



In conversation with Harbour

The Barrister talks to Co-founder and Head of Litigation Funding for Harbour Litigation Funding, **Susan Dunn**, about the evolution of third party funding (TPF) and how Harbour played a pioneering role.

1 Susan, we understand Harbour is celebrating its 10th Anniversary in 2017? Isn't that 'ancient' in funding terms?

(laughs) Well, maybe not quite ancient but definitely mature in that we were present from the very start and I have been funding since 2002. Harbour has been at the forefront of many developments ever since and is solely focused on TPF; always has been. The evolution of funding with just £1 million and a team of two from a converted carpet factory in Kidderminster, into an international activity with £410 million to fund large commercial disputes and a team of 25 talented individuals seems like an amazing journey.

2 So what does that mean for Harbour as a business?

We can truly say that we have seen it all. Our litigation experience, funding expertise and track record is, in my view, unrivalled. We have funded in 13 jurisdictions and, currently, 5 different arbitral forums. So far, we have reviewed well over 2,300 large claims and funded a wide range of cases in a number of jurisdictions, from large arbitrations, shareholder disputes, fraud claims arising out of insolvencies to class actions, offering access to justice.

3 How has third-party funding evolved since you started funding in 2002?

Funding is now adopted by more types of claimant, not just by those without the means to litigate. It is finally regarded as a finance tool in that the claimant may want to hedge their legal costs or may need working capital for other purposes. More law firms and chambers now instinctively consider TPF as part of the process when dealing with a claim. We also find they are less coy to admit that they are not so familiar with TPF. Globally, jurisdictions have made tremendous headway in embracing TPF. Hong Kong and Singapore being the most recent examples.

4 And where is it going?

In short, we believe TPF will be used globally as we expect the remaining few countries who have not yet endorsed it, will do so, and the profile of the funded party will include all types. I predict an increase in the 'large corporate' use, on both the claimant and defendant side of a matter.

5 Are there any hurdles you need to overcome?

Everyone who approaches us think they have a winnable case and it is sometimes hard for them to accept that we may not agree. Some struggle with the concept of us taking a share of the proceeds which in our portfolio varies from 7.5% to 50% depending on the risk, budget size and length of the claim. In our considerable experience, statistics for success at trial on what we are advised are 'strong cases', are no better than 50-50. In essence, the losses need to be absorbed by the gains as losses result in a 100% write-off.

6 What are the most common misconceptions about funding Harbour encounters?

People believe we drive the claim but nothing could be further from the truth. The claimants and their lawyers fully control the litigation. As we pay the legal bills regularly throughout the life of the case, we will be kept informed of its progress. If the claim is unsuccessful, neither the claimant nor their legal representatives need to repay the legal costs. That is our risk. This is why due diligence is key for us; it explains why an in-depth review process takes place at the very beginning, as that is our only opportunity to decide on the merits of a case. We only back cases we believe will win, but we all know, even good cases don't succeed. There is a misconception that corporates are less interested in TPF but some of our team, previously in-house counsel at large corporates, confirmed that they did not always ring fence huge legal budgets.

7 Which 3 questions should anyone considering funding ask?

- How is the claimant and funder going to get paid if this case is successful and how much will they realistically get paid? (Enforcement issue)
- How can I be sure the funder I use has the funds to see my case through to conclusion?
- Have I thought carefully about what assumptions lie behind the budget for the case?



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Third Party Funding: a “nice to have” or a necessity?

By **Lucy Pert**, Director of Litigation Funding, Harbour Litigation Funding



The use of third party funding for litigation has grown exponentially over the last few years, since its birth a mere fifteen years ago. Through pioneering developments in Australia, it has been aided by favourable decisions such as *Campbell's Cash & Carry Pty Ltd v. Fosfit Pty* [2006] HCA 41 and *QPSX Ltd v. Ericsson Australia Pty Ltd* (2005) 219 ALR 1, 54 as well as important decisions of the High Court such as *Arkin v. Borchard Lined Ltd.* [2005] EWCA Civ. 655. It is now estimated that funds managed by litigation funds active in the UK, are over £1.5 billion.

