Litigation Funding

Contributing editors
Steven Friel and Jonathan Barnes

2017

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Litigation Funding 2017

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First edition

Getting the Deal Through is delighted to publish the first edition of *Litigation Funding*, which is available in print, as an e-Book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print and online. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford Litigation Funding, for their assistance in devising and editing this volume.

GETTING THE DEAL THROUGH

London
November 2016

Cayman Islands

Guy Manning and Kirsten Houghton
Campbells

1 Is third-party litigation funding permitted?

We should first define what we mean by third-party litigation funding. There are three principal forms of agreement for funding litigation: (i) agreements by which a third party advances money to fund the litigation in exchange for a share of any sums awarded (which we will refer to as 'third-party litigation funding'); (ii) contingency fee agreements by which a law firm agrees to conduct a cause of action on terms whereby its remuneration is limited to a share of any proceeds of the claim ('contingency fee agreements'); and (iii) conditional fee agreements by which a law firm agrees to conduct a cause of action on terms whereby its hourly rates are reduced if the claim fails and uplifted if it succeeds ('conditional fee agreements').

We address third-party litigation funding in response to questions 1 to 10. Contingency and conditional fee agreements are addressed separately in question 11.

Third-party litigation funding agreements are not currently permitted in the Cayman Islands, except when the plaintiff (or counterclaimant) is a company in official liquidation. This is because, outside the context of an official liquidation, they are void for illegality on the grounds of maintenance and champerty. Maintenance is the giving of assistance or encouragement to a litigant by someone without an interest in the proceedings or any legally recognised motive. Champerty is a form of maintenance by which assistance is provided in consideration for a share of the proceeds. Champerty and maintenance (which is also a tort) remain offences under the common law of the Cayman Islands, although there have been no prosecutions in the jurisdiction for either offence. This contrasts with the position in England, where both offences were abolished by statute in 1967. See generally in this regard *Quayum v Hexagon Trust Company (Cayman Islands) Limited* [2002 CILR 161].

Third-party litigation funding is, however, common, and has been judicially endorsed on many occasions, in the context of litigation brought by Cayman Islands companies in official liquidation. This is because liquidators have a statutory power to sell the 'fruits of an action' to a third-party funder, and the court has recognised that the exercise of this power constitutes a 'special statutory exemption' conferring immunity on what would otherwise be a prima facie champertous agreement. The same principles should apply to an action brought in Cayman by a foreign company in liquidation where the foreign liquidator or trustee has sold the fruits of the action pursuant to a similar statutory power of sale, although we are not aware of any case in which this issue has been considered by the Cayman court.

The exercise of a liquidator's power to sell the fruits of an action is subject to the approval of the court and to various restrictions.

In particular, it is only possible for a liquidator to enter into a third-party litigation funding agreement in respect of claims that vest in, and are brought in the name of, the company. He or she cannot do so in respect of statutory claims that vest in him as liquidator (such as preference claims), because those claims do not form part of the company's property and any assignment of the liquidator's fiduciary power in that regard would be contrary to Cayman Islands public policy.

Further, the Cayman court will not permit a liquidator to enter into a third-party litigation funding agreement that provides the third party with the right to control or interfere with the litigation. Any such agreement would fall outside the scope of the 'special statutory exemption' and would therefore be void for illegality on the grounds of maintenance and champerty. However, an outright sale of a cause of action by an official liquidator, by way of legal assignment, where the price is expressed to be a percentage of the proceeds of the action, is a valid exercise of the liquidator's statutory power of sale, provided that it is sanctioned by the court. See, generally, in this regard *In the Matter of ICP Strategic Credit Income Fund Limited* [2014 (1) CILR 314].

