LITIGATION FINANCE: ACCESS TO JUSTICE AT WHAT COST?

PART II

By Adam Howden-Duke and Alexander D.C. Kask

This article continues the discussion published in (2011) 69 Advocate 717 regarding litigation finance. In Part I we reviewed recent developments in other provinces of Canada concerning the torts of maintenance and champerty and the recovery of charges for non-party funders of litigation (starting with *Burgoin v. Oullette*[1]). We considered and discussed the current state of the law in British Columbia in cases such as *Milne v. Clark*,[2] and the likelihood of developments in this field finding traction in B.C.

In this part, we attempt to identify some lessons that may be drawn from the evolution of litigation finance in other Commonwealth jurisdictions on subjects such as the practical issue of whether one party's cost of litigation financing should be recoverable from the other party in a bill of costs and, if so, to what extent. We also consider some of the more philosophical issues, including whether and to what degree the courts and legislators ought to encourage litigation financing to become an entrepreneurial profit centre, particularly in the current climate, where such financing could easily be seen as a politically palatable device to increase access to justice where civil legal aid would otherwise have fulfilled that role.

THE LITIGATION FINANCE INDUSTRY IN THE UNITED KINGDOM

Litigation finance really came to the fore in the English Court of Appeal decision in *R. (Factortame Ltd.) v. Transport Secretary (No. 8)*,[3] where the court allowed as a recoverable disbursement fees paid to a firm of accountants based on a percentage of the final trial award. The court rejected the defendant's argument that the arrangement was champertous and found that the amount of the fee was reasonable based upon the anticipated work required and the low risk that the accountants would not be paid (liability had already been established—the fee had been negotiated for work to quantify the damages). In addition, in allowing the arrangement, the court was cognizant of the commercial reality in that given the financial circumstances of the plaintiffs, the only means to pay was by way of an award of damages yet to be quantified.

It appears from the judgment that the only reason the accountants agreed to act for a percentage was because a commercial funder (Manager and Processor of Claims Ltd.—"MPC") was vying for the work on such an arrangement.[4] The anticipated fees were in the region of £2 million.

In 2009, the £89 million professional negligence claim by Stone & Rolls against another accounting firm reached the House of Lords, financed by a litigation funder. The case is said to have originally been assessed with a 70 per cent likelihood of success; however, the House of Lords upheld the appeal court's dismissal of the claims, finding that the accountants were not liable for failing to detect an extensive letter-of-credit fraud.[5] Interestingly, it was also suggested that under the agreement, the funder stood to obtain 40 per cent of the proceeds, but that it duly accepted liability for the defendant's costs (at £2.5 million).

It is clear that in the U.K., the market for litigation funding, particularly of large expensive litigation, is expanding quickly and becoming mainstream. Along the way, the courts, commentators and legislators have grappled with several issues which are also of interest to the question of how such funding arrangements should be dealt with in B.C.

REGULATION?

The litigation funding industry both in Canada and the U.K. is currently unregulated. Given the disparity between the prime lending rate and the 32.9 per cent rate of interest on litigation funding in *Bourgoin v. Ouellette*,[6] there is clearly room for a perception that this is a form of speculative and opportunistic profiteering. Indeed, according to some commentators, litigation finance should be considered part of the same genus as subprime mortgages and payday loans, and that this new form of credit provision should be regulated.[7]

In the U.K., while there have not been any publicized defaults or scandals, there are calls from both sides for regulation. Funders generally support this as being advantageous to the industry by ensuring public confidence, and consumers see the benefit of protecting those who particularly vulnerable to being taken advantage of by unscrupulous funders. Furthermore, the concept of predictability is important, Jackson L.J. noting in his recent comprehensive report on litigation funding in the U.K. that "[t]he principal constraint upon the terms of funding agreements and the conduct of funders is fear of allegations of maintenance and champerty".[8]

Currently in the U.K., the Civil Justice Council has promulgated for discussion purposes a voluntary code of conduct for third-party litigation funders. It provides (*inter alia*) for independent advice before entering into the agreement, termination clauses, clauses spelling out clearly the costs the funder undertakes to pay (including legal fees, disbursements, insurance premi-

ums, court costs and adverse parties' costs), the means by which payment will be made, the funder's maintenance of adequate capital and the control of the action.[9]

Other areas for possible regulation are caps on permissible rates of interest to be charged on funds advanced for litigation (perhaps by fixing maximum rates or "stepped" rates as a function of varying degrees of assessed risk) and fixed minimum repayment terms (e.g., to avoid the situation which occurred in *Guilani v. Halton*,[10] where a loan was taken out to finance disbursements three months prior to trial, but carried penalties if repaid in less then than two years).