While once the domain of the insolvent or indigent Claimant, multi-national

corporates and financial institutions now use litigation funding as a way to set legal budgets with greater certainty, manage the risk associated with the costs of large scale litigation and place legal spend off-balance sheet. As corporate clients have to negotiate a more uncertain financial future (Brexit and the outcome of the US election for example), this will increase pressure on their legal budgets. Law firms commonly speak of corporate clients demanding year on year decreases in external legal spend. It is likely this will result in an increased use of third party litigation funding.

Driven to a large extent by client demand, the litigation community

needs to become better versed in the use of third party litigation funding in order to keep pace in an increasingly competitive legal market. Members of the Bar may imagine that it is for the solicitors to manage and advise their clients on funding. Increasingly, however, barristers get involved in claims at an earlier stage and work directly with in-house solicitors or lay clients. Consequently, it is incumbent on barristers to keep abreast of the latest trends and developments in third party funding.

This article discusses the principles behind third party funding and offers useful pointers on aspects to which members of the Bar should be alive.

Third Party Funding

In a nutshell, the funder agrees to pay the legal bills of the Claimant, including barristers' fees and other disbursements, every month throughout the life of the case, until the matter concludes.

Opinion on the merits

A key feature of third party funding is that it is non-recourse; if the Claimant is not successful, the funder writes off its investment and neither the Claimant, the solicitors nor the barristers have to repay any amounts. Consequently, the initial due diligence undertaken by a funder is crucial. This is where barristers play an important role in providing opinions on the merits of a claim, which in turn can lead to securing the instructions to conduct the whole action.

Budgeting

The funding agreement is built around a detailed budget and barristers' fees form an important part of this budget. While rarely the favourite pastime of lawyers, post the 2013 Jackson reforms, budgets are increasingly required by the Courts. Even prior to the legal reforms, clients were driving the demand for greater certainty around the litigation budgets. The days of paying an open-ended amount for the lawyers' hourly rates is coming to an end.

It is important that barristers and their clerks are involved in the costs budgeting process. When barristers (or their clerks) have not been consulted directly on the budget, this can result in significant inaccuracies. Budgeting can be a challenge for barristers because the instructing solicitor controls the litigation strategy and members are not always instructed from the very beginning. That said, as experienced litigators funders understand that the course of the litigation is not always predicable from the outset. Experienced and reputable funders will not panic if, later down the road, there is a need to amend the budget for reasons not anticipated at the outset of the funding.

Management of the litigation

The rules vary from jurisdiction to jurisdiction, but in most instances the funder cannot be directly involved in the running of the litigation itself. They are, however, kept apprised of major developments as the claim progresses. There are certain instances where a funding agreement might influence the decisions made by a funded party. As regards settlement, for example, the funded party and the funders' interests are aligned in that both are looking to achieve the best outcome. If, however, a client ignores its own legal counsel's recommendation to accept a

settlement offer, the funder may reserve the right to have an independent mediator involved in determining whether a settlement offer should be accepted.

In certain predetermined circumstances, usually related to a material adverse change, a funder may be able to withdraw funding. Rest assured, such a decision will not be taken lightly as it results in the funder losing all of the funds invested in the claim to that point.

The necessity of setting out in the funding agreement what is to be done in these circumstances is considered to be best practice, as made clear in the Code of Conduct for Litigation Funders established by the Association for Litigation Funding. The Code also sets out standards of practice and behaviour to be observed by funders.

Disclosing the existence/identity of the funder

There is a live debate both in the courts and the international arbitration community as to whether the Claimant should be required to disclose that it is working with a third party funder and the identity of that funder.

