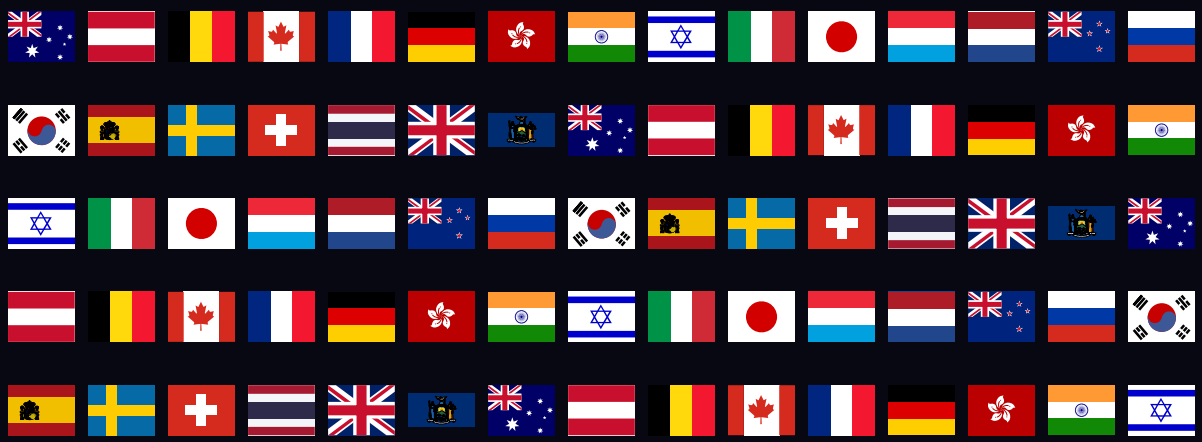
LITIGATION FUNDING

New Zealand



LEXOLOGY
Getting The Deal Through

Consulting editor
Woodsford

Litigation Funding

Consulting editors

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Woodsford

Quick reference guide enabling side-by-side comparison of local insights, including regulation and regulators; funders' rights (choice of counsel, participation in proceedings, veto of settlement and funding termination rights); conditional and contingency fee agreements; judgment, appeal and enforcement; collective actions; costs and insurance; disclosure and privilege; disputes between litigants and funders; and recent trends.

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REGULATION

Overview

Is third-party litigation funding permitted? Is it commonly used?

Third-party litigation funding is permitted. Although the common law torts of maintenance (assisting a party in litigation without justification) and champerty (assisting in consideration of a share of proceeds of the litigation) have not technically been abolished in New Zealand, the recent attitude of the New Zealand courts to third-party funding can be described as 'cautiously permissive' and, perhaps, increasingly receptive. To describe this approach, a distinction needs to be drawn between representative proceedings under Rule 4.24 of the High Court Rules (which allows one or more persons to sue on behalf of, or for the benefit of, all persons with the same interest in the subject matter) and ordinary non-representative proceedings.

Representative proceedings

A representative proceeding requires that the representatives sue with the consent of the other persons who have the same interest (Rule 4.24(a)), or the court directs this on an application (Rule 4.24(b)). The Court of Appeal has confirmed that the existing procedure does not require the court to give prior approval for a funding arrangement (Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group [2017] NZCA 489 (Southern) at [79]). Instead, the court will ensure that in making a direction it is not facilitating an abuse of process. If a representative proceeding is based on clearly misleading funding arrangements or amounts to a bare assignment of claims, then the court will not grant leave knowing that its processes are being used to facilitate unlawful conduct. In this regard, the courts will exercise a greater supervisory role over the setting up of representative proceedings (ie, the funding arrangements and communications with prospective class members) than where a party bring an ordinary proceeding that is funded.

Non-representative proceedings

The Supreme Court of New Zealand has made it clear that it is not the role of the courts to act as general regulators of litigation funding arrangements or to give prior approval to such arrangements, outside its supervisory role in 'representative' proceedings (see above). Instead, the role of the courts is to adjudicate on any applications brought before them to which the existence and terms of a litigation funding arrangement may be relevant (Waterhouse v Contractors Bonding Ltd [2013] NZSC 89, [2014] 1 NZLR 91 (Waterhouse) at paragraphs 28 to 29). The Supreme Court has accepted that some measure of control by a third-party funder is 'inevitable' to enable a litigation funder to protect its investment (Waterhouse at paragraph 46).

Scope for intervention

Under the High Court Rules or its inherent powers, the High Court may intervene (for example, by imposing a stay of proceedings) in both representative or non-representative funded proceedings under the following circumstances.

