Client Alert | Commercial Litigation

What duties does a lawyer owe a litigation funder - put simply, what do the words say?

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The recent judgment in *John Hall v Saunders Law Limited & Others* considers the extent of the duties (if any) owed by solicitors conducting funded litigation to those funders, and emphasises the importance of careful drafting in litigation funding agreements.

Factual Background

Litigation funding had been obtained to enforce an Egyptian arbitral award in England ("the Enforcement Proceedings"); the Enforcement Proceedings were unsuccessful due to the Egyptian Court of Appeal declaring the underlying award to be a nullity. Following this, Mr. Hall, the Claimant, first made a claim under the Litigation Costs Insurance Policy ("the ATE Policy") that had been taken out, but the ATE insurer declined to pay out due to not having been provided with the more pessimistic advice from counsel as to the prospects of success of the Enforcement Proceedings.

He subsequently brought a claim in his own right and as an assignee of the then insolvent litigation funder ("the Funder"), against the various law firms and lawyers who had taken conduct of the Enforcement Proceedings (together, "the Defendants").

Mr. Hall complained that the Defendants had failed to communicate to the Funder the increasingly pessimistic views expressed by counsel as to the prospects of success of the Enforcement Proceedings. Mr. Hall argued that this omission was a breach of the duties owed by the Defendants to the Funder under the tripartite funding agreement (the "Funding Agreement") between the Funder, Malicorp Limited ("Malicorp"), who was the Claimant in the Enforcement Proceedings, and the law firms who conducted the Enforcement Proceedings at the material times. Mr. Hall further submitted that the omission was a breach of the common law duty of care owed by a solicitor to his client and/or a fiduciary duty owed by the Defendants to the Funder.

In response to the allegations made against them, the Defendants brought an application for summary judgment and/or strike out on the basis that Mr. Hall's claim for breach of contract was bound to fail; on the correct construction of the terms of the Funding Agreement, the Defendants were under no duty to pass on the views of counsel as to the prospects of success of Enforcement Proceedings as any such duty was only owed by their client, Malicorp. Accordingly, in the absence of any contractual duty, the Defendants owed no duty of care and/or fiduciary duty to the Funder.

Mr. Richard Salter QC, sitting as a Deputy Judge of the High Court, granted the application for summary judgment, holding that there was no positive obligation on the Defendants to perform the client's obligations and that "*the Particulars of Claim as presently pleaded disclose[d] no reasonable grounds for the claims advanced on behalf of Mr Hall… [and] Mr Hall's case has no realistic prospects of success*".[1]

The case raised the interesting question as to whether it was suitable for summary judgment because "…*the nature of the relationship between litigation funders and the solicitors retained by those whom they fund is a*

[1] John Hall v Saunders Law Limited and others [2020] EWHC 404 (Comm) at paragraph 77.

modern one on which there is little authority. This is a developing issue of considerable relevance in the new landscape conduct of litigation."[2] However, Salter DJ rejected Mr. Hall's attempts to avoid summary judgment on the basis that the matter should go to a full hearing because of its novelty and importance. Instead, as will be seen below, the Judge reached his conclusions applying well established legal principles.

Contractual obligations

The ATE Policy did contain some obligations on the part of the lawyers to provide information to the ATE insurer. As a result, a key part of the Claimant's case was that the funding arrangement comprised a suite of transaction documents including not only the Funding Agreement but also the ATE Policy. The Claimant then tried to use the helpful wording of the ATE Policy as part of the admissible background known to both parties, and submitted that the terms of Funding Agreement fell to be interpreted by reference to this.

The Court accepted that the ATE Policy and the Funding Agreement were intended "*to be complementary to each other as integral parts of the commercial arrangements for funding the Enforcement Proceedings*"[3] and were part of the admissible background. However, this ultimately did not assist the Claimant, who was not party to the ATE Policy, because it did not follow that because the lawyers owed a duty to the ATE insurer, they owed a like duty to the Funder under the terms of the Funding Agreement

This then left the parties' arguments on the interpretation of the Funding Agreement. In common with many such agreements, the emphasis of the Funding Agreement was on the obligations owed by Malicorp, the client, to do certain things namely:

- to either itself or to instruct its solicitor to provide the Funder with any documents, information or advice relating to the legal proceedings;

- to either itself or to instruct its solicitor to provide the Funder, insofar as it was reasonably practicable and proportionate, with copies of any draft pleadings, witness statements and significant correspondence, prior to the issue of legal proceedings; and

- to either itself or to through instructions to its solicitor, keep the Funder informed promptly of any significant developments in the legal proceedings, including any information, evidence or advice coming to the attention of Malicorp or the solicitors which may be material either to the prospects of success of the claim or of enforcing any judgment or reward.