In a recent decision of the High court, Mr Andrew Barker QC, ruled that he had ancillary power to order the claimant to identify any "non-altruistic" third party funders to allow the Defendant to apply to make the funder provide security for costs. (See *Wall v The Royal Bank of Scotland Plc* [2016] EWHC 2460 (Comm). For a contrary position see the judgment of HHJ Keyser Q.C., (*Dawnus Sierra Leone Limited v. Timis Mining Corporation Limited* [2016] EWHC B19 (TCC)), in which the Court found that the Defendant was not obliged to disclose the identity of the funder funding its cross claim, as to do so at that stage in the proceedings would be inappropriately intrusive and in the nature of a fishing expedition. This topic is also the subject of a live debate in the context of international arbitration.

Quite apart from the legal debate, informing the Defendant that the claim is funded may send a powerful message as the Claimant clearly has the resources to fight the claim all the way, and that the claim has withstood the scrutiny of a robust due diligence process. On the other hand, disclosing the presence of a third party funder can result in satellite litigation which unnecessarily increases costs, by defendants who seek to distract or adopt a scorched earth approach to the litigation. Equally, large corporates might object to the Court's intrusion into their finances when their ability to pay is not in doubt.

Alternative fee arrangement

Not all third party litigation funders require the lawyers involved in the cases they fund to work on a discounted

basis or an alternative fee arrangement, although those dealing with smaller claims or without an in-house due diligence capacity may do so.

Alternative fee arrangements are attractive to clients as they reduce the amount of money that must be spent up front. These arrangements can be entered into on a standalone basis or in conjunction with a funding agreement.

Increasingly barristers agree to work under a Conditional Fee Agreement (“CFA”) whereby if the claim is successful, counsel will be paid their full fee plus a possible success fee but will receive no fees (or only the discounted fee if working on a modified CFA) if unsuccessful. Pursuant to the Legal Aid Sentencing and Punishment of Offenders Act 2012 (“LASPOA”), and the Conditional Fee Agreements Order 2013 the uplift on a CFA is no longer recoverable from the losing party. The exemption that was made in the case of an insolvent Claimant has, since April 2016, also fallen away.

Recently, in the Commercial Court, HHJ Waksman QC held that the costs of third party funding in the context of an ICC arbitration were recoverable as part of “legal and other costs” within the Arbitration Act 1996 and the ICC Rules (see *Essar Oilfield Services Ltd v Norscot Rig Management PVT Ltd* (2016) QBD (Comm)).

Finally, pursuant to the Damages-Based Agreements Regulations 2013, it is possible to enter an agreement where the amount of counsel’s fee is linked to the amount of damages or debt recovered (“DBA”). Certain funders have developed a back-to-back funding product for a DBA, whereby the funder will fund the barrister working on a DBA for the duration of the litigation and share in the proceeds upon success.

Why does Third Party Funding matter to the Bar?

The way in which clients access legal services is changing. Solicitors can encroach on the work of the Bar and, similarly, barristers have been permitted to take instruction directly from clients. More and more, in house legal teams seek to access the Bar directly for advice and representation. For example, the legal press recently reported that BAE Systems, The Crown Estate and Coco-Cola Enterprises are developing barrister panels. In these circumstances, barristers may find themselves having to advise on financial aspects of litigation such as third party funding.

In addition, solicitors are increasingly working with barristers at the outset of a claim seeking their opinion on the legal or proposed litigation strategy.

While the funder does not typically control the litigation, or the choice of counsel, their experienced teams of lawyers are sometimes asked their opinion as to the right choice of barrister for a particular claim.

Third party funding allows meritorious claims to proceed that would not otherwise have been pursued. In this way, third party funding should be seen by barristers as a way to grow their practice.

Being abreast of developments in third party funding and possessing an in-depth understanding of its working, can be a way to gain an edge in an increasingly competitive legal market. Third party litigation funders are now a well-established part of the litigation landscape. Understanding funding and knowing the main players in the funding market should no longer be a “nice to have” for members of the Bar, but a necessity.



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