

## Spreading the cost, spreading the word

By Susan Dunn



For the Global Issue, edition July/August 2017, the Lawyer asked Susan Dunn several questions to identify what the latest global trends in third party litigation funding are. This is the unabridged version of Susan's answers.

**Q: What trends in the litigation market have affected third-party funding in the past 12 months?**

Generally, the positive developments in Singapore, Hong Kong and Dubai related to third party funding have further consolidated acceptance globally. In those regions law firms and GCs are keen to discuss the benefits of funding. As soon as we alleviate some of their concerns - typically on conflicts of interest, control of litigation/settlement and disclosure of funding - they are enthused about its possibilities.

Specifically, we have seen the following three trends: a continued increase in enquiries for funding for arbitration, more requests for inventive products away from pure single case funding and, interestingly, an upsurge in direct enquiries from corporates, not always going via their lawyers when they want to speak to a funder.

Unfortunately, there is also an increase in the number of entrant "funders" who source cases first, then seek investors and who won't join the Association of Litigation Funders because they do not satisfy the capital adequacy test set by ALF. I always recommend to those who

come and talk to us, to ensure they are satisfied that any funder they work with a) has sufficient capital and b) will only use it for their case.

**Q: What trends are seeing in terms of type of cases? (e.g. shareholder actions, competition class actions, class-action tourism)**

People talk to us about a broad range of claims, with no particular emphasis on any one type. Some competition cases get a lot of coverage, such as the trucks cartel for example, so it appears that there are a lot more of these types of cases while they remain relatively rare. We have been approached by lawyers who clearly see these types of cases as a growth area but without the requisite experience, or even a client!

Arbitration cases continue to be on the increase and ICSID claims get a lot of profile as proportionately a relatively high number of them are funded.

**Q: What trends are you seeing in terms of take-up across different jurisdictions?**

Enquiries are increasing across all jurisdictions. As mentioned before the positive developments, endorsing funding in Singapore, Hong Kong, Dubai and Paris, assist with elevating third party funding's profile amongst law firms and claimants alike. We receive numerous requests to speak at arbitration and litigation conferences worldwide: South Korea, Japan, China but also the BVI and Western Europe.

Regrettably, the recent decision of the Supreme Court of Ireland in the Persona/Sigma appeal deviates from the positive developments elsewhere in that they ruled that third party funding, save in limited circumstances, remains unlawful because of their rules regarding champerty. We believe it to be one of the most meritorious cases we have ever considered, and one in the public interest. It is a shame if claims such as this still cannot be pursued in Ireland, simply for lack of funding.

**Q: What do you consider the biggest misconceptions about litigation funding? How can funders work to disprove them?**



“ There is a significant misunderstanding of the level of risk funders take. Losing a case leads to a total write off of all the legal costs. Even when successful, in terms of settlements or wins at final hearings, amounts are often significantly below the initial assessment of the case. ”

That brings us to probably the greatest misconception i.e. that funders are making outsized returns.

Whereas budgeting is getting better, costs overruns remain relatively common while the value of the claim remains static. Every claimant believes they have the 'best ever' case, guaranteed to succeed, but we have lost cases everyone thought we would win. Perhaps lawyers can help manage their clients' expectations better while funders can explain better what their risk effectively means to them.

Corporate clients often worry about ceding control to the funder, so we clarify that is absolutely not the case and emphasise we only want to add value. Some corporates have recognised that and have asked us to be part of the litigation committee formed to manage each large litigation matter. This works very well.

## **Q: How should litigation funders reassure potential clients about reputational and ethical issues?**

Professional funders focus on ensuring their excellent reputation in the market and point out that they are compliant with the Code of Conduct for Funders.

We could also turn the question on its head and ask what claimants and their representatives should do as part of their due diligence when working with a funder. For example, they should check whether the funder has adequate capital to fund the claim. Will they ring fence the funding so the claimant has confidence funding is in place for the whole of their case? Where do they get their funds? How many claims have they effectively funded? Where? How fast can they move? How do they deal with issues when they arise, as it always does in the unpredictable world of litigation?

If such questions were asked more regularly, claimants and their lawyers would place themselves in a stronger position. I am always surprised how little I get asked those questions when meeting people for the first time, and I urge representatives to probe funders on this.



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