Benefits may accrue to opposing litigants through knowledge of the funding arrangements of their opponents. Given the current prevailing interest (or contingency) rates in the Canadian litigation finance market[11] and the fact that the only statutory cap for the interest rate may be that set out in s. 347 of the *Criminal Code* (60 per cent per annum), some strategic or psychological leverage may be gained from knowledge a plaintiff has had recourse to such funding. Indeed, if we were to see a return to the market lending rates of the early 1980s or 1990s, this leverage would be even greater.

These issues may be managed in an equitable way by regulation of the maximum rates of interest recoverable as a disbursement. An example may be to define a fixed maximum percentage (such as the 30 per cent rate found in the *Payday Loans Regulation* to the *Business Practices and Consumer Protection Act*). Another approach would be to allow for an acceptable floating interest rate range that is fixed to a market indicator (e.g., the prime lending rate). While the *Rules of Court* or provincial legislation may be used to determine what rates can be claimed as a disbursement, the question of regulation of the relationship between creditor and lender is one that may also involve federal legislation.

Finally, we note that there is a further, separate issue to consider: the role the *Court Order Interest Act* ought to play with regard to the finance costs associated with disbursements.

PROPORTIONALITY—THE INVOLVEMENT OF FUNDERS

Some lessons may be taken from the perception in the U.K. that the uncontrolled involvement of third parties in speculating on litigation is driving costs to levels that are out of proportion to the value of the claim or complexity of the issues. A classic example reached the House of Lords in *Callery v. Gray*.[12] This was a straightforward, low-value personal injury action that settled before proceedings were issued for £1,500 plus reasonable costs. The bill subsequently submitted was for £4,709.35. It included a success fee and an ATE[13] insurance policy premium of £367.50.

The issue in the House of Lords was the level of the success fee and allowance of the ATE insurance premium, given the apparent lack of proportionality and the early stage of settlement. The success fee of the claimant's solicitor under a conditional fee agreement ("CFA"), which in this case was 40 per cent, was payable by the defendant—an important departure from practice in this jurisdiction.[14]

This was a test case on the part of the insurance industry. The circumstances were that liability was admitted two weeks after the initial letter before action was sent and the claim was settled approximately six weeks later. The U.K. rules provide for settlement prior to action and require that the defendant pays costs in addition to the settlement amount without any knowledge of what those costs will be. Not surprisingly, disproportionate plaintiffs' costs have become the norm and the insurance industry is desperate for some relief to this perceived mischief. Unfortunately the House of Lords did not oblige (for reasons unrelated to the merits of the argument).[15] However, their Lordships' judgments are replete with references to the staggering disproportionality of the costs to the value of claims such as this.[16] This case also, it is respectfully submitted by the authors, was part of the rallying call that led to Jackson L.J.'s wide-ranging and comprehensive review on the costs of civil litigation and changes to the Civil Procedure Rules, capping success fees on contingency agreements for matters concluded pre-issuance of proceedings.[17]

LIABILITY FOR COSTS AND DISCLOSURE ISSUES

In 2005, the English Court of Appeal established the principle that a third-party for-profit funder can be liable for costs to the extent of the funding provided to the litigant. The "*Arkin* Principle" came out of the Court of Appeal's judgment in *Arkin v. Borchard Lines*.[18] The litigation funder was MPC, and at issue were costs in the region of £6 million.

