GHERSON
THE LITIGATION REPORT

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Third Party Litigation Funding is Here to Stay

Neil Micklethwaite, Partner, reports on the availability of third party funding in the UK

Litigation funding is now a growth area both in the UK and many other countries. It allows those who either lack the resources to fund a litigation claim to seek a professional third party funder who will meet the legal costs in return for a share of the litigation proceeds.

It is not new. However, the previous constraints on such funding have loosened, with the effect that an increasing number of players (private equity houses, hedge funds, insurers and brokers) are now entering the UK market.

Recent news that Moore Stephens, an international accountancy firm, is facing a £90m negligence claim brought with the assistance of litigation funding, has drawn attention to this new area, with the legal profession and clients starting to understand the opportunities it presents.

The largest Australian litigation funder, IMF, has already funded more than 70 cases with total damages at stake of around £400m

Access to Justice

For many years the rules of maintenance and champerty (laws which prevented third parties seeking to profit or fund litigation) have provided a brake on the development of contingency or other funding arrangements. These rules are still very much in place, but a number of recent cases marked a lowering of those barriers. Further, the emphasis in public policy is now more focused on access to justice and with the recent endorsement of such third party funding arrangements by the Civil Justice Council (the advisory body with responsibility for overseeing the modernisation of the civil justice system), the trend is unlikely to be reversed.

Pitfalls Remaining

If the developments in Australia are considered carefully, the scale of litigation in this jurisdiction is likely to see the third party market in the UK grow faster. The largest Australian litigation funder, IMF, has already funded more than 70 cases with total damages at stake of around £400m. However, the third party funding arrangements certainly will continue to be challenged as an abuse of process by those with a lot to lose, particularly D&O insurers and professional advisory firms such as lawyers and accountants.

The pitfalls that potential claimants and funders should avoid or consider are:

- the funder should not seek to exercise excessive control over the litigation, as this may be seen as an abuse of the litigation process for commercial gain.

- the success fees charged by a funder must be proportionate to the funding which is provided.

- funders being liable for the other parties' costs if a funded claim fails. After The Event (ATE) insurance can assist to meet the costs, but otherwise a professional funder will need to factor this cost into any decision to fund a case.

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The Class Action Revolution

Nick Ractliff, Associate, explains how the class action is becoming a reality in the UK and maps out the options available

The class action is an available but uncommonly used form of collective redress in this jurisdiction. However this may be about to change.

The Court Regime

There are two existing mechanisms for pursuing a class action through the English courts. These are:-

Group Litigation Orders - these allow the court to deal with and case manage multiple claims involving a common or related issue of fact or law;

Representative Actions - these allow one or more claimants to bring an action as representatives of others who have the same interest in the claim. They are commonly used in shareholder actions and are likely to see increased use with the introduction last October of the new statutory derivative claim set out in the Companies Act 2006.

It is also possible to bring a class action by including a large number of claimants to the action, as happened when the former shareholders of Railtrack sued the Government.

The Competition Regime

In addition there are other specific regimes which allow and encourage class actions. The most notable is that recently introduced by the Competition Act 1998 and the Enterprise Act 2002. This permits "specified bodies" to bring before the Competition Appeals Tribunal damages claims on behalf of consumers following a finding of anti-competitive conduct by the Office of Fair Trading against a supplier. The first of these actions was commenced by Which? magazine against JJB Sports last year after the latter was found guilty of anti-competitive practices in pricing replica football shirts.

The Difficulties

It is not the lack of available claims but the difficulties in launching them that make class action uncommon in this jurisdiction. A substantial hurdle is funding. The onset and availability of third party funding, discussed elsewhere in this report, may provide a solution. However, that is not the only problem.

A common feature of class actions in the UK is that they require the claimants' agreement to join. This creates a logistical difficulty in attracting enough support to give weight to the merits and commercial viability of the claim.

