



## Delimiting the scope of reasonable and fair limits of third party funding in class action: Nigeria and Canada in perspective

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### Abstract

Third party funding (TPF) is one of the ways funding is provided for class proceedings. However, its regulation suffers difficulty because of the uncertainty as to what amounts to a reasonable and fair reward for the funders. When funding is advanced for improper purpose, the common law rule against maintenance and champerty is breached. The law recognizes suit funding as being non-champertous when the claim is reasonable and fair but determining when a funder's claim meets this criterion is a herculean task for class actions. This paper proposes how to determine the reasonability of a funder's claim by focusing on rewarding the service offered by the third-party funder rather than focusing on the reasonability of the proportion claimed by the funder in relation to the possible global recovery. There are concerns that TPF agreements offer insurance services because of the nature of the funding provided, but for constraint of space, such analysis is not covered here. While the judicial precedents discussed in this paper are not limited to Ontario and Nigeria, this paper is mainly centered on Class Proceedings in Ontario and Nigeria; therefore, references to the CPA is to the Class Proceedings Act of Ontario except where otherwise indicated.

**Keywords:** class action, class action funding, litigation funding, champerty

### Introduction

Class actions are capital-intensive, and the likelihood of an adverse cost award is a possibility that representative plaintiffs will have to contend with, should they commence a class action. If representative plaintiffs were to cater to these costs all by themselves, possibly, only a few class proceedings would be initiated since the remedy such plaintiffs could get as an individual member of the class cannot be compared to the amount such representative plaintiff could be liable to in adverse cost award should the case go in favour of the defendant. This is a disincentive to initiating class proceedings. In view of this and in a bid to foster the goals of class proceedings, financial support for class actions is necessary. Public funding, counsel funding and third party funding (TPF) have evolved as financing options to ensure that the purpose of class proceedings are not defeated owing to paucity of funds or a low appetite for risk taking. This paper is concerned with the last of the above three options- third party funding. Third party funding regulation is largely in the evolution stages in Canada and a lot remains uncertain in relation to what qualifies as a reasonable and fair reward for third party funders as compensation for their service. There are various concerns; chief among these concerns is whether the funding is advanced for improper purpose, thereby sustaining a ground in the common law rule against maintenance and champerty. The law as currently constituted recognizes suit funding as being non-champertous when the claim being made is reasonable and fair. The problem with determining that a funding agreement is reasonable and fair has proved a herculean task

since the court is faced with arriving at this determination without having hindsight of how the proceedings would be concluded. This paper proposes how to determine the reasonability of a funder's claim. The first part of the paper discusses the available funding options with a view to establishing the necessity of third party funding. The second part discusses the nature of third party funding, while the third part discusses the regulation of third party proceedings and specifically the rule on champerty for the purpose of analyzing whether third party funding contravenes the rule. The fourth proposes how best to determine the compensation of third party funders and the last part concludes.

Third-Party Funding ("TPF") is an agreement or arrangement between a Funding Company/individual and a client (the claimant) whereby the Funder agrees to finance some or all of the clients' legal fees in exchange for a share of the proceeds of the matter. It is a financing method where a party to a dispute obtains funding for its legal costs from a third party who has no bearing with the dispute in exchange for a share of the proceeds of the matter <sup>[1]</sup>. Under a Third-Party Funding arrangement, the legal fees and expenses of a claimant are financed on a non-recourse basis. The costs agreed to be covered by the financier may include all or any of the following:

- The solicitor's legal fees
- Costs ordered by the court or arbitration panel
- Security or bond required to be executed by law or the court or arbitration panel
- Incidental expenses e.g., cost of fielding expert witnesses, expert reports, etc

- Arbitrators' fees (in the case of arbitration)
- Award/Judgment enforcement
- Insurance for judgment or award default <sup>[2]</sup>

If the claim is successful, the finance provider recovers the capital invested in addition to a success fees. If the case is unsuccessful, the funder loses its investment and receives no success fees and thus has no recourse against the funded party. Third Party Funding is dynamic and popularly explored in many countries in the world today like Australia, Hong Kong, United States of America, Singapore, etc <sup>[3]</sup>. However, like many concepts in law, there is no one-definition-fits-all approach to the concept of TPF. There are two major forms of TPF namely: <sup>[4]</sup>

1. TPF in the court system (also known as litigation funding or financing); and
2. TPF in arbitration or in other alternative dispute resolution mechanism.