Earlier, in *Hamilton v. Al Fayed (No. 2)*,[19] the plaintiff, an impecunious M.P., brought a libel action against a wealthy businessman. Most of his legal expenses were met out of a "fighting fund" to which several hundred donors had contributed. The action failed and the defendant sought an order that nine of the major contributors should pay the costs which he was unable to recover from the plaintiff. The judge rejected this application and the plaintiff appealed.

The leading judgment in the Court of Appeal was given by Simon Brown LJ. He identified that there was a conflict in the authorities between two principles: on the one hand, the desirability of the funded party obtaining access to justice, and on the other, the desirability that the successful party should recover his costs. He considered that, where the funders were "pure

funders" (being "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course"),[20] the former principle (access to justice) should prevail. In doing so, he found the respondent's argument persuasive: that if, in the cases where solicitors acting under a CFA are not to be liable for the other side's costs if their client's claim fails, why should the pure funder be?[21]

In *Arkin*, the Court of Appeal's judgment makes it clear that the *Arkin* principle is seen as a balancing of the interests:

> [O]n the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences.[22]

As with regulation, the predictability offered by this principle has obvious benefit to all concerned in the management of litigation. Whether B.C. courts would consider an approach such as this remains to be seen.

Given the shared inherent jurisdiction basis for awarding security for costs (and, in particular, the inability to order such security against a natural person ordinarily resident within the jurisdiction), B.C. courts may be willing to exercise their discretion along the lines seen "down under". There, while for-profit litigation funders are not exposed to liability for opposing parties' costs, defendants can protect their interests by relying on the rules pertaining to security for costs.[23] In *Saunders v. Houghton*, the New Zealand Court of Appeal held:

> We consider that the change [the involvement of a litigation funder] is so radical as to justify the High Court, in exercise of its inherent jurisdiction under s. 16 of the *Judicature Act 1908*, to consider ordering security as a term of such orders, even where numerous natural persons are among the plaintiffs, as the price of the privilege to employ such a procedure.[24]

However, achieving the predictability of set costs rules in such circumstances requires disclosure of funding arrangements. Currently, plaintiffs are not required to disclose their funding arrangements.[25] This imposes an obstacle to any attempt to gain security for costs beforehand, or an order against a litigation funder after the event. The current B.C. Civil Rule 7-1 requirement to disclose policies of insurance may assist plaintiffs in managing their litigation strategy. Ought not a similar rule to apply to the financing charges associated with litigation funding?

PARTICIPANTS TO LITIGATION AND DE FACTO vs. DE JURE FUNDING

A very relevant factor to the court allowing the funding arrangement in *Factortame* was the accountant's arm's-length relationship with the expert evi-

dence sought to be obtained (having retained, on a "regular" retainer, separate accountants to fulfill that role). In its judgment, the Court of Appeal noted the obvious public policy concern raised when those giving expert assistance to the court have a direct interest in the outcome of the litigation.[26] But where should the line be drawn? Even the court in *Factortame* did not say that an employment relationship with a litigation party is a ground for excluding expert evidence. It only goes to weight.[27]

What of other service providers? Some providers of medical imaging in B.C. already charge on a no-win, no-fee basis, and one appears to have funded a recent appeal of a registrar's taxation which had disallowed its fee.[28] Earlier this year, in *Edmondson v. Payer*,[29] the defendant sought to challenge the credibility of a medical expert called on behalf of the plaintiff on the ground that the expert's husband operated a medical imaging entity that relied on business from the plaintiff's bar. While the fact that the expert had arranged for the MRI at her husband's clinic, which would only be paid for if the litigation succeeded, did not establish that she had a direct interest in the outcome of the litigation, the court noted that it raised the possibility of bias that needed to be taken into account.

It is also not beyond the realm of possibility that if litigation charges of this nature were to be recognized as a legitimate disbursement, defendants, too, may opt to seek financing for defence-related expenses, particularly where those defences are provided by insurers and if costs rules allow the recovery of the interest as a disbursement. However, absent such a rule, the current case law would appear to require a defendant to meet the necessity requirements we addressed in Part I of this article before recovery is allowed.