Abuse of process

The High Court may intervene if there is a manifestation of an abuse of process on traditional grounds, such as where proceedings:

- deceive the court, are fictitious or mere sham;
- use the process of the court in an unfair or dishonest way, for some ulterior or improper purpose, or in an improper way;
- are manifestly groundless, without foundation or serve no useful purpose; and
- are vexatious or oppressive.

See PriceWaterhouseCoopers v Walker [2016] NZCA 338 (PriceWaterhouseCoopers) at paragraph 14(e).

Non-permitted bare course of action

A funding arrangement (including an assignment of a security agreement) amounts to an assignment of a bare cause of action to a third-party funder in circumstances where this is not permissible (ie, the exceptions to maintenance and champerty do not apply).

In assessing whether litigation funding arrangements amount to an assignment that is not permitted, the court will have regard to the level of legal (rather than de facto) control able to be exercised by the funder, the profit share of the funder and the role of the lawyers acting (Waterhouse and PriceWaterhouseCoopers).

For a recent example where an assignment of bare causes of action to a litigation funder was held not to be permissible (and a stay of the proceedings was ordered), see Cain v Mettrick [2020] NZHC 2125.

Even where such concerns arise, the provision of appropriate undertakings by a funder may be effective to allay them. In PriceWaterhouseCoopers , a funding agreement was in place between the plaintiff company (in liquidation) and the litigation funder (SPF No. 10 Ltd), in conjunction with an assignment under a security agreement to the funder of the plaintiff's right of action against the defendant (being its only valuable asset). The defendant argued that this arrangement was an impermissible assignment of a bare cause of action to the funder, which amounted to an abuse of process. The majority of the Supreme Court held (paragraphs 77 to 91) that the belated provisions of the following undertakings given by the funder to the court satisfied concerns as to the permissibility of the assignment:

- to not rely on clauses in the security agreement giving it greater control than it had under the funding agreement; and
- to pay a proportion of proceeds of a successful claim for the benefit of unsecured creditors (where the funder was otherwise entitled to all of these under the security agreement).

Misleading statements given to the court

Where a representative action has been promoted to prospective litigants using misleading statements, the court may also intervene, either by refusing a direction under Rule 4.24(b), or to correct the harm done by the distribution of the material (Southern at paragraphs 78 and 82).

Funding of arbitration

Given the private nature of arbitration, the treatment of third-party litigation funding in domestic arbitration in New Zealand is largely unknown. The relevant legislation (the Arbitration Act 1996) does not contain any provisions relating either directly or indirectly to litigation funding (or even class arbitrations). Instead, an arbitrator has the power to conduct the arbitration, or to control the conduct of the arbitration, subject to the agreement between the parties and the rules of natural justice (article 19, Schedule 1). An arbitrator may also order 'any party to do all such other things

during the arbitral proceedings as may reasonably be needed to enable an award to be made properly and efficiently' (Clause 3(1)(j) of Schedule 2). These broad powers would encompass the ability to regulate funded domestic arbitrations with respect to those referred to in the following questions.

In addition, the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request assistance from the High Court or a district court in the exercise of the powers conferred on the arbitral tribunal relating to the conduct of arbitral proceedings (Clause 3(2) of Schedule 2). This ability would allow either the arbitral tribunal of its own motion, or one of the parties with its approval, to request assistance from the High Court or a district court in the event of an issue arising in the context of a funded domestic arbitration.

Litigation funding is becoming more commonly used in New Zealand, although is not as commonly used as in other common law jurisdictions (such as the United Kingdom and Australia). In recent years, a variety of proceedings funded by third parties have been brought, with allegations in relation to:

- losses on share investments resulting from misleading statements in a share prospectus (Saunders v Houghton [2014] NZHC 2229) or in initial public offering materials (Fullarton & Ors v Arowana International Ltd v Ors CIV-2020-404-551);
- building products (White v James Hardie New Zealand [2017] NZHC 2112 and Paine v Carter Holt Harvey Ltd [2019] NZNC 1614);
- losses resulting from kiwi fruit being affected by the entry of disease into the country (Strathboss Kiwifruit Ltd v Attorney-General [2018] NZHC 1559 (Strathboss Kiwifruit);
- illegitimate fees charged to consumers by banks (Cooper v ANZ [2013] NZHC 2827);
- insurance claims arising out of earthquakes (Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd [2017] NZCA 489, [2018] 2 NZLR 312); and
- breaches of directors' duties owed to companies (Walker v Forbes [2017] NZHC 1212 and Mainzeal Property and Construction Ltd (in liq) v Yan [2019] NZHC 255).