### 1. Why Funding is Necessary

By the nature of class actions, only few cases will be prosecuted in the absence of funding. The cost of prosecuting the claim and the risk of an adverse cost award translates to enormous financial implications given the unique nature of class proceedings. Without external funding, the representative plaintiffs would have to shoulder these costs as they arise all by themselves. Even though the court can earmark a part of the fruits of judgment to be used in defraying counsel costs and disbursements, however, the reality is that the resources to provide the funding as they arise is often not available to the representative plaintiff and even if available, the risk of an adverse cost award may be all too much for such plaintiffs to bear.

In class proceedings and in the absence of an agreement to the contrary, it is the representative plaintiffs and not the entire class that bears an adverse cost award ordered by the court pre-certification, during certification and after the claim has been decided. Thus, they stand to lose a lot-possibly all such representative plaintiffs have should an adverse cost award be made <sup>[5]</sup>. This is unlike what is obtainable where the claim succeeds, in which case, the entire class will reap the benefit of the fruits of the judgment. The necessity of funding in a class action is succinctly expressed by Strathy J (as he then was) in *Dugal v Manulife* <sup>[6]</sup> as follows:

The grim reality is that no person in their right mind would accept the role of representative plaintiff if he or she were at risk of losing everything they own. No one, no matter how altruistic, would risk such a loss over a modest claim. Indeed, no rational person would risk an adverse costs award of several million dollars to recover several thousand dollars or even several tens of thousand dollars.

Given these fears and the likely reservations, the lofty aims of class actions, namely behavioural modification, judicial economy, and access to justice could be defeated. In a bid to promote these aims, funding for class actions is available in three major ways: through public agency funding, indemnity agreements with class counsel and private funding arrangements.

#### 1.1 Public Agency Funding

Recognizing the necessity of class actions, the Ontario Class Proceedings Fund and the Class Proceedings Committee were established in 1992 under S. 59.1 of the Law Society

Act s. 59.1 <sup>[7]</sup>, which is administered by the Law Foundation of Ontario. The purpose of the fund is as stated in S. 59.1 to provide:

1. Financial support for plaintiffs to class proceedings and to proceedings commenced under the Act in respect of disbursements related to the proceeding; and
2. Payments to defendants in respect of costs awards made in their favour against plaintiffs who have received financial support from the Fund.

The fund caters for limited disbursements and for indemnity against adverse cost awards but does not fund counsel fees. Applications for funds are scrutinized to ensure its viability before releasing funds.

#### 1.2 Counsel Contingency fee

Class counsel could also provide funding for class proceedings. This could be done by plaintiffs' counsel opting to bear some or all the financial risk that would otherwise be borne by representative plaintiffs or class members. This is done through contingency fee arrangements. The effect is that representative plaintiffs are relieved of the burden of paying counsel fees as they arise unless the claim succeeds, in which case the payment is made from the sum awarded by the court. In addition, class counsel may agree to fund class proceedings by undertaking to pay disbursement and adverse cost awards.

#### 1.3 Limitations

It is important at this point to consider the sufficiency or otherwise of the above two methods of funding class actions.

### 3.1 Public Funds

Funding through Public funds such as that of the Class Proceedings Funds of Ontario has been helpful in enhancing class litigations. However, it has limitations. Applications for these funds are assessed on a case-by-case basis, resulting in some applications being turned down. In 2018, out of 17 applications, 13 were approved, 2 were refused and 2 were stayed; while in 2019, out of 16 applications, 8 were approved, 7 were refused and 1 was stayed <sup>[8]</sup>.

In determining whether to provide support, the Class Proceedings Committee is directed by the Law Society Act <sup>[9]</sup> to have regard to a number of factors, including whether the plaintiff has made reasonable efforts to raise funds from other sources; the extent to which the issues in the proceeding affect the public interest; the available money in the fund. These show that though a claim may be viable, funding may nevertheless be denied. Consequently, the representative plaintiffs may need some other type of funding if their class action will be instituted otherwise, access to justice may suffer hindrance. Moreover, the fund may be unable to cater for high-profile class proceedings given the cost implication of such proceedings.