There have historically been relatively few arbitrations in the Cayman Islands, although the Arbitration Law has recently been re-enacted to encompass the UNCITRAL Model Rules with a view to encouraging it. Accordingly, the question whether the common law principles of maintenance and champerty apply to arbitration proceedings has not been considered by the Cayman court. It is likely, however, that the Cayman court would follow the decision of Sir Richard Scott VC in *Bevan Ashford v. Geoff Yeandle* [1999] 2 Ch 239, in which it was held that the doctrines of maintenance and champerty did apply to arbitration proceedings. In that case, it was held that a conditional fee agreement in relation to arbitration proceedings which would otherwise have been unenforceable would not be declared invalid since the public policy objections to maintenance and champerty had been removed in that jurisdiction. However, in the Cayman Islands, the public policy objection has not yet been overruled by relevant legislation, so it is likely that third-party litigation funding in relation to an arbitration (unless used by a liquidator with court sanction) would be unenforceable. Given the current infrequency of arbitrations in Cayman, we have confined our answers to the following questions to litigation proceedings.

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

There is currently no statutory limit on such fees or interest, nor is there any firm judicial guidance in this regard.

However, as noted above, a liquidator requires the court's sanction to sell the proceeds of a claim pursuant to a third-party litigation funding agreement (see question 1). To obtain that sanction he or she will need to satisfy the court that (among other things) he or she has taken reasonable care to obtain the best price available for the claim in the circumstances (see, for example, *In the Matter of Trident Microsystems (Far East) Limited* [2012 (1) CILR 424]). The court will ordinarily expect the liquidator to have sought funding proposals from the stakeholders in the liquidation, and potentially also from third-party funders, and in so doing to have satisfied himself or herself that the proposed funding terms are the best available in the circumstances. To the extent that there are competing funding proposals, this will necessarily operate to limit the amount of fees and interest which are charged. But even if the proposed funding agreement represents the best or only terms that were offered or that the liquidator was able to negotiate, the approval of the agreement remains a matter for the court's discretion based on the facts and circumstances of the case, and the court may direct the liquidator to explore alternative funding options if it regards the proposed fees or interest as excessive.

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

Not currently, but a draft bill has been circulated in respect of a law to regulate the private funding of litigation (the draft Bill). If a law was enacted in the form of the draft Bill, it would (among other things) repeal any offences under the common law of maintenance and champerty,

and impose (as yet unspecified) limits on the amount payable to a third-party funder.

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

Not currently. The draft Bill proposes that no cause of action may be wholly or partially assigned by the client to the attorney who is acting for him.

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

At present, consideration of third-party funding lies in the hands of the judges, both as a result of the *Quayum* line of cases and, in insolvency proceedings, as a result of section 110(2)(a) of the Companies Law (2016 Revision), which requires official liquidators of a company to obtain the court's approval of any such arrangement undertaken on behalf of the estate.

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

It is very unlikely that the court would sanction a liquidator to enter into a third-party funding agreement on terms that permitted the funder to select counsel. In *ICP Strategic*, it was held that a liquidator must not fetter his or her fiduciary power to control the litigation, and that the court should scrutinise a third-party funding agreement carefully 'to ensure that it does not directly confer upon the funder any right to interfere in the conduct of the litigation or indirectly put the funder in a position in which it will be able, as a practical matter, to exert undue influence or control over the litigation'.

The draft Bill is silent on this matter, but it is possible that, should it come into force, regulations made under it might deal with the issue.

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

Funders would be entitled to attend any hearing in open court. They would usually be permitted to attend hearings in chambers with the consent of the liquidator and the judge, unless, perhaps, the other side objected. A funder would not have standing to appear by counsel at any hearing, save in the context of a costs order being sought against a funder as a non-party (see question 18).

A funder would not be permitted to have any control over a settlement (see question 6), but there is no reason in principle why it could not attend a settlement meeting with the consent of the liquidator and (if necessary) the other parties at the meeting.

8 Do funders have veto rights in respect of settlements?

No; see questions 6 and 7.

9 In what circumstances may a funder terminate funding?

The funder's rights of termination will be a matter of contract to be addressed in the funding agreement. Typically a liquidator would seek to ensure that in the event of termination the funder was committed to provide sufficient funding to meet the company's costs of bringing an end to the proceedings and the amount of any adverse costs orders.

10 In what other ways may funders take an active role in the litigation process?

As outlined above, the role of the funder in the litigation process is currently very circumscribed. This may change if the draft Bill is enacted and regulations brought into force under the proposed new law provide differently.