Law stated - 29 October 2021

Restrictions on funding fees

Are there limits on the fees and interest funders can charge?

There are no limits prescribed by either legislation or the common law. In the context of a non-representative funded action, the Supreme Court of New Zealand has said that it is not the role of the courts to assess the fairness of any bargain between a funder and a plaintiff, presumably including funder remuneration (Waterhouse , paragraph 48). In the context of a representative funded action, the High Court was not persuaded that the terms of the funding agreement (including an entitlement to terminate the funding agreement without cause on five days' notice and a power to veto in relation to settlement) were inappropriate for a representative action (Strathboss Kiwifruit Ltd v Attorney-General [2015] NZHC 1596, (2015) 23 PRNZ 69 at paragraph 70).

That said, in assessing whether litigation funding arrangements amount to an assignment that is not permitted, the courts will have regard to the profit share of the funder.

Law stated - 29 October 2021

Specific rules for litigation funding

Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

There are no provisions specifically applicable to third-party litigation funding, but there are general provisions that have application.

As providers of financial services and products in trade, litigation funders are subject to the provisions of the Fair Trading Act 1986. This contains consumer protections against misleading and deceptive conduct, unsubstantiated representations, and false or misleading representations. It provides redress against such conduct by funders in, for example, marketing funding, negotiating with prospective plaintiffs, or in relation to acts or omissions while a funding arrangement is in place. The Consumer Guarantees Act 1993, which imposes statutory guarantees in relation to services, may also have application.

Funders with a place of business in New Zealand, and who provide a 'financial service' (typically, this is because they act as a creditor under a credit contract, as defined in section 5 of the Financial Service Providers (Registration and Dispute Resolution) Act), must register as a financial service provider. Those providing services to 'retail clients' (as defined in section 49 of the Financial Service Providers (Registration and Dispute Resolution) Act) must also belong to a dispute resolution scheme. All financial service providers are subject to the 'fair dealing' provisions in the Financial Markets Conduct Act 2013, which prohibit misleading conduct, false or misleading representations and unsubstantiated representations in relation to financial products and services. The regulatory authority, the Financial Markets Authority, can take civil action against financial service providers whose conduct breaches these provisions. Possible civil orders include declarations of contravention, pecuniary penalties and compensatory orders.

Law stated - 29 October 2021

Legal advice

Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

No specific rules apply. The general professional and ethical rules in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 apply.

In Houghton v Saunders (2011) 20 PRNZ 509, the High Court, at paragraph 75, found the following guidelines 'helpful':

- There should be a direct client–solicitor relationship between the members of the represented group and the lawyer acting for the represented group in the litigation.
- The lawyer acting for the represented group must be responsible for advising the named claimants and members of the represented group about the merits of the case and all material developments in the case. That advice must be prepared and provided without interference by the litigation funder.
- The litigation funder must not provide expert evidence in the litigation. Expert witnesses must be instructed directly by the lawyers acting in the litigation and the litigation funder should have no direct involvement in that process.

Law stated - 29 October 2021

Regulators

Do any public bodies have any particular interest in or oversight over third-party litigation funding?

No public bodies have specific interest in or oversight over third-party litigation funding, apart from the courts and the Financial Markets Authority to the extent that litigation funders are subject to the relevant legislation.

Law stated - 29 October 2021

FUNDERS' RIGHTS

Choice of counsel

May third-party funders insist on their choice of counsel?

It does not appear that this issue has come before the courts to date. It is very unlikely that third-party funders have such a legal entitlement, because choice of counsel is the exclusive right of the client (ie, the plaintiff). This right is reflected in the professional and ethical rules in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Law stated - 29 October 2021

Participation in proceedings

May funders attend or participate in hearings and settlement proceedings?

There is no restriction on representatives of funders attending hearings or settlement discussions, unless excluded by order of the court. Funders do not have a right to participate in hearings, and attempts to do so might raise concerns as to inappropriate control or abuse of process. Funders may participate in settlement negotiations, but cannot influence or make settlement decisions unless this is provided for under the funding agreement. Such an entitlement might also raise concerns as to inappropriate control or abuse of process.

Law stated - 29 October 2021

Veto of settlements

Do funders have veto rights in respect of settlements?