CONCLUSION

The role of the *Court Order Interest Act* is one of a number of other aspects to the debate on litigation finance that have not been touched upon here. In light of the current political and economic climate—in particular, the contraction of state-funded assistance for public access to justice, the authors' expectation is that litigation finance will become increasingly more commonplace in British Columbia. It is therefore an opportune time to grapple with balancing the myriad of issues that arise. Some issues are at the more esoteric level of the societal impact of litigation becoming more of a speculative profit centre. There are also the more direct day-to-day issues of regulating availability of and liability for those costs so as to ensure that this growing industry helps rather than hinders the just, economic and timely resolution of litigious matters. With appropriate foresight, access to justice for deserving litigants can be balanced against liability for the attendant costs in a way that allows all involved parties to manage litigation in a proportionate way.

ENDNOTES

1. 343 NBR (2d) 58 (QB), 2009 CanLII 27242.
2. 2010 BCSC 317. After the submission of Part One, the B.C.C.A. handed down its decision. While Saunders J.A. (for a unanimous bench) noted the divergent authority on the recoverability of interest as a disbursement, the judgment did not deal with that issue, nor did it deal with whether the amount may be recoverable as special damages.
3. 2002 EWCA Civ 932 [*Factortame*].
4. *Ibid* at para 9. And already at this time claimed to have an "excellent track record in recovering compensation [in cases such as this]".
5. *Moore Stephens v Stone Rolls Ltd (in Liquidation)*, [2009] UKHL 39 (on appeal from [2008] EWCA Civ 644).
6. 343 NBR (2d) 58, 2009 CanLII 27242 (NB QB) [*Bourgoin*].
7. See, for example, Susan Lorde Martin, "Litigation Financing: Another Subprime Industry that has Place in the United States Market" (2008) 53 Vill L Rev 83.
8. "Review of Civil Litigation Costs—Preliminary Report"(May 2009) at 163.
9. Online: <http://www.judiciary.gov.uk/Resources/JCO/Documents/CJC/Publications/consultation%20papers/tpf-consultation-paper.doc> at 19–25.
10. 2011 ONSC 5119.
11. In *Bourgoin*, the plaintiff was charged an effective per annum rate of 32.9 per cent through Seahold Investments. According to its website, Bridgepoint Financial Services offers litigation finance at 24 per cent per annum (as a "reduced rate" as of October 2010).
12. 2002 UKHL 28.
13. "After the Event" insurance is, as its name suggests, taken out after an injury or event giving rise to litigation. Such policy provides cover for an adverse costs award, and the premium itself is typically not payable unless the litigation is successful. The premium is payable by the opposing party if the claimant (as the term is used in the U.K.) is successful at trial. It is a form of litigation finance common in England and Wales.
14. Another notable difference is that the success fee is a proportion of fees billed rather than the trial award.
15. Their Lordships holding that the responsibility for monitoring and controlling the developing practice in this field fell to the Court of Appeal as having the ultimate responsibility for the supervision of the administration of civil procedure by the lower courts.
16. *Supra* note 12, at para 7 (Lord Bingham), and para 54 (Lord Hope), by way of examples.
17. *Supra* note 5. Jackson L.J.'s consultation included visiting other Commonwealth jurisdictions, and his recommendations for reform lead to a consultation paper published by the Ministry of Justice in November last year, with proposals for the implementation of certain of his recommendations ("Proposals for Reform of Civil Litigation Funding and Costs in England and Wales"—Consultation paper CP 13/10).
18. [2005] EWCA Civ 655 [*Arkin*].
19. *Ibid*.
20. *Ibid* at para 40.
21. *Ibid* at para 45.
22. *Ibid* at para 38.
23. See *Jeffrey & Katauskas Pty Ltd v SST Consulting Pty Ltd*, [2009] HCA 43 (High Court of Australia).
24. [2009] NZCA 610 at para 36.
25. Unlike the U.K., where the Civil Procedure Rules require disclosure, failure to comply with which limits recoverability of the financing charges (CPR Part 44.3B).
26. *Supra* note 3 at para 73.
27. *Ibid* at para 70.
28. See *Farrokhmanesh v Sahib*, 2010 BCSC 1797 at paras 7, 42–43.
29. 2011 BCSC 118 at paras 85–89.