On a practical level, funding agreements often contain extensive information rights for funders, sometimes including the right to see the liquidator's legal advice on prospective or actual litigation by asserting a common interest privilege. The basis for asserting that type of privilege under Cayman Islands law is, however, narrower than in some other jurisdictions (for example, the United States), and depending on the nature of the information sought to be protected, common interest privilege might not be upheld if challenged on a discovery application brought by an opposing party. This is particularly important to bear in mind in the period leading up to the entry into the funding agreement and, in order to be secure, the third-party funder ought to make its own assessment of the merits of the case, since it is arguable that, until an agreement is reached, the parties are subject to a legal 'conflict of interest', in which case privilege in the liquidator's legal advice may be lost inadvertently.

Where the company in liquidation has multiple claims against one or more defendants, a funding agreement might also give the funder the choice whether to fund a particular piece of litigation, provided that it does not give the funder any rights of control once the litigation has been commenced.

Further, many of the funding agreements sanctioned by the Court are entered into with creditors of the insolvent company, who agree to fund third-party litigation in order to recover assets of the company for distribution to themselves and the other creditors, as well as making a profit (or reducing their losses) through the funding terms. Such funders may have some degree of influence (but not control) over the liquidator and the proceedings in their capacity as creditors (rather than as funders), through the processes of the liquidation committee, creditors' meetings, and their right to make or appear at the hearing of sanction applications with regard to the exercise or proposed exercise of the liquidator's powers (eg, as to the settlement of the litigation).

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

Contingency fee agreements are currently contrary to Cayman Islands public policy and are therefore void and unenforceable. Litigation lawyers in Cayman are therefore not permitted to enter into them. The Grand Court will, however, authorise Cayman Islands liquidators to enter into contingency fee agreements with foreign lawyers, provided that (among other things) contingency fee agreements are enforceable in the foreign jurisdiction where the proceedings are to be brought. See *ICP Strategic Credit*.

Conditional fee agreements have been held by the Grand Court to be permissible, subject to approval by the court in each case, although they remain relatively rare in practice and the Court of Appeal has cast at least some doubt on whether they would be held to be enforceable as between the attorney and the client. In *Quayum*, the Chief Justice applied the following principles when considering whether to approve a conditional fee agreement:

(a) All such proposed arrangements must first receive the sanction of the court to be considered in the context of all the circumstances of the client and of the case.

(b) The court is best placed to consider the reliability and reputation of the attorney, and will do so.

(c) In the present matter and in others, as a matter of discretion, where there is to be an enhanced fee a requirement for submission to taxation on the solicitor and own client basis will be imposed and, if appropriate, a cap may be placed upon the quantum of fees recoverable.

(d) In an appropriate case the court, as a matter of the exercise of its discretion, can disallow the whole or such part, as it sees fit, of any enhanced fee from the amounts which, upon taxation, the unsuccessful opponent may be required to pay. That is, the fee will be limited to what is reasonable in the circumstances. In this way the potential risk of unfairness to such an opponent can be avoided.

(e) In appropriate cases, depending, among other things, upon the potential value and size of the litigation, the circumstances of the client and the proposed terms of the conditional fee agreement, the client should be encouraged to take independent legal advice about it. The court may so require before granting its approval.

(f) The agreement must be in writing and there must be a mechanism by which the client can discharge the attorney.

(g) The overriding objective is that the conditional fee arrangement must, from beginning to end, be governed in principle and in practice by what is fair and reasonable. To this end,

> *notwithstanding the prior approval of the court, the court must always be able to oversee its execution, by reference, in particular, to the manner of the conduct of the proceedings by the attorney.*

In *DD Growth Premium 2x Fund* [2013 (2) CILR 361], the Chief Justice considered the level of remuneration proposed in a conditional fee agreement, drawing heavily on the guidelines used in England and Wales, in particular, the 'ready reckoner' contained in *Cook on Costs* (2012), which compares the chance of winning against a likely reasonable success fee. Additionally, the law firm in that case had agreed to a sliding scale of uplift to be applied, depending on the amount of damages subsequently awarded. The formula adopted also factored in an interest rate (on the basis that no interim payments of fees would be made).