Only if such rights are provided for under the funding agreement. The courts take a fairly liberal approach to such veto rights. In Strathboss Kiwifruit Ltd v Attorney-General [2015] NZHC 1596, (2015) 23 PRNZ 69 at paragraphs 70 to 73, the High Court was not persuaded that the existence of a power of veto in relation to settlement was inappropriate for a representative action. This was for the following reasons:

- in most scenarios, the claimants and the funder should continue to have aligned interests in relation to what would constitute an acceptable settlement;
- to the extent the action requires positive input from all the claimants, the funder will need to maintain their goodwill to carry on with the action; and
- where the funding agreement contemplates the involvement of independent third parties with appropriate expertise to resolve disputes, reputationally this will provide a fetter on the funder's ability to act unreasonably.

Law stated - 29 October 2021

Termination of funding

In what circumstances may a funder terminate funding?

In the first instance, this will depend on the terms of the funding agreement (which often provides for termination upon notice). In the unlikely event that the funding agreement does not make express provision for termination, the Contracts and Commercial Law Act 2017 will apply by default. A funder would be able to cancel (prospectively) a funding

agreement in the following circumstances:

- for misrepresentation by the plaintiff(s) prior to the agreement that has induced the funder to enter the agreement;
- if a term of the funding agreement is broken by the plaintiff(s); or
- if it is clear that a term in the funding agreement will be broken by the plaintiff(s).

In all these situations, the funder may exercise the right to cancel if, and only if:

- the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term, is essential to the funder; or
- the effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be:
  - substantially to reduce the benefit of the contract to the funder;
  - substantially to increase the burden of the funder under the contract; or
  - in relation to the funder, to make the benefit or burden of the contract substantially different from that represented or contracted for.

Law stated - 29 October 2021

Other permitted activities

In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

Funders may not take any active role in the litigation process if that would amount to an abuse of process.

That said, it should be noted that, in the context of a funded representative action, the High Court has stated that concerns as to champertous pursuit of claims have to be tempered by the reality that funded arrangements are commercial arrangements and it 'would be somewhat naïve to expect that he who pays the piper will not have some ability to call the tune' (Strathboss Kiwifruit Ltd v Attorney-General [2015] NZHC 1596, (2015) 23 PRNZ 69 at paragraph 66).

There are no ways in which funders are required to take an active role.

Law stated - 29 October 2021

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

May litigation lawyers enter into conditional or contingency fee agreements?

Litigation lawyers may enter into conditional or contingency fee agreements, but only of a certain type. 'Conditional fee agreements' (where payment depends on whether the outcome of the matter is successful) are permissible under sections 333 to 335 of the Lawyers and Conveyancers Act 2006 if the fee arrangement amounts to:

- the normal fee that would have been charged for the services provided; or
- the normal fee accompanied by a premium that:
  - compensates counsel for the risk of not being paid at all;
  - compensates counsel for waiting to be paid until proceedings have been concluded; or

- is not calculated as a proportion of the amount recovered by the proceedings.

However, conditional fee agreements are prohibited for criminal proceedings, immigration proceedings and family law proceedings.

Conditional or contingency fee agreements that fall outside this statutory permission may be illegal or unenforceable, especially where the payable fee is calculated as a proportion of the amount recovered (and therefore amounts to the tort of champerty).

Law stated - 29 October 2021

Other funding options

What other funding options are available to litigants?

Government-funded legal aid for litigants who cannot afford lawyers is available through the Ministry of Justice for certain civil disputes (including debt recovery, breaches of contract, defamation, and bankruptcy proceedings). A litigant must apply for such aid. Whether aid is granted depends on a number of factors including:

- any arrears from a previous legal aid debt;
- the income of the litigant;
- the assets of the litigant; and
- the merits of the legal case.

Legal aid is considered a loan and a litigant may have to repay some or all of the legal aid, depending on how much they earn, the property they own and whether they receive any money or property as a result of the case.

Litigants may explore other funding options, including specialised insurance products. Such products are not yet widely available (or even promoted as being available) in New Zealand.

Law stated - 29 October 2021

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

How long does a commercial claim usually take to reach a decision at first instance?

This will depend on the nature and complexity of the claim, the number of parties, the level of court in which it is filed and the workload of that court. Given the typical quantum of funded claims, almost all of these will be filed in the civil jurisdiction of the High Court.

In the civil jurisdiction of the High Court, the statistics for the past four years available are as follows:

- 1 January to 31 December 2020: the average age at disposal was 735 days;
- 1 January to 31 December 2019: the average age at disposal was 764 days;
- 1 January to 31 December 2018: the average age at disposal was 699 days; and
- 1 January to 31 December 2017: the average age at disposal was 759 days.

Law stated - 29 October 2021

Time frame for appeals

What proportion of first-instance judgments are appealed? How long do appeals usually take?

