Development of Third-Party Funding in England & Wales and Contingency Fee Agreements

Eleni Polycarpou
Withers LLP
Feudal Barons
Maintenance and Champerty

• Maintenance
  • the support of litigation by unassociated third party
    ‘without just cause or excuse’
• Champerty
  • Contract to fund of litigation by third party in return for a share in the
    proceeds
  • Champertous agreements unenforceable as a matter of public policy
• Must be an element of ‘impropriety’
  • Interference in the conduct of litigation; decision-making power, access to information
  • Disproportionate profit
  • Corruption of justice; inflaming damages, distorting evidence
Third Party Funding Agreements

• Viable money claims viewed as assets
• Fees are payable from proceeds recovered and can be calculated as:
  • A percentage of the amount recovered or
  • A multiple of the funding deployed or
  • A multiple of the funding committed or
  • A combination of any of the above
• If the claim is not successful capital invested can be lost
• ATE insurance covering adverse costs an option
Association of Litigation Funders

- Code of Conduct for Litigation Funders
  - Expressly covers the funding of arbitration
  - Minimum of £2m capital
  - Audited
  - Complaints procedure
- Sets benchmark...
Contingency Fee Agreements – Permitted Types

• Conditional Fee Agreements
  • Part or all of solicitors’ fee payable only if litigation successful
  • Conditional ‘uplift’
  • Client liable for all fees
  • ‘Uplift’ recoverable from losing side if pre-1 April 2013

• Damage-Based Agreements
  • Pre-defined success criteria
  • Solicitors’ fees a percentage of the award
  • Solicitors become litigation funders
Industry Regulation

- Solicitors’ Regulation Authority Code of Conduct
  - Must not act where there is a conflict of interest
  - Fee arrangements must be ‘legal’
  - Duties of confidentiality and privilege
- Bar Standards Board Code of Conduct
  - ‘only propose, or accept, fee arrangements which are legal’
  - Must not act where there is a conflict of interest e.g. temptation for counsel to favour the interests of the funder over those of the client
Thank you!