Limited Disclosure of Litigation Funding Arrangements Required

There is a general rule of law in New Zealand that a person not a party to litigation cannot interfere in the litigation, for example by funding one of the parties in return for a share of any damages awarded in the case. Such interference can amount to the tort of maintenance or champerty. This explains why historically New Zealand lawyers have not entered into contingency fee arrangements with their clients.

There are exceptions to the rule that allow third parties (typically litigation funding companies) to pay a plaintiff's legal fees in taking a case to court. A recent decision from the Supreme Court (*Waterhouse v Contractors Bonding Limited* [2013] NZSC 89) may pave the way for these to become more common.

The Waterhouses brought proceedings against Contractors Bonding Limited in relation to a failed insurance business. Contractors Bonding Ltd discovered that the Waterhouses were being funded by a third party litigation funder, and applied to stay the Waterhouses' case until the litigation funding agreement was disclosed, the Waterhouses obtained leave to prosecute the claim and the Waterhouses gave security for Contractors Bonding Ltd's costs.

The Supreme Court considered whether the Waterhouses should be ordered to disclose the litigation funding agreement to Contractors Bonding and, if so, on what terms. Their judgment only deals with independent third party funders who have a success fee arrangement, or who have some degree of control over the proceedings. It does not cover relatives or associated entities who might find litigation, lawyers' conditional fee arrangements, insurers or independent third party funders who fund litigation for a commercial return on the money or for altruistic reasons.

The Court was not prepared to take on the role of a supervisor of litigation funding arrangements. It did however find that when proceedings commence, a funded party should disclose to the court and the other parties:

1. the fact that there is a litigation funder;
2. the funder's identity and location; and
3. whether the funder is subject to the jurisdiction of the New Zealand courts.

The funder does not need to provide the other party to the litigation with an indemnity for its costs.

Sometimes the details of the funding arrangement itself will need to be disclosed. This might be necessary where the other party is making applications for a stay of proceedings on the basis of an abuse of process, for costs (against the funder) or for security for costs. The parties do not have to disclose confidential, privileged or litigation-sensitive material, such as the terms on which the funding can be withdrawn (This could provide a tactical advantage to the other side. It might, however, be appropriate to disclose this in certain cases.) Nor does the funder's financial position have to be disclosed.

The Court held that sometimes the existence of a funding arrangement might be an abuse of process (for example, it might amount to an assignment of the cause of action to the funder). In deciding this, the court should take into account the funding arrangements as a whole, including the level of control that the funder can exercise and the profit share that the funder will receive. The role of the lawyers acting will also be relevant.

The principle that emerges is that aspects of litigation funding arrangements do need to be disclosed. This will allow the other party to the litigation to assess the arrangement, and determine whether to make applications to the court to protect that party's financial position or to seek to prevent an abuse of the court's process.