This can be estimated as a function of the number of cases disposed of and the number of appeals brought.

In the civil jurisdiction of the High Court, the statistics for the past four years available are as follows:

- 2020: 2,273 cases were disposed;
- 2019: 2,360 cases were disposed;
- 2018: 2,308 cases were disposed; and
- 2017: 2,352 cases were disposed.

New civil appeals to the Court of Appeal:

- 2020: 230, which means that roughly 10.12 per cent were appealed;
- 2019: 211, which means that roughly 8.94 per cent were appealed;
- 2018: 239, which means that roughly 10.36 per cent were appealed; and
- 2017: 234, which means that roughly 9.95 per cent were appealed.

The length of time an appeal takes depends on the nature and complexity of the appeal, the number of parties and the workload of the Court of Appeal. On average, an ordinary civil appeal might take at least one year to be disposed, from the date of filing until the date of judgment.

Law stated - 29 October 2021

Enforcement

What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

There are no statistics available on this issue. Whether enforcement proceedings are required will primarily depend on the defendant's financial position in each case.

In the High Court, following the sealing of judgment, a range of enforcement options are available against the judgment debtor and the judgment debtor's personal or real property (Part 17 of the High Court Rules). These are as follows:

- order for examination of the debtor;
- attachment orders over salary or wages due and payable by an employer;
- charging orders over real or personal property;
- sale orders over land and chattels;
- possession orders over land and chattels;
- arrest orders;
- sequestration orders over rents and profits from real and personal property; and
- imprisonment until security deposited or bond executed.

Generally, an enforcement procedure in respect of real property (such as a sale order) is the most difficult to implement.

Law stated - 29 October 2021

COLLECTIVE ACTIONS

Funding of collective actions

Are class actions or group actions permitted? May they be funded by third parties?

The High Court Rules allow for 'representative actions' rather than 'class actions' or 'group actions' per se. Rule 4.24 provides:

One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding:

- with the consent of the other persons who have the same interest; or
- as directed by the court on an application made by a party or intending party to the proceeding.

The threshold for the 'same interest' requirement is low: there must be a common issue of fact or law of significance for each member of the class represented (see Credit Suisse Private Equity LLC v Houghton [2014] NZSC 37, [2014] 1 NZLR 541 at paragraphs 53 and 151). In addition:

- all members of the class must have been able to claim as plaintiffs in separate actions in respect of the event concerned, with no defences applicable to only some of the class;
- the action must be beneficial to all of the class; and
- the action must cover the whole or virtually the whole of the class of potential plaintiffs and consent of all represented members of global damages to the representative plaintiff must be given (Credit Suisse, paragraph 151).

Sub-paragraph (a) allows a group of identified plaintiffs with the 'same interest' to sue together if they consent to this. The plaintiffs are then listed together in the same statement of claim.

Sub-paragraph (b) requires the party or intended party to make an application to the court for a representative order. In granting a representative order, it is standard practice for the court to impose a final 'opt-in' date for qualifying members of the class (Cridge v Studorp Limited [2017] NZCA 376 at paragraph 41). This has the benefit of protecting members of the represented group against a limitation bar arising after the date of their election to opt in to the proceeding (Credit Suisse , paragraphs 65 to 66 and 129).

Representative actions may be funded by third parties, although there are greater restrictions on these than on non-representative actions. In Saunders v Houghton [2009] NZCA 610, [2010] 3 NZLR 331 at paragraph 79, the Court of Appeal concluded (in the context of a representative action) that litigation funding arrangements will not be tortious or otherwise unlawful maintenance and champerty where:

- the court is satisfied there is an arguable case for rights that warrant vindicating;
- there is no abuse of process; and
- the proposal is approved by the court.

Funding arrangements have been approved in earlier cases (In re Nautilus Developments Ltd [2000] 2 NZLR 505 (HC) and In re Gellert Developments Ltd (in liquidation) (2001) 9 NZCLC 262,714). It remains unclear whether such approval

must, as a matter of course, be obtained in advance of proceedings, or simply in the event that the proposal is challenged by the defendant.

Law stated - 29 October 2021

COSTS AND INSURANCE

Award of costs

May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

Yes. The courts may order the unsuccessful party to pay the costs (and certain disbursements) of the successful party in litigation. All matters of costs are at the discretion of the High Court (Rule 14.1), but one of the default principles is that the party that fails with respect to a proceeding or an interlocutory application should pay (scale) costs to the party who succeeds (Rule 14.2(a)).