The last point was the principal battleground. Mr. Hall alleged that the correct construction of the obligations owed by Malicorp to the Funder under the Funding Agreement amounted to a continuing instruction from Malicorp to its lawyers to report to the Funder on developments material to the prospects of success of the action. Further, he submitted that such instruction could only be rescinded should Malicorp decide to report directly to the Funder itself.

Salter DJ did not agree with this construction, holding that "*even when set in their commercial context and in the landscape of the instrument as a whole, that is simply not what the words of [the Funding Agreement] say*".[4] The words used in the Funding Agreement did not amount to a continuing instruction by Malicorp to the Defendants to advise the Funder of certain matters; rather the Funding Agreement provided that instructions could be given to the lawyers and law firms, but such instructions would have to be given individually by Malicorp. Further, he explained that even if this were not the case and if, contrary to his view, the wording did amount to a continuing instruction, then any breach of that instruction would in any event be actionable by Malicorp rather than by the Funder. This is because the lawyers and law firms would be accountable to their client and not to the Funder.

Mr. Hall also advanced the argument that when looking at the drafting of Malicorp's obligations in the round, there was a positive contractual reporting obligation on the lawyers to the Funder. Reference was further made to a clause in the Funding Agreement whereby no act would be permitted that would deprive the contracting parties to any benefit under it. The Claimant sought to invert this into a positive obligation on the lawyers to report. Salter DJ rejected that argument as "*ingenious*"[5] but nevertheless incorrect, and held that the Funding Agreement did not impose a free-standing positive obligation on the lawyers to the Funder, nor was there any basis for implying any such an obligation. Simply put, the Funding Agreement did not "*lack commercial or practical coherence without [such obligation]*".[6] Salter DJ reiterated the importance of careful drafting in such agreements,

[2] At paragraph 16.
[3] At paragraph 36.
[4] At paragraph 40.
[5] At paragraph 43.
[6] At paragraph 42.

emphasising that "*the task of the court is 'to identify what the parties have agreed, not what the court thinks that they should have agreed'*".[7]

Breach of fiduciary duties

Mr. Hall also brought claims based on breach of a duty of care and/or fiduciary duty by the Defendants in not disclosing the alleged pessimistic advice provided to them by counsel to the Funder, and/or by not ceasing to act for Malicorp once it became clear that it was refusing to pass on relevant information to the Funder. Such tortious and fiduciary breached claims are not infrequently pleaded in the alternative to a contractual claim but are notoriously difficult to establish if the principal contractual claim has failed. This case was no exception.

In particular, it was common ground amongst the parties that unless a contractual duty to report could be established on the lawyers (given the existence of the contract), no positive obligation could arise either by way of a duty of care at common law or by way of a fiduciary duty. In this regard, Salter DJ referred in his judgment[8] to the dicta of Lord Bridge in *Scally v Southern Health and Social Services Board*, that *"… If a duty of the kind in question was not inherent in the contractual relationship, I do not see how it could possibly be derived from the tort of negligence…*".[9] Given that the contractual duty had not been made out, the tortious duty therefore also failed.

Salter DJ further rejected the fiduciary duty for that reason as well. While it was possible for fiduciary duties to arise in a commercial setting, he stated that it was "*clear that it is not enough that one party simply 'trusts' or is relying on the other party to perform an obligation to turn a contractual obligation into a fiduciary one. Something more than that is required to attract the intervention of equity*".[10] In the present case, it was held that it was "*inherently unlikely*"[11] that the sensible commercial parties (and their solicitors) would have agreed to an arrangement in which conflicting fiduciary duties were likely to arise. Here there was a clear distinction between the fiduciary relationship of solicitor and client, and the purely contractual relationship between the lawyers and the Funder. As such, if any fiduciary duties were owed in these circumstances, they were owed by the lawyers to Malicorp, and not to the Funder.

Comment

This decision emphasises the importance of careful drafting in agreements between funders, clients, and their lawyers. In bringing the claims, Mr. Hall was doubtless aware that the Defendants were insured and so offered a deep pocket. Unfortunately for him, the Funding Agreement failed to impose direct obligations on the lawyers and attempts to construe the Funding Agreement creatively, and/or to imply a term or rely on a duty of care in tort or fiduciary duty, could not plug that gap.

Consequently, litigation funders may look to impose direct obligations in funding agreements on the legal advisors and not just on the funded client, particularly when it comes to reporting on the merits of an action. Lawyers should be aware in future that when signing up to funding agreements they may well be taking on board a liability and not just an administrative obligation.

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[7] At paragraph 42.
[8] At paragraph 51.
[9] [1992] 1 AC 294 at 303.
[10] At paragraph 55.
[11] At paragraph 56.

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