Another reason resorting to public agency funding is unattractive to some is the levy placed on awards. In Ontario, a 10% levy on any award proceeding from a funded class action is required <sup>[10]</sup>. Some may consider this onerous especially as some third-party funders are willing to take 7% of the proceeds and even so with a cap should the monetary award exceed a certain threshold <sup>[11]</sup>.

### 3.2 Counsel Contingency fee

Although contingency fee arrangements provide another veritable means of funding, they are also not without their limitations. Contingency fee agreements relieve the plaintiff of the burden of paying counsel's fees as they arise (or at all if the claim is unsuccessful). This is specifically permitted by the Class Proceedings Legislation <sup>[12]</sup>. While such arrangement is not new to legal representation, class proceedings present unique circumstances because in establishing the requirement of adequate representation in the certification test, the representative plaintiff is required to show that he can adequately represent the class. Part of the element required to establish this is that class counsel possesses sufficient experience and knowledge in class representation <sup>[13]</sup>. Thus, the representative plaintiff cannot find "just any lawyer" that is willing to accept contingency fees, but one who is able to provide adequate representation in a class action.

Moreover, a contingency fee arrangement does not erase the risk of an adverse cost award. Recognizing the huge benefits class counsel stands to gain in a successful class action, it is now expected that class counsel that has agreed to a contingency fee arrangement will also provide indemnity to the representative plaintiff in costs jurisdictions except where other funding arrangements have been made in this regard <sup>[14]</sup>. While contingency fee arrangements involve merely the assumption of a risk in exchange for a likelihood of deferred gratification, undertaking to pay adverse cost requires the availability of a large financial outlay which may not be readily available. Law firms are increasingly becoming wary of taking up such huge risks and even in situations where they desire to, the funds required may well be beyond their immediate reach.

The limitations of public agency funding, class counsel funding and indemnity show that there is a need for alternative means of funding class actions. Third party funding provides that alternative.

## 2. The Nature of Third-Party Funding (TPF)

TPF Agreement is defined in Section 33.1 Class Proceedings Act as follows:

[T]hird-party funding agreement means an agreement in which a funder who is not a party to a proceeding under this Act agrees to indemnify the representative plaintiff or provide money to pursue the proceeding under this Act, in return for a share of any monetary award or settlement funds or for any other consideration.

A TPF agreement was first approved in the Canadian class action of *Hobsbawn v ATCO Gas and Pipelines LTD* <sup>[15]</sup>. A funder in a TPF undertakes to pay for litigation expenses (otherwise known as disbursements) and to provide indemnity for adverse cost awards (pegged to a certain limit in some cases). Such expenses include expert fees, travel costs and notice fees in return for a determined share of the global recovery and a right to be reimbursed of the sums advanced <sup>[16]</sup>. The third party is one who has no connection to the litigation, usually a commercial enterprise that offers a for-profit service <sup>[17]</sup>. Although it can take various forms, the share of the third party's proceeds is usually represented in a percentage or by a fraction of the amount awarded in damages <sup>[18]</sup>. Usually, the funder conducts a due diligence to satisfy itself that the claim is viable before it offers to fund the action. The due diligence aims at evaluating the litigation risks to discover the claim's likelihood to succeed,

the enforceability of judgment against the defendant, and the likelihood that the judgment sum that is available to it after settling the class members is adequate to defray the sums expended by the funder while providing return for investment. While parties to the funding agreement may negotiate their own bargain, it is essential to obtain the approval of the court to the agreement to bind the class in the event that the claim succeeds, and this should be done as soon as the agreement is entered into <sup>[19]</sup>, otherwise, the funding agreement is of no effect by section 33.1 (3) CPA. TPF agreements have enhanced class actions in no small measure and have helped to promote optimum performance by ensuring that persons who have a grievance that is common to a class are able to obtain adequate legal representation to redress and discourage the perpetrators from further wrongs.