Generally, costs are assessed by applying a notional daily recovery rate (normally, two-thirds of the daily rate considered reasonable for each step of the proceeding) to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application (Rule 14.2(c) and (d)).

According to Rule 14.6(3), the court may award increased costs where:

- the nature of the proceeding, or the step it is in, such that the time required by the party claiming costs would substantially exceed the time allocated under the highest scale band;
- the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by:
  - failing to comply with the rules or with a direction of the court;
  - taking or pursuing an unnecessary step or an argument that lacks merit;
  - failing, without reasonable justification, to admit facts, evidence or documents, or accept a legal argument;
  - failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under the rules; or
  - failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under Rule 14.10 or some other offer to settle or dispose of the proceeding;
- the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or
- some other reason exists that justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

According to Rule 14.6(4), the court may award indemnity (ie, actual) costs where:

- the party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a proceeding or a step in a proceeding;
- the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party;
- costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding;
- the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to it;

- the party claiming costs is entitled to indemnity costs under a contract or deed; or
- some other reason exists that justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

Litigation funding costs do not constitute either 'costs' or 'disbursements' within the meaning of the above costs regime. The only basis on which the High Court might order the unsuccessful party to pay the litigation funding costs of the successful party would be pursuant to its inherent jurisdiction; there does not appear to be precedent for this.

Law stated - 29 October 2021

Liability for costs

Can a third-party litigation funder be held liable for adverse costs?

In exceptional circumstances, funders may be liable for adverse costs as non-parties, even in the absence of any abuse of process (Waterhouse v Contractors Bonding Ltd [2013] NZSC 89, [2014] 1 NZLR 91 at paragraph 52) or impropriety (Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2) [2004] UKPC 39, [2005] 1 NZLR 145 (Dymocks) at paragraph 33). Further, the level of such costs is not limited to the amount of funding provided (Waterhouse at paragraph 53).

According to the leading case on costs against non-parties (Dymocks at paragraph 25):

In this case, a non-party had funded unsuccessful litigation by an insolvent company. The Privy Council did not have litigation funding specifically in contemplation. Given that a litigation funder always stands to benefit financially from the proceedings and will ordinarily exercise at least some control over the proceedings, the above proposition must be read down. It seems likely, therefore, that for a funder to be liable for adverse costs, something more is required. One situation might be where the funder exercises control over the proceedings to the effective exclusion of the plaintiffs. Another might be where the funder withdraws funding part way through the litigation, leaving the defendant or defendants to face a plaintiff who is impecunious or insolvent. A third, and very rare, instance might be where it should have been clear at the time of filing that the funded claim was simply not tenable and litigation should have been avoided (Poh v Cousins & Associates Unreported, HC Christchurch, CIV 2010-409-2654, 4 February 2011 at paragraph 61).

Indemnity or increased costs will not be awarded merely because a litigation funder with a profit motive stands behind the losing party (Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd [2016] NZCA 67 at paragraph 135).

Law stated - 29 October 2021

Security for costs

May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

Yes. Under Rule 5.45 of the High Court Rules, on the application of a defendant, a judge may order the giving of security for costs if:

- a plaintiff is resident outside New Zealand;

- a plaintiff is a corporation incorporated outside New Zealand;
- a plaintiff is a subsidiary (within the meaning of section 5 of the Companies Act 1993) of a corporation incorporated outside New Zealand; or
- there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.

The evolving practice is for funders of funded representative actions to provide security for costs that tend to be quantified on a relatively generous basis in favour of defendants (Saunders v Houghton (No 1) [2009] NZCA 610, [2010] 3 NZLR 331 at paragraph 36 and Walker v Forbes at paragraphs 92 to 94).

Calculation of the sum is a matter for the court to assess in all the circumstances.

Those circumstances include the:

- amount or nature of the relief claimed;
- nature of the proceeding, including the complexity and novelty of the issues, and therefore the likely extent of interlocutory procedures;
- estimated duration of trial; and
- probable costs payable if the plaintiff is unsuccessful, and perhaps also the defendant's estimated actual (ie, solicitor and client) costs.

Insofar as past awards of security are a legitimate guide, they generally represent some discount on the likely award of default scale costs.

The sum ordered must either be paid into court or security for such sum must be given to the satisfaction of the judge or registrar. Where the litigation funder is overseas, an appropriate form of security will be a bank guarantee directly enforceable by the defendant.

Law stated - 29 October 2021

If a claim is funded by a third party, does this influence the court's decision on security for costs?

