Unlocking secrets

Joanna Bailie reports on a ruling that could see claimants forced to reveal funding details

The barely decade old litigation funding industry in England and Wales has evolved rapidly over the years. Awareness and acceptance of funding has grown in the legal community, as has the reputation of funding as a means for claimants with meritorious claims to secure access to justice. Yet while many historic concerns about funding as a concept have been resolved, the nebulous issue of 'transparency' remains for some. This was seen in the recent judgment in *Jalla & Ors v Royal Dutch Shell Plc & Ors* [2020] EWHC 738 (TCC), in which the court seemingly ordered broad disclosure of both the claimants' damages-based agreement with their lawyers, and the funding arrangements sitting alongside this. This article considers the *Jalla* judgment, and the competing interests of litigants in relation to such disclosure.

BACKGROUND

Outside of certain group action and competition law regimes, there is no general requirement under English law for claimants to disclose the presence and terms of their litigation funding. Funding agreements also usually contain confidentiality provisions to protect commercial interests. This allows the business model of funders to remain proprietary.

Subject to such provisions, claimants may see the strategic benefit of voluntarily disclosing the presence of a third-party funder on their side. This shows that they have the deep-pocketed financial firepower to take the matter as far as necessary. It also demonstrates to the defendant that a professional funder has independently assessed the merits of the case, and believes they are strong enough to put non-recourse money at risk behind it.

One exception to this general principle (in other words where we see the courts willing to compel disclosure in relation to a claimant's funding), is to allow a defendant to bring an application for security for its costs. Rule 25.14 of the English Civil Procedure Rules provides that the court may make an order for security from a party other than the claimant, if that party has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings. This is a well-established power that we have seen exercised numerous times by the court.

Although an order under this jurisdiction would involve revealing the identity of the funder and details of the arrangements specifically in respect of liability for adverse costs (whether the funder agrees to indemnify the claimant, the existence of any after-the-event insurance policy, and details of the limit of indemnity, and so forth) disclosure in this context has typically not extended to the terms of the litigation funding agreement more broadly. In other words, disclosure is limited to that which is required to enable the defendant to make an effective application under CPR 25.14.

It should also be noted that the court will not entertain a 'fishing expedition' in this context; there must be good reason to believe the claimant is funded, and that an application for security for costs would have reasonable prospects of success.

JALLA & ORS V ROYAL DUTCH SHELL & ORS

These waters may have been muddied somewhat by a recent finding in the case of *Jalla & Ors v Royal Dutch Shell*. The claim was bought by 27,500 inhabitants of a stretch of coastline in Nigeria. The claimants allege that the Royal Dutch Shell defendants are liable for negligence and nuisance in relation to a large oil spill that occurred in 2011. The allegations are being resisted by the defendants on a number of grounds.

The defendants sought, and obtained, an order for disclosure of 'any third-party funding arrangements, including the extent to which (a) any third-party funders stood to benefit from a favourable outcome, and (b) any third party funding included funding to cover adverse costs orders against the claimants.'

The judge's reasoning for granting the request was to 'level the playing field' in relation to the risks the defendants are exposed to, which is partly understood. Certainly, the request for information around adverse costs liability is consistent with the CPR 25.14 jurisdiction discussed above. However, the defendants' requests appear to have been drawn much more widely than that. The judge also went on to make the following finding: 'This court is prepared to take judicial notice of the fact that settlement of large litigation is rendered virtually impossible in the absence of reasonable transparency about these matters.'

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We cannot follow the proposition that the terms of the funding arrangements are relevant to *settlement* as well as to costs, and respectfully disagree with the suggestion that a settlement is 'rendered virtually impossible' without such disclosure. That is certainly not borne out by experience in the funding industry, and unfortunately the judge does not explain his reasoning. Indeed, while this finding appears to have been made in the name of transparency, it is not clear how much detail the judge intended to be provided in relation to the terms of the funding agreement. To the extent any disclosure was expected beyond the requirements of the CPR 24.15 jurisdiction, this could represent a concerning precedent.

CONFIDENTIALITY OF FUNDING

The terms of a claimant's funding arrangements will, in the vast majority of cases, be irrelevant to determining the issues in dispute. Further, the funding agreement will attract privilege to the extent that its terms allow inferences to be made about the substance of legal advice received by the claimant. A funder's success fee is often cited as an example of this, insofar as it reflects the contracting parties' assessment of the merits of the case.

That litigation funding agreements are capable of attracting privilege in this way was confirmed in the case of *Edwardian Group Limited* [2017] EWHC 2805 (Ch). In considering the privileged status of the contents of litigation funding agreements, the High Court followed

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Lyell v Kennedy (No 3) (1884) 27 ChD 1, in which the Court of Appeal found that a selection of documents was privileged on the basis that it would give the opponent 'a clue to the advice given by the solicitor' – or 'betrays the trend of the advice'.

Edward Group was concerned with disclosure of the claimant's negotiations with potential funders, and it was not necessary for the court to make findings in relation to disclosure of the terms of its current funding arrangements. However, there was recognition of the sensitivity of that information, and the potential for the respondents to abuse this knowledge by proposing terms of settlement which would create a conflict between the petitioners and their funders, and disadvantaging the petitioners. Notably in that case, Morgan J also rejected the application for an order disclosing the identity of the litigation funder, holding that it was irrelevant to the wider dispute.

COMMENT

Jalla is a first instance decision, and the extent of the disclosure required, and the reasoning given for this, is not wholly clear from the judgment. On one reading, it simply continues the established jurisdiction around basic disclosure for security of costs. Defendants have the right to ensure that their costs are secured if the relevant legal test is met. The jurisdiction in CPR 25.14 is aimed at ensuring a level playing field in that regard, where impecunious but funded claimants are involved. However, if the disclosure ordered was, in fact, broader than this, in our view that gives reason for concern.

The interests of all parties in this context need to be considered. Funders promote access to justice with their commercial models. These models in part rely on confidentiality, in the same way as other sophisticated commercial agreements. For the business of funding to continue to support meritorious claimants, some regard needs to be had to this.

Further, the terms of a litigation funding arrangement may well be commercially sensitive from the claimant's perspective. This information could be exploited by a defendant to its own advantage. Is it therefore fair to cite transparency in criticism of a claimant who seeks to keep its 'war chest' under wraps? Litigation is a high stakes adversarial process, and as such, it is unsurprising that both claimants and defendants seek to withhold information from their opponent to avoid possible tactical disadvantage. A defendant faced with a professional negligence action will often refuse to disclose the level of its indemnity insurance, for example.

We consider that the court should therefore be very wary of entertaining broad requests for funding disclosure outside the strict requirements of the CPR 25.14 jurisdiction. Defendants might well claim it aids 'transparency' and settlement prospects, but such disclosure would appear to go well beyond what is equitable, and risks real prejudice to claimants' interests.

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