Happily, third party funders are growing in number <sup>[20]</sup>, however, without proper regulation, third party funding could lead to devastating effects, thereby putting public justice to disrepute. Third party funding raises concerns to the defendant, the representative plaintiff, the class and to the third party itself. Before the court approves a TPF, the agreement must meet the requirements listed in Section 31.1(9) of the Ontario Class Proceedings Act. The court is mindful of these requirements in an application to approve third party funding agreements. The first is that:

"...the agreement, including indemnity for costs and amounts payable to the funder under the agreement, is fair and reasonable..."

Large uncertainty currently looms in determining what a "fair and reasonable amount" is. It is undeniable that great harm could result if third party funding is left unregulated. One of the major concerns in relation to the quantum of the award claimed by the funder is that such arrangements are by their nature a breach of the common law rule against maintenance and champerty.

## 3. Regulating Funding Agreements

### 3.1 Is It Champertous?

Class action funding has seen a gradual evolution from the times when it was considered out rightly champertous <sup>[21]</sup> to the present times when third party funding is considered non-champertous per se <sup>[22]</sup>. TPFs have gained relative recognition as a means of encouraging access to justice when set conditions are met even though the jurisprudence in this area is evolving in Canada. Historically, the rule against champerty was used by the common law to protect "the administration of justice from a variety of real or perceived abuses" <sup>[23]</sup>. Emerging in the medieval era, they were designed to deter influential nobles from lending support to frivolous proceedings with their reputable names and wealth. Champerty finds its basis in the tort of maintenance. Champerty is prohibited by An Act Respecting Champerty <sup>[24]</sup>.

Initially, lawyers were reluctant to undertake contingency fee agreements with clients for fear of being caught by the rule against champerty. But in *Goodman v R* <sup>[25]</sup>, the accused was convicted for the crime <sup>[26]</sup> of champerty at a time when champerty was a crime. The basis for the charge was that he agreed to assist an impecunious man who had been injured by a streetcar by locating witnesses to the event in return for a share of any proceeds from the suit in court. In quashing the decision, the Supreme Court of Canada held

that his conduct did not amount to "officious intermeddling" because he did not "stir up strife."

In *McIntyre*, the court, while maintaining that the law proscribing champerty as a civil wrong is still good law, interpreted the Champerty Act in the light of modern-day realities to promote access to justice in the face of rising litigation costs. In that case, the court held that contingency agreements were not per se a breach of the Champerty Act except where improper motive (as indicated by an unreasonable or unfair fee structure) was apparent. The court found that the Champerty Act does not constitute an absolute prohibition of lawyers' contingency fee agreements, rather, that an improper motive is essential to establish champerty.

Building on this, the court in *Metzler Investments GmbH v Activewear Inc* [27] held that the same rationales for holding contingency fee arrangements non-champertous were applicable to third party funding agreements. This was the first case in Ontario where TPFs were considered in great details. The court in determining whether a third-party funding agreement was champertous in nature applied the "improper motive" test laid down in *McIntyre*. As was held in *McIntyre*, improper motive is revealed by an unreasonable or unfair fee. The court defined Champerty and maintenance as follows:

- maintenance is the intermeddling in litigation by a disinterested party for an improper motive
- champerty is the process whereby the maintainer shares in the profits of the litigation.

The above definition raises three keywords, namely: "disinterested", "intermeddling" "improper motive".

Third party funding is an agreement in which a funder who is not a party to a proceeding agrees to provide funds for the prosecution of a class action. Third party funders are disinterested parties, and are, as the name suggests, third parties and not parties to the suit. Their interest in the suit is no other than a pecuniary one which they created by investing in the litigation. Though third-party funders are disinterested parties, their role is justified when their funding is not for improper purpose. According to the court in *Houles*:

"The public policies supporting the torts of champerty and maintenance are the goals of discouraging unnecessary litigation prompted by a non-party stirring up strife in order to profit from it and of preventing a non-party from meddling and perhaps controlling somebody else's litigation."

Consequently, although third party funders are disinterested parties, the necessity of their service-providing access to justice, makes them persons of interest to the suit. However, the line is drawn when the motivation for their involvement goes beyond providing access to justice to stirring up strife.

There is "intermeddling" when the motivation for funding is to stir up strife. Precedents show that in considering whether a TPF is champertous, the courts are really trying to balance the need to promote access to justice with the need to prevent abuse of court process.

