



Association of Litigation Funders

Press Release

For immediate distribution

Statement from the Association of Litigation Funders of England & Wales regarding the Court of Appeal Judgment in Excalibur

London 18 November 2016: The Association of Litigation Funders of England & Wales (“the ALF”) today welcomed the Appeal Judgment in Excalibur.

The ALF notes the Court of Appeal’s reaffirmation of litigation funding as “an accepted and judicially sanctioned activity perceived to be in the public interest.” Tomlinson LJ

The ALF welcomes not only the Court of Appeal’s recognition of the ALF’s role as the voluntary regulator of “professional funders”, but also the important distinction drawn by the Court between professional funders and “the funders [in the Excalibur case] [who] were inexperienced and did not adopt what the ALF membership would regard as a professional approach to the task of assessing the merits of the case.”

Perhaps the most interesting aspect of the judgment for the litigation funding market is the clarification of funders’ ongoing role in relation to review of the cases in which they have invested. Tomlinson LJ said [emphasis added]:

“By funding, the funder takes a risk, a risk as to the nature of which he has the opportunity to inform himself both before offering funding **and during the course of the litigation** which he funds.” and “When conducted responsibly, as by the members of the ALF I am sure it would be, there is no danger of such review being characterised as champertous” [i.e. behaviour likely to interfere with the due administration of justice].

Professional Funder Members of the ALF have always known that claims evolve over time and recognise the legal and commercial importance of maintaining an active oversight of cases throughout. Their aim is to ensure, to the extent possible, that they are only ever funding meritorious claims being conducted properly by all concerned. No sensible, experienced funder has any interest in funding speculative claims that do not have good chances of success.

Excalibur is a graphic illustration of the risks of litigation funding, particularly for the sources of capital that may be attracted to funding on an ad hoc basis. Excalibur’s various inexperienced funders were found to be jointly and severally liable for nearly £32m. In the ALF’s view the risks involved in litigation funding are not easily managed by anyone other than professional funders, staffed by experienced litigation and arbitration experts, who ‘live and breathe’ the asset class.



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NOTES TO EDITORS

About the Association of Litigation Funders

The Association of Litigation Funders (the ALF) is an independent body that has been charged by the Ministry of Justice, through the Civil Justice Council, with delivering self-regulation of litigation funding in England and Wales.

Litigation funding is the provision by a third party of non-recourse finance to a party to litigation or arbitration, which is used to pay for the legal costs of the dispute, in exchange for the funder taking a share of the proceeds in the event of a successful outcome.

The litigation funding industry has established and paid for its own regulation and defined best practice, protecting claimants who seek the rational management of financial risk in litigation and arbitration.

By working with a Funder Member of the ALF, parties accessing litigation funding are assured that they will find an organisation that meets the high quality standards that should define this industry. The ALF Code of Conduct sets out the standards by which all Funder Members of the ALF must abide. It sets the standards for the capital adequacy of funders, sets out the specific, limited circumstances in which funders may be permitted to withdraw from a case, and outlines the way in which the roles of funders, litigants and their lawyers should be kept separate. The ALF also maintains robust and efficient complaints handling procedures.

The ALF actively engages with government, legislators, regulators and other policy makers to shape the regulatory environment for litigation funding in England and Wales.

The ALF was advised in the Excalibur Appeal by PJ Kirby QC and Louise Bell and her team of litigators at Olswang in London

For more information please visit: <http://associationoflitigationfunders.com/>

About the Excalibur case

The Excalibur case was a London Commercial Court claim by two brothers, Rex and Eric Wempen, through their company Excalibur Ventures LLC, against two oil exploration companies, Texas Keystone and Gulf Keystone in connection with oil fields in Kurdistan, for damages put at US\$1.6 billion. The complex and expensive trial lasted 60 days and the claim failed on every point. The trial judge described the litigation as having met with “a resounding, indeed catastrophic, defeat”.



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The claim was funded to the tune of US\$31.75mm by four groups of litigation funders, none of them members of the ALF. Only one of the funders had any previous experience of funding litigation and, for that funder, this was its first foray into litigation in the UK.

The costs appeal to the Court of Appeal whose judgment (by Tomlinson LJ) was handed down today was to determine on what basis the burden of payment of the successful defendants' legal costs should be divided between the four groups of funders.

The judgment was eagerly awaited by professional litigation funders in the UK as an important indicator of senior judicial attitudes to litigation funding and as an authoritative assessment of its impact on the administration of justice.

The principal conclusions of the Court can be summarised as follows:

- That the character of the Excalibur claim justified making an order for indemnity costs against the funded claimant. Therefore the funders of that claim should expect to have an order for indemnity costs against them too. [Per Tomlinson LJ] "I can see no principled basis upon which the funder can dissociate himself from the conduct of those whom he has enabled to conduct the litigation".
- That an advance to enable security for costs to be provided gives rise to the same potential exposure for adverse costs as an advance to enable legal costs to be paid.
- [Per Tomlinson LJ] "...on-going review of the progress of litigation through the medium of lawyers independent of those conducting the litigation, a fortiori those conducting it on a conditional fee agreement, seems to me not just prudent but often essential in order to reduce the risk of orders for indemnity costs being made against the unsuccessful funded party. When conducted responsibly, as by the members of the ALF I am sure it would be, there is no danger of such review being characterised as champertous."