In *Attorney General of the Cayman Islands v Barrett* [2012] 1 CILR 127, the Court of Appeal held that, under the rules of taxation of costs that currently apply in the Cayman Islands, any conditional uplift fee that might be payable by a successful party to his or her attorney would not in any event be recoverable by the successful party from the losing party. The Court of Appeal left open the question of whether the right to any such fee would be enforceable by the attorney against his or her own client, as it did not arise on the facts of the case, thereby casting some doubt on whether *Quayum* and *DD Growth* were correctly decided.

If a law in the form of the draft Bill is enacted, then contingency and conditional fee agreements will be authorised by the statute, save in respect of criminal, quasi-criminal and family proceedings. Court approval of the agreements will not be required, provided that statutory limits on the fees based on a percentage of recoveries or uplifted hourly rates are not exceeded. An agreement containing fees in excess of the statutory limits will require the approval of the court.

12 What other funding options are available to litigants?

Bank lending is possible, although not common. Cayman Islands banks are generally risk averse, and would not be likely to advance significant funding for litigation costs unless heavily secured. 'Private' lending is also possible, but in certain circumstances a private source of funds may be regarded as an intermeddler, and can find himself the subject of a third-party costs order (in the event that the borrower loses the case), or having to provide a bond or payment into court on behalf of the litigant. It is possible, although not common, to obtain after-the-event insurance, but the costs of this would be unlikely to be recovered from the losing opponent.

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

No official statistics are available. Matters that are contested through to a trial may take on average 18 months to two years, depending on the complexity of the issues and the intensity of interlocutory proceedings.

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

No official statistics are available. The Cayman Islands Court of Appeal sits three or four times a year for two to three weeks each time. An appeal proceeding at usual pace will probably be dealt with within six to nine months. In cases of urgency, a procedure exists to convene a special sitting of the Court of Appeal outside its normal timetable, on payment of a fee.

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

No official statistics are available. Domestic judgments are relatively easy to enforce, particularly if there are assets within the jurisdiction that are available for execution. A wide variety of options exists, including charging orders for sale of real estate and other assets. If the judgment debtor is foreign, and has no assets in the Cayman Islands, it is possible to 'export' a Cayman Islands judgment for enforcement, provided that the jurisdiction in which the debtor has assets will recognise the judgment.

Most contentious enforcement proceedings concern attempts to enforce foreign judgments against assets situated in the Cayman Islands. Currently, this requires action by writ based on the foreign judgment debt, in which summary judgment would be sought, followed by execution of the Cayman Islands judgment against the assets. Proposals for legislative changes to simplify this process are under consideration. It is possible in some circumstances to freeze the assets pending judgment, in cases where there is a risk of dissipation.

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

The closest thing that the Cayman Islands currently has to a 'class' or 'group' action is a 'representative' action under Order 15, rule 12 of the Grand Court Rules. This is possible where numerous persons have the same interest in the proceedings. Such proceedings can be commenced in the name of a representative, but all those whom he or she represents are parties to the action. Such proceedings can be funded by a pooling arrangement between the participants. Subject to the approval of the Court they could also be brought pursuant to a conditional fee agreement, but for the reasons explained above they could not currently be funded pursuant to a third-party funding agreement.

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

The general rule in the Cayman Islands is that costs follow the event; ie, the loser pays. It is unusual for any other order to be made, unless there has been some kind of misfeasance or negligence on the part of the winner that justifies a departure from the normal rule, or there has been a without-prejudice save as to costs offer and the 'winner' has been awarded less than the offer.