A Proposal for Change

A research paper commissioned by the Civil Justice Council (CJC) and published in February 2008 has concluded that there is a need for a reform of the class action to make it easier to support and use as a form of redress. Its solution is the introduction of an "opt out" regime whereby an action can be pursued by or on behalf of a class of claimants who are deemed included unless they specifically ask to be excluded.

This is the type of regime that operates in the United States. If introduced into this jurisdiction, particularly with the availability of third party funding, it is likely to result in a radical change and an increase in the number of class actions.

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Watch this Space

It should be stressed that as these are conclusions of a research paper the position needs to be monitored. There is however a continued drive towards increasing access to justice. The introduction of the new statutory derivative claim for shareholders set out in the Companies Act 2006 and the follow-on actions before the Competition Appeals Tribunal for damages for breach of competition law suggests that there is a move to promote and encourage the use of the class action as a form of civil redress. If the findings of the CJC's research paper are adopted as policy that movement could well develop into a revolution.

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A New Revenue Stream

Jim Sharkey, Partner, spills the beans on Revenue and Customs and their plans for offshore accounts

Since its merger with UK Customs & Excise, to form HM Revenue and Customs, the Revenue has been in the news recently for all the wrong reasons. The attention has focused on the loss of a disc containing the personal and banking details of 25 million tax payers. What has gone almost unnoticed by the public at large is the fact that the Revenue has been focusing on collecting huge amounts of tax in a far more aggressive way than ever before by using innovative new methods.

Why the Change?

The Revenue has been set very challenging tax collection targets and increased its power. It has been studying the methods of other tax collection agencies worldwide, particularly the IRS in the United States, and it likes what it sees.

Recent Developments

Two merit particular mention. In the first case, the Revenue has recently tried to persuade a large number of UK financial institutions (thought to be around 160 in number) to provide it with the evidence that would then allow it to apply for notices obliging those financial institutions to hand over the details of all customers having both a UK address and an offshore bank account.

On the intervention of bodies representing various sectors of the UK financial services industry, the Revenue appears to have backed off (at least for the time being). It has stated that it will now only seek notices against financial institutions where it has actual evidence of them having at least some customers with UK addresses, undisclosed offshore bank accounts and, on the face of it, a potential liability for unpaid tax.

In the second case, the Revenue has paid a reported £100,000 for a list of deposits held by a bank in Lichtenstein on behalf of approximately 100 UK taxpayers. What makes the purchase of this list unusual is not only the amount of money which was paid for it but also the fact that the list was taken unlawfully from the Lichtenstein bank by one of its own employees. The German tax authorities have already carried out a number of raids and started wide ranging tax investigations using the information. There seems little doubt that a number of people in the UK will be called in for a series of very worrying interviews with the Revenue.

What Next

With tough targets to achieve and the powers available to help achieve them, there is no doubt that the Revenue will continue to seek new ways to get evidence and to collect taxes. Financial institutions and UK taxpayers

will need to be on guard to ensure that the Revenue does not overstep the mark. If it does, taxpayers need to be ready to challenge any attempts to push the limits too far.

Final Thoughts

Just one: financial institutions in tax havens will need to be more careful than ever to vet and monitor the honesty and integrity of those of their staff who have access to comprehensive and highly confidential customer information. It really is now gold dust to the tax collectors!

Third Party Litigation...

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On the other hand, potential claimants may wish to be clear that they maintain sufficient control over any decision making in the litigation and can appoint lawyers with whom they want to deal. Claimants should shop around between potential third party funders to assess the deals available to them.

Despite such pitfalls, and the need for clearer boundaries in the market, most funders believe the market is here to stay. The critical issue will be whether any particular funding arrangement creates a risk that the litigation process could be abused.

Is My Claim Fundable?