Yes. A third-party funded claim does have an influence, and may justify increased security for costs. In Houghton v Saunders [2015] NZCA 141, the Court of Appeal stated at paragraph 11:

In that case, the Court of Appeal ordered security (for the appeal) in the sum of NZ$100,000 (increased from NZ $86,000) because the overseas litigation funder retained the right to terminate its indemnity to the representative plaintiff for costs on notice and the scale costs of the proceeding were unusually high.

It was confirmed by the High Court in Highgate on Broadway Ltd v Devine [2013] NZHC 2288, [2013] NZAR 1017 at paragraph 22(d) that the fact the plaintiff is funded is a ground for the order of security.

Law stated - 29 October 2021

Insurance

Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

Yes. ATE is permitted in New Zealand. In our experience, it is commonly used by funders.

Generally, the only types of parties who would use other types of insurance to cover legal (defence) fees would be company director defendants (directors and officers' insurance) and professional defendants, such as lawyers, accountants, architects and engineers (professional indemnity insurance).

Law stated - 29 October 2021

DISCLOSURE AND PRIVILEGE

Disclosure of funding

Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Upon the commencement of funded proceedings, a litigant must disclose the following matters to the other party or parties:

- the fact there is a litigation funder and the funder's identity;
- the amenability of the funder to the jurisdiction of the New Zealand courts; and
- the terms of withdrawal of funding, but only if those terms in some way give legal control over the proceedings to the funder (eg, the ability to withdraw finding if the funded party refuses to obey instructions given) (Waterhouse v Contractors Bonding Ltd [2013] NZSC 89, [2014] 1 NZLR 91, paragraphs 67 to 69 and 72).

The litigation funding agreement itself must be disclosed to the opposing party and court where an application is made to which the terms of the agreement could be relevant, such as applications for a stay on the basis of abuse of process, applications for third-party costs orders, and applications for security for costs (Waterhouse , paragraphs 73 to 74).

In relation to the latter type of application, the Supreme Court has said that it is 'strongly arguable' that the courts have power to order disclosure of at least the existence of a litigation funder and the relevant terms of the funding agreement (Waterhouse , paragraph 63).

Disclosure to the opposing party is subject to redactions being made to preserve confidentiality, litigation-sensitive matters, and privilege.

In domestic arbitrations, an arbitral tribunal may order the discovery and production of documents or materials within the possession of power of a party (Schedule 2, Rule 3(1)(f) to the Arbitration Act 1996). This is broad enough to encompass a litigation funding agreement, although an arbitral tribunal would be cognisant of the need to protect confidentiality and privilege.

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Privileged communications

Are communications between litigants or their lawyers and funders protected by privilege?

Yes. The Evidence Act 2006 relevantly provides that the following communications and materials are capable of being protected by privilege:

1. a communication between the party and any other person (which would include funders);
2. a communication between the party's legal adviser and any other person (which would include funders);
3. information compiled or prepared by the party or the party's legal adviser; or
4. information compiled or prepared at the request of the party, or the party's legal adviser, by any other person (which would include funders).

(In all cases described under points (1) to (4) above, the communication or information must be made, received, compiled or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding.)

The applicable types of privilege are:

1. Section 56: privilege for a communication or information if the communication is made, received, compiled or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding.
2. Section 57(1): a person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication was:
    1. intended to be confidential; and
    2. made in connection with an attempt to settle or mediate the dispute between the persons.
3. Section 57(2): a person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute.

It should be noted that communications between lawyers and funders are not capable of being protected by solicitor-client privilege (section 54) given that lawyers acting for plaintiffs in funded proceedings will not be acting for the funders.

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DISPUTES AND OTHER ISSUES

Disputes with funders

Have there been any reported disputes between litigants and their funders?

There do not appear to be any such disputes reported as at the time of writing.

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Other issues

Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

It appears that some funded litigation has occurred in the main Pacific Islands. The civil procedure rules of the Cook Islands, Fiji and Samoa all permit ‘representative actions’, rather than ‘class actions’ or ‘group actions’ per se.

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UPDATE AND TRENDS

Current developments

Are there any other current developments or emerging trends that should be noted?

Reform

On 10 May 2018, the Law Commission (an independent law reform agency established by statute) announced that it is to review the law relating to class actions and litigation funding, with a view to making reform recommendations to the Minister of Justice.

The task of the Law Commission is ‘to assess whether the potential benefits of class actions and litigation funding can be realised in a manner that outweighs any costs and disadvantages they might give rise to’.

