

Litigation Crowdfunding

It is widely known that litigation can be prohibitively expensive, and this has become even more of an issue with recent legal aid cuts and increases in court fees. As a result, litigants are turning to an alternative source of funding known as crowdfunding.

Originally a way for start-up companies and charitable causes to seek resources from the public, crowdfunding has expanded into a viable and significant source of funding for litigation. As third party litigation funding is already an established method of financing legal proceedings, it was only a matter of time before an attempt was made to crowdfund a legal dispute.

There are already various litigation-specific crowdfunding platforms in the US, such as LexShares, which enables investors to purchase shares of equity ownership in commercial disputes requiring between \$100,000 and \$1 million of capital. In return, investors get a share of the eventual proceeds. Invest4Justice, on the other hand, allows parties to post details of cases requiring funding of any type and size, and anyone can donate or invest.

Now the first official UK legal crowdfunder, CrowdJustice, has been established. CrowdJustice invites the public to make donations towards “public interest cases”. Its first campaign is a human rights action against an oil company by a Colombian trade unionist.

It is perhaps difficult to imagine members of the public parting with their hard-earned cash to assist purely commercial claims through the courts. However, crowdfunding for business disputes could gain traction in the UK, as it has in the US.

Despite its increasing popularity, however, crowdfunding is still a relatively untested option and it should, of course, be approached with caution. Here are a few of the potential legal issues and grey areas:

Champerty and maintenance

Historically, English law refused to recognise arrangements where litigation was funded or “maintained” by third parties, where causes of action were assigned to third parties or where “champertous” agreements were put in place (under which a third party paid some or all of the costs of litigation in return for a share of the proceeds of the claim). This refusal was based on the public interest in protecting the purity of justice, the fear being that third parties with a monetary interest might be tempted to abuse the process, for example by manufacturing evidence and bribing witnesses.

More recently, the need to ensure access to justice in the wake of the erosion of legal aid has made Parliament more receptive to litigation funding arrangements, and legislation has been introduced to moderate the applicability and effect of the doctrines. The courts are also increasingly willing to accept the validity of third party funding agreements.

The rules against maintenance and champerty do still exist, however, and can render third party funding agreements void and unenforceable. Whether or not the rules are breached will depend on the circumstances of each individual case, including:

- The extent to which the funder controls the litigation.
- The level of communication between the funded party and the solicitor.
- The extent to which the funded party is provided with information about, and is able to make informed decisions concerning, the litigation.
- The amount of profit that the funder stands to make.
- Whether or not there is a risk of inflating damages.

- Whether or not there is a risk of distorting evidence.
- Whether or not the funder is regulated.

The litigation funding agreement is therefore key to whether the arrangement is considered acceptable and legally binding. Each crowdfunding platform is likely to have its own terms and conditions.

Liability for other side's costs

If the funded party loses the case, can the successful party apply for an order making the crowdfunders liable for their costs and, if so, will the Arkin cap apply to limit those costs to the amount of their contribution? How would this work in practice if a number of different individuals have contributed?

Regulation

Third party litigation funding is regulated in England and Wales by the Association of Litigation Funders but, given the demanding membership eligibility requirements (which include having access to £2 million of capital at all material times), it is difficult to see how crowdfunding could fall within the ALF's remit. So how else will it be regulated?

Professional duties

Any solicitors who become involved with a crowdfunded case must ensure that their professional duties to their client and the court are not compromised. Where a third party has a commercial interest in legal proceedings, there may be a higher risk of a conflict of interest arising. Similarly, a balance must be struck between providing sufficient information and documents to permit potential crowdfunders to make an informed decision about the strength of a claim, and protecting clients' confidential information and ability to rely on privilege.

As can be seen, the concept of crowdfunded litigation throws up a number of unanswered questions. Although it may seem like one way of increasing access to justice, there is still a long way to go.