise to a "procedural quagmire." For those of you who remember the 1989 divorce film "The War of the Roses", starring Kathleen Turner, Michael Douglas and Danny DeVito, imagine that case with a funder thrown in.

In her divorce proceedings, Mrs Simon was funded to the tune of £1m by a loan from Integro, as security for that funding she had assigned her right to any financial relief the court granted. In the end, she reached an agreement with Mr Simon which was recorded in the form of a consent order, by which Mrs Simon was given a life interest in a property but no cash to repay Integro. Integro complained that the effect of the order was to deprive them of payment of the sums to which they were contractually entitled. Integro applied to set the consent order aside and issued civil claims alleging repudiatory breach on the part of the wife, procuring a breach of contract by the husband, procuring a court order by fraud and unlawful means conspiracy, all arising from the consent order

Integro applied in the proceedings for disclosure of material and information relating to the settlement negotiations which had led to the consent order,[44] contending that the settlement which resulted from those negotiations was "deliberately structured by the parties so as to leave the wife with no assets or entitlement to property or liquid funds from which her debt … could be met.". It sought disclosure in support of various intended claims, including a claim to set aside the consent order under s.423 of the Insolvency Act 1986. Referring to the public policy which favoured litigants having access to the funds necessary to pursue litigation on a level playing-field, Mrs Justice Roberts held that Integro had been entitled to seek party status in the litigation, but rejected its claim for disclosure of privileged material, noting that "there is already a wealth of material open to the court … (including the specific

[39] Paragraph 11.
[40] Paragraph 12.
[41] Paragraph 13.
[42] *Harcus Sinclar v Buttonwood Legal Capital Limited* [2013] EWHC 1193 (Ch), [1].
[43] *Simon v Simon and Integrate Funding Ltd* [2023] EWCA Civ 1048. See David Capper, "Third Party Funder's Rights in Financial Provision Proceedings" (2024) 140 LQR 187.
[44] *LS v PS* [2021] EWFC 108.

terms of settlement reached) which is either a matter of record or which is available as part of the evidence which has already been collected for the purposes of disclosure in the financial remedy proceedings."

The husband eventually agreed to the setting aside of the consent order, and directions were given for a financial remedy trial with Integro as a party. However, the husband argued that the court should make a fresh order in the terms of the consent order, and that the wife should not be forced to litigate against her will to advance the funder's interests. When the judge rejected this contention he appealed.

The Court of Appeal held that the judge had fallen into error in giving directions for a financial remedies hearing, rather than convening a case management conference at which Mrs Simon could explain her position, noting that "if the wife made clear that she did not wish to pursue her financial remedy application, and the husband did not seek the continuation of the proceedings, a court cannot require her to do so."[45] The Court acknowledged the important role which litigation funders play in facilitating access to justice in all kinds of hearings. That meant that the interests of funders should be taken into account when deciding whether or not to approve a consent order. King LJ observed of funders who made litigation loans:

> "In my view, those who provide such loans are entitled to expect some measure of protection from the improper manipulation of the outcome of the proceedings by the parties in order to avoid repayment of the loan."[46]

However, it would be a rare case in which they would be given party status, not least because the nature of their interests will ordinarily be apparent without taking this course. Intervention in the proceedings would be appropriate where the lender alleged that the debt was incurred exclusively to enable the recipient to litigate, and they had become aware of the parties taking steps to conclude a settlement that has the appearance of defeating its ability to recover its loan. Even here, the lender's participation in the proceedings should usually be limited to something like a preliminary finding of fact hearing, with no need for full disclosure to the lender, or for the lender to have the right to file questionnaires, cross-examine the parties, or make submissions as to the appropriate terms of settlement.

Conclusion

In 2013, David Donaldson KC referred to disputes between funders and funded parties as "a new type of satellite litigation, of which, given recent developments in the funding of large commercial claims, the courts appear likely to see more".[47] And so it has proved. But, so far as the courts are concerned at least, it may be that "blue on blue" litigation has already peaked. This is because litigation funding agreements increasingly provide for disputes to be determined in arbitration. As litigation funding agreements are entered into against a backdrop of current or pending litigation, it is no surprise that a particular value is attached to preserving the confidentiality of any dispute. For example the public determination of whether a litigation funder had reasonable grounds for terminating a funding agreement due to an adverse change in the perceived merits of the claim would risk seriously undermining the prospects of the funded party in the litigation. Further, as noted, many disputes – for

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[45] *Simon v Simon and Integrate Funding Ltd* [2023] EWCA Civ 1048, [61].
[46] *Simon v Simon and Integrate Funding Ltd* [2023] EWCA Civ 1048, [105]-[106].
[47] *Harcus Sinclar v Buttonwood Legal Capital Limited* [2013] EWHC 1193 (Ch), [37]-[38].

example as to whether a settlement should be accepted, or whether the funding agreement can be terminated – will be subject to determination by an independent KC. Nonetheless, the funding of litigation is a matter of considerable public interest, and has significant implications for court process. I hope there will remain scope for the court to offer its perspective on how the legal principles applicable in this vital area operate.

Going forward, we can expect "blue on blue" disputes to reach the court through applications for injunctive relief under s.44 of the Arbitration Act 1996, or, if the right of appeal has not been excluded (and it is to be hoped it will not be), by appeals on points of law which are able to get through the strict filter of s.69 of the 1996 Act. But while these disputes may involve less work for judges, they are likely to remain an important work stream for litigators. So that's alright then.

Thank you.