There are some basic ground rules in place. Meaningful sums have to be at stake. The defendant must be able to pay any damages awarded and the legal merits of the claim must be good, at least 70% chance of succeeding. In the initial stages, the funders focused on insolvency and professional indemnity claims, the focus is now on identifying more funding opportunities amongst more straightforward commercial claims and the competition-related class action cases.

Funders will naturally only wish to focus on claims that they believe will succeed and as early as possible, either by way of mediation or settlement.

The advantage that now exists is that a brokerage community, who can identify potential funders is emerging.

Where Next?

If clarity is brought to the rules governing third party funding, the professional litigation funders are likely to fill the space. One of the greatest barriers to development remains the English rule that the loser pays the winner's costs and the potential scale of such costs. However, if the emphasis of the courts remains on encouraging access to justice, the market may offer an appealing investment opportunity. This will not only provide assistance to those who would otherwise be unable to fund litigation claims, but it may see faster development of class actions in the UK.

Finally Some Action

Chloe Pounds is a Paralegal specialising in litigation, here she clarifies the FSA's new stance towards financial market abuse

The Financial Services Authority has long suffered from a reputation for impotence and passivity. Its predilection for imposing low fines has led, perhaps unsurprisingly, to unflattering comparisons being made with the more aggressive US Securities and Exchange Commission. However, the regulator's recent criminal prosecution, under section 52 of the Criminal Justice Act 1993, has shown that its public pledge to crack down on market abuse and to, "change behaviour through enforcement action" is not an empty threat.

Christopher McQuoid, former general counsel of TTP Communications Plc, and James Melbourne appeared at City of London Magistrates' Court charged with possessing inside information relating to the proposed cash offer by Motorola Incorporated for the entire issued share capital of TTP Communications Plc. Following the defendants' pleas of not guilty, the court held that the case was suitable for trial on indictment. The case was committed to the Crown Court on 19 February 2008.

The FSA has publicly advertised its intention to stamp out market abuse

The FSA has publicly advertised its intention to stamp out market abuse and make greater use of its statutory criminal powers. Margaret Cole, Director of Enforcement at the FSA, has gone on record stating that the risk of being caught is not enough to deter the inveterate gamblers that line the ranks of the City professionals. She considers that it is the fear, "of being prosecuted through the criminal courts and...of going to prison" that will be the "ultimate deterrent".

The historic preference of the FSA to utilise its civil sanctions has, clearly, been superseded by a new determination to dust down its hitherto redundant criminal enforcement protocols. Moreover, the regulator has recently announced the mandatory storing of bank, phone and e-mail records for six months, and has begun to cold call traders involved in cases under investigation, questioning individuals under caution in a bid to gather evidence 'hot off the floor'. This is in stark contrast to its former practice of giving up to a month's notice to would-be interviewees.

There can be little doubt that the wind of change is blowing through the corridors of the FSA. The City would be well advised to brace itself for a more robust and interventionist approach towards the regulation of the financial sector. The corresponding disincentive to break the rules should enhance, not damage, London's pre-eminent reputation as a financial centre.

Try Mediation

In a ringing endorsement of mediation, Lord Justice Ward in the Court of Appeal decision in *Egan -v- Motor Services (Bath) Limited* said he regarded the parties as "completely cuckoo" for having spent in the region of £100,000 on litigation in connection with a dispute that was worth £6,000. He said:-

"....And what benefit can mediation bring? It brings an air of reality to negotiations.... Mediation can do more for the parties than negotiation. In this case the sheer commercial folly could have been amply demonstrated to both parties sitting at the same table but hearing it come from somebody who is independent.... The cost of such mediation will be paltry by comparison with the cost that would mount from the moment of the issue of the claim. In so many cases, and this is just another example of one, the best time to mediate is before the litigation begins. It is not a sign of weakness to suggest it. It is the hallmark of commonsense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often".

The Legal Stuff

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This report is correct to the best of our knowledge and belief at the time of going to press. It is, however, written as a general guide, so we recommend that specific advice be sought before any action is taken.

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