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

Under certain circumstances, yes. The Grand Court has express jurisdiction under section 24(3) of the Judicature Law to order costs against non-parties. The principles on which it will do so were considered by the Court of Appeal in *Kenney v ACE* [2015] 1 CILR 367. In that case, a creditor under a foreign judgment sued a Cayman Islands company to enforce the debt. The judgment creditor was subject to the appointment of a receiver by the Liberian courts. The Grand Court ordered the judgment creditor to provide security for costs on the basis that it was merely a nominal plaintiff for an undisclosed principal (AJA). The plaintiff company failed to provide security for costs and its action was struck out, an order for costs being made in favour of the defendant. The Grand Court ordered the plaintiff to disclose the identity of those parties funding the litigation, including Mr Kenney, an attorney in practice in the BVI, who acted for AJA. In evidence, it was determined that Mr Kenney and his clients, including AJA and a special purpose vehicle called CCI, controlled the receiver's actions, placed limits on his ability to act, and required him to account to CCI for his decisions and expenditures. Mr Kenney ensured that the receiver was no more than a straw man, executing the plans of Mr Kenney and his clients. Mr Kenney's strategy also attempted to ensure that the actual litigant in the Grand Court, the receiver, would be judgment-proof and unable to pay costs. Mr Kenney funded the litigation, and had set in place a structure that would enable him to benefit from any recoveries. It appeared from the evidence that was placed before the court on the question of leave to serve the summons on the third parties outside the jurisdiction, that the agreement that Mr Kenney had entered into was a kind of contingency fee agreement (although it is important to bear in mind that he was not licensed to act as an attorney in the Cayman Islands and could not, therefore, have conducted litigation here himself).

The Grand Court, and the Court of Appeal, gave leave to serve a costs summons on Mr Kenney and CCI in their home jurisdictions. This order was upheld on appeal. In so doing, the Court of Appeal cited the principles set out in the decision of the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 with approval and summarised that, generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his or her own financial benefit, he or she should be liable for the costs if his or her claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting in the interests of the company (and more especially its shareholders and creditors) rather than in his or her own interests. It is noteworthy that this principle does not depend on any analysis of maintenance and champerty; simply

Update and trends

We anticipate that third-party litigation funding will continue to be a growth area in the context of liquidations, and that if the draft bill is enacted it will lead to the development of third-party litigation funding in other contexts, to the use of contingency fee agreements, and to an increase in the use of conditional fee agreements.

the degree of control and benefit that the third-party funder exercises and obtains.

If a third-party funding agreement is appropriately drawn, approved by the court and complied with, there should not, in most circumstances, be grounds for the imposition of a non-party costs order, although it remains the case that orders for security for costs might be made.

19 May the courts order a claimant or a third party to provide security for costs?

The Grand Court has a wide discretion to order security for costs against a claimant provided by Order 23 of the Grand Court Rules and also (against a company) under section 74 of the Companies Law (2016 Revision). There are four grounds provided in the Rules, namely that the plaintiff (i) is ordinarily resident outside the jurisdiction; (ii) is a nominal plaintiff suing for the benefit of some other person and there is reason to believe that he or she will be unable to pay the costs of the defendant if so ordered; (iii) has not endorsed his or her address on the writ or his or her address is incorrect; or (iv) has changed his or her address so to avoid the consequences of the litigation. Under the Companies Law, security for costs may be ordered if the judge is satisfied that there is reason to believe that if the defendant is successful in his or her defence the assets of the plaintiff company will be insufficient to pay his or her costs.

In considering the plaintiff's ability to pay the costs, the court will take into account all the sources of funding available to the plaintiff (including third-party funding), not merely his or her own resources. The application is made by summons supported by an estimate of the costs to be incurred, and the court will, if satisfied, make an order in such sum as it thinks fit, bearing in mind that in some cases, a really significant order for security might stifle an otherwise arguable claim. It has been held that if the sole reason for ordering security is that the claimant is resident abroad, the amount of the security will be limited to the difference, if any, between the costs of enforcing a costs award in Cayman, and the (additional) costs of enforcing it abroad.

The proceedings are usually stayed until the security is provided. The most common means by which security is provided is a payment of cash into court, but in some circumstances a letter of credit or bank guarantee will be permitted. Unless the parties agree otherwise, the court will generally require any letter of credit or bank guarantee to be provided by a Cayman Islands bank.

There is no express power to order security to be provided by a third party (whether a funder or not), but, as mentioned above, the existence of third-party sources of finance to the claimant is a relevant factor that will be taken into account for the purpose of the decision.