The Terms of Reference for the review include the following issues in relation to litigation funding:

1. whether and to what extent the law should allow litigation funding, having regard to the torts of maintenance and champerty;
2. the role of the courts, if any, in overseeing litigation funding arrangements; and
3. whether and to what extent litigation funders or funding arrangements should be regulated, for example, in relation to:

- the nature and extent of the litigation funder’s recovery;
- the powers and responsibilities of litigation funders;
- the potential for conflicts of interest; and
- disclosure requirements.

Subsequently, an expert advisory group, representing a range of perspectives, was established to provide technical expertise and advice to the Law Commission.

On 4 December 2020, the Law Commission released an Issues Paper entitled 'Class Actions and Litigation Funding'. The Commission stated its preliminary view that litigation funding is 'desirable in principle' and 'should be permitted' in New Zealand, as long as certain concerns can be addressed. The concerns were stated as including:

- funder control over litigation;
- the potential for conflicts of interest;
- funder profits; and
- capital adequacy of litigation funders.

The Commission sought feedback on the preliminary view that litigation funding is desirable in principle, and on how the concerns with litigation funding can be managed and whether a regulatory response is warranted. Options for the form of any regulation and oversight of litigation funding were stated as including:

- industry self-regulation;

- bringing litigation funding within the scope of the Financial Markets Conduct Act 2013, as a 'managed investment scheme';
- a tailored licensing system for litigation funders;
- a new statutory regime with oversight by a new statutory body; and
- court approval of funding arrangements.

Submissions closed on 11 March 2021.

After considering those submissions, the Commission confirmed its view that New Zealand should have a statutory class actions regime. On 30 September 2021, the Commission issued a Supplementary Issues Paper to seek feedback on detailed aspects of a class actions regime and to outline draft legislative provisions on some topics. The topics covered in the Supplementary Issues Paper are:

- issues relating to commencement of a class action, including class actions with multiple defendants and the impact of a class action on limitation periods;
- a detailed proposal for certification;
- how competing class actions should be managed;
- relationships in a class action, including the responsibilities of the representative plaintiff and the nature of the lawyer-class member relationship;
- issues that arise during a class action, including giving notice to class members, case management, discovery, managing individual issues and whether to allow common fund orders or funding equalisation orders;
- several issues associated with class action judgments; and
- settlement of a class action.

Submissions on the Supplementary Issues Paper were open until 12 November 2021.

Ultimately, the Commission will make recommendations in a final report to the Minister of Justice. As at the time of writing, no final completion date for the review has been set.

Once completed, the government will decide whether to accept or reject some or all the recommendations. If some or all are accepted and legislation is required, a bill is prepared and introduced to Parliament in the ordinary way. Unless urgency is required, the process can take several Parliamentary sessions over one or more years before legislation is enacted.

Case law

In relation to the existing procedural rules, a significant development in 2020 was the judgment of the Supreme Court in Southern Earthquake Services Ltd v Ross [2020] NZSC 126, confirming the ability of the court to make an ‘opt-out’ order as part of a direction under Rule 4.24 of the High Court Rules. Such an order means all members of the relevant class are automatically included in the action, unless they expressly ‘opt out’. Where actions are tried in two stages (a trial on liability followed by a trial on quantum), it is possible that class members will still need to ‘opt in’ at the quantum stage, to have an opportunity to prove their loss and enjoy a share of recovery. The parties had agreed on this course in Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group [2017] NZCA 489, although the Court did not hold that it was necessary either in that case or generally.

This marks a significant change to the New Zealand law relating to representative actions, enabling funded actions to be brought more easily.

It is also possible that, absent legislative intervention, ‘common fund orders’ or ‘equalisation orders' in favour of

litigation funders may become a feature of the funded class action landscape. In Southern Earthquake Services , the respondents had applied for a common fund order. The Supreme Court did not comment on the availability of such an order, and as at the time of preparing this publication, the application is still to be heard by the High Court.

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Jurisdictions

Australia	Piper Alderman
Austria	Nivalion AG
Belgium	Nivalion AG
Canada	Omni Bridgeway
France	Nivalion AG
Germany	Omni Bridgeway
Hong Kong	Herbert Smith Freehills LLP
India	Khaitan & Co
Israel	Woodsford
Italy	Fideal S.R.L
Japan	Miura & Partners
Luxembourg	Nivalion AG
Netherlands	De Brauw Blackstone Westbroek
New Zealand	Thorn Law Limited
Russia	Aperio Intelligence
South Korea	KL Partners
Spain	Procurator Litigation Advisors
Sweden	Nivalion AG
Switzerland	Nivalion AG
Thailand	Rajah & Tann Asia
United Kingdom - England & Wales	Woodsford
USA - New York	Liston Abramson LLP