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# Law

## Third-party funding bounces back



A dispute over oil fields in Kurdistan proved costly for Excalibur Atef Hassan / Reuters

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## Despite big setbacks, this model of funding litigation has lived to fight another day

Excalibur was meant to put third-party litigation funding to the sword. The action, the longest running English commercial court trial of 2012/13, involved a claim by Excalibur against the US energy company, Texas Keystone, for a share of oil fields in Iraqi Kurdistan.

The case was thrown out in October last year with the judge, Mr Justice Clarke, ordering indemnity costs against Excalibur, and its lawyers Clifford Chance also in the line of fire. The case was financed by third parties and City whispers predicted the ruling meant the nascent third-party funding sector was headed for an early bath.

Then two weeks ago along came Bentham and Tesco. Days after Excalibur funders announced they were likely to sue Clifford Chance, Bentham Europe — the London off-shoot of Australia's leading third-party funding business — trumpeted its backing of Tesco shareholders in a group action against the UK's largest retailer.

The supermarket is under fire for overstating profits by £263 million, with the shareholders claiming executives made misleading statements and omissions to the market. The action will be one of the biggest third-party funded cases in English legal history.

And earlier this week, Isle of Man-based funder, Vannin Capital, claimed its own research showed that 73 per cent of lawyers would consider using third-party funding. So reports of the demise of the funding technique have clearly been exaggerated.

What, though, are the lessons from Excalibur? One lawyer in the case forecasts a controversial and little discussed ramification. Christopher Coffin, a partner at City law firm Withers who acted for the initial funder in Excalibur, says that third-party backers could start demanding indemnities from law firms acting for claimants before agreeing to stump up the money for the action. "So far," Coffin says, "third-party funding has been fairly risk-free for solicitors: this judgment could change that."

He and other litigators agree that Excalibur will raise the costs of third-party funding. Funders will have to ramp up due diligence and take on enhanced cover from after-the-event insurers. But the funders themselves are not running shy of the market, despite Excalibur being a significant setback.

"Something definitely went very wrong in Excalibur," says former Irwin Mitchell partner Jeremy Marshall, who is now Bentham Europe's chief investment officer. "The funders weren't involved in the due diligence as much as they should have been. But funders generally aren't exercised about the Excalibur ruling. Everyone else is — they are seeing it as a doomsday scenario. But I don't see it as a doomsday scenario."

Marshall is sanguine because of what he calls a core principle in the market: "Funders don't want to invest in rubbish cases. And they aren't going to be shaking in their boots because the judge in Excalibur simply pointed out that third-party funding should not be used to fund dud cases. It just means that due diligence needs to be followed much more closely."

Stephen Pearson, a litigation partner at the London and New York offices of US law firm Jones Day, which acted for the defendant oil and gas company in Excalibur, agrees. "People need to take account of the judgment," he counsels, "but it won't send a complete chill through the sector. People will just have to modify their agreements."

Pearson and Coffin maintain the ruling will put third-party funding agreements under more scrutiny; as well as redoubled due diligence. All of which means that funders will have to walk an increasingly fine line around champerty issues — the tricky ethical legal point forbidding those not directly affected by the litigation to control its conduct. "They must ask the right questions for the due diligence," Pearson says, "but they can't meddle with the running of the case."

Despite reassurances from funders and claimant solicitors that the third-party model will stay on the right side of the ethical divide, those acting for large corporate defendants are concerned. And the US Chamber of Commerce's Institute for Legal Reform — a body representing the giants of corporate America — continues to lobby both Westminster and Brussels to stop third-party funding spreading to Europe.

Ken Daly, a partner at the Brussels office of US law firm Sidley Austin, is instructed by the institute to argue its case. He says that currently UK third-party funders are only interested in "the cherries" — large-scale commercial cases with a solid chance of success.

"But what happens when all the possible cherries have been picked?" he asks. "Isn't it inevitable that riskier cases will be taken because funders will be sitting on large pools of capital and looking to invest it in cases? It might be in the interest of funders to whip up actions; indeed, we've already seen that happening in Australia." Funders, he predicts, will get "hungrier and hungrier".

Yet David Greene, senior partner at London litigation law firm Edwin Coe, maintains that third-party funding will remain a minority sport in the UK, with the Tesco case an exception. "The judiciary often says third-party funding fills an access to justice gap," he says. "But third-party funders go for claims of substantial substance. They've little or no interest in consumer or mass claims which are complex, subject to all sorts of unknown factors and hard to manage."

Green has little truck, however, with the ethical concerns voiced by American big business over conditional or contingency fees. "Modern-day litigation has addressed those questions and come up with practical answers. You have to face reality. Claimants have an entitlement to enforce their rights and to go to court — and sometimes they need funding."

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