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

On an application for security based upon the fact that the plaintiff is a nominal plaintiff, suing for the benefit of a third party, the existence of third-party funding is directly relevant, although in most cases, a claim brought with the benefit of third-party funding will not be a claim brought by a nominal plaintiff (cf. *Kenney*). In other cases, the statutory tests require consideration of the plaintiff's means, and the court will look to all of the resources of the plaintiff, including third-party funding, to make its decision. The Grand Court will apply the well-known principles in *Keary Developments v Tarmac Construction* [1995] 3 All ER 534. In that case, the court was required to consider a submission that a claim would be stifled if an order for security for costs was made because the plaintiff company was not substantial, although it was argued that it had a good claim. The Court of Appeal held that the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be uniquely within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation.

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

After-the-event-insurance is permitted, but is not common, probably because of the limited size of the market. Defence costs are sometime paid by insurers (in third-party liability cases, such as those in professional negligence or directors' duties cases). We have not had any experience of insurance for attorneys' fees other than that paid for defence costs, nor for non-payment of judgment debts. We do not think these would be objectionable in principle.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Liquidators must disclose litigation funding agreements to the court, within the liquidation proceedings, for the purpose of obtaining the court's sanction to enter into the agreement. A copy of the funding agreement, or an affidavit summarising its terms, will be placed on the court's liquidation file in connection with the application. That file is not open to inspection by the public, but it can inspected by (among others) the creditors, shareholders, former management and former professional service providers to the company. Documents on the liquidation file can therefore become public through disclosure by one of those parties. If the court can be persuaded that the agreement or applicable affidavit is confidential and that its publication would harm the creditors' economic interests, it is possible to obtain a sealing order, within the liquidation proceedings, preventing the agreement or affidavit from being inspected on the liquidation file.

Prior to the decision in *Barrett* referred to above (see question 11), applications to sanction conditional fee agreements in ordinary civil cases were often made ex parte, and the first the defendant knew of the agreement was when a costs order was made against it. Bearing in mind that the success fee is not recoverable from the paying party, this practice is likely to cease. The question whether disclosure of the funding agreement is compellable has not been tested but, in circumstances where the issue of funding is relevant (for example, to the status of the plaintiff, or to an application for security for costs), it may well be within the discretion of the court to compel production, even if subject to safeguards as to future use of the documents, or to draw adverse inferences where the plaintiff refuses to disclose any such agreements. Bearing in mind that the court has the power to compel disclosure of the existence of third-party funders (see *Kenney*), it is a short step to compelling disclosure of the nature and terms of the funding agreement (and it is it is apparent from the report of the judgment in *Kenney* that details of at least the nature of the funding agreement were before the court).

The draft bill does not consider these issues but regulations may be made to regulate them.

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

There is no special category of privilege for such communications with funders. However, in the same way that an insurance policy is generally regarded as sui generis, we suggest that litigation funding agreements would be regarded as distinct from the facts giving rise to a cause of action, and therefore, discovery would not always be appropriate (see question 22). Clearly, if communications fit into other recognised categories of privilege (such as litigation privilege or legal advice privilege) then that privilege may be claimed, although it is unlikely that direct communications between litigants and their funders would fall within those categories. Common interest privilege, as understood in the Cayman Islands, is a fairly narrow concept, in particular a sub-set of legal professional privilege. Accordingly, the mere fact of communication between funder, litigant and the litigant's attorney does not give rise to privilege, if the substance of the communication would not, in itself, in the hands of the original donee of the information, have attracted legal professional privilege.

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

No, not yet, although there is an as yet unreported decision of the Court of Appeal in *Deutsche Bank AG London & ors v Krys (as Official Liquidator of the SPhinX Group)*, 2 February 2016, relating to a dispute between Cayman Islands liquidators and lawyers they had retained on a contingency fee basis to pursue claims in courts in the United States. The facts of the case were, however, highly specific; the *ratio* of the case concerns a point of arbitration law not specifically related to the funding arrangements.

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

We believe that the principal issues are addressed in our answers above.

Campbells

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