Litigation funding, without more, would ordinarily be regarded as intermeddling because it gives life or at least sustains the life of a class action because in many instances, such actions may not have been prosecuted but for the funds provided by the third party. Besides, funding is advanced with a view to gaining returns on the investment. But funding is not considered intermeddling where there is a

"justifying motive or excuse" [28] because it is in the public interest that wrongs do not go without a remedy. Hence, the insufficiency of funds by the representative plaintiff, the unwillingness of the representative plaintiff to solely bear the risks involved in class proceedings or even the hope of financial gain by the funder should not be a deterring factor. In *Buday v Locator of Missing Heirs Inc.* [29], the Ontario Court of Appeal held that a business arrangement that was not made for "improper purpose" was not champertous because it did not "stir up" litigation though commercial interest was evident. This was also the position of the court in *McIntyre Estate v Ontario (Attorney General)* [30] where the Ontario Court of Appeal set out the principles guiding maintenance and champerty thus:

"[M]aintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation"

Although a TPF is done primarily for the purpose of making gains and access to justice is merely peripheral to the funder's interest, being a means to an end, however, to amount to "stirring up," the third party must be doing "more" than merely providing funds for the litigation. "More" in this regard entails situations where the funder is making demands in the TPF that are inimical to the class's interest, for instance by requiring the representative plaintiff and counsel to do everything possible to win the case as a condition to the release of funds. This is a breach of ethical rules and will amount to improper motive. In *McIntyre*, the court held that the client- counsel relationship must be protected to ensure that the counsel does not pursue an action merely for the purpose of advancing their financial interest. The cases also show that courts are unwilling to approve of a TPF that encroaches on the lawyer/client privilege. Understandably, the court is guarding not only the interest of the representative plaintiff, but also those of the rest of the class who may be absent at this stage. The court's concern about the funder's control has also caused a refusal to approve TPF agreements that tend to give undue power to the funder to withdraw funding at will- thus bending the will of the representative plaintiff to do as it wills or suffer potential loss. Rather, the court prefers agreements that are couched in a way as to give no room for termination of funding except in occasions where the representative plaintiff is in breach of its terms or where they appointed another lawyer. Beyond the foregoing, the amount or proportion of the damages laid claim to by the funder has been held by the court to be an indication of whether the TPF is for the purpose of advancing the course of justice or intermeddling for some collateral reason. Consequently, a TPF agreement that provides for an excessive return to the funder will not likely be approved [31] as this will be considered for improper motive by such a party. This raises the question of when a return is deemed to be excessive because it indicates improper motive. Improper motive is defined by the court in *McIntyre* as the lack of a "legitimate interest" [32]. It is apparent that the court is not considering the existence of financial gain as an improper motive, rather it is the quantum claimed by the funder that is of concern of the court- hence the question of whether the agreement is within reasonable and fair limits. This forms the crux of the

discussion on whether a TPF is champertous or not because the reasonability of the compensation claimed is an indication of proper or improper motive.

### 3.2 The problem with Percentages

In some instances, the court has considered 10% the reasonable proportion since that is what public agency funders such as the Ontario Class Proceedings Funds charges<sup>[33]</sup>. In *Houle*, the court pegged the funder's reward to 10% or any such lesser amount proposed subject to a subsequent approval when and if the claim succeeds. But 10% (or less) cannot be considered the reasonable proportion in every instance since every case is unique. In *Drynan v. Bausch Health Companies Inc.*, the court considered a demand of 25% proceeds and disbursements capped at 33% to be reasonable. These show that a certain percentage or even a range of percentage cannot be generally accepted as "reasonable" in all cases since each case is peculiar. Establishing the reasonability of a third-party funder's claim in particularly challenging because, the award (if the class's claim succeeds) is at the time of application for TPF approval, unknown. In *Metzler Investment GMBH v. GildanActivewear Inc.*<sup>[34]</sup>, the court disapproved of the third-party funding agreement requiring an uncapped 7% compensation to the funder in the event the action succeeds since according to the court, the determination of whether the uncapped 7% was reasonable was impossible until after an award had been made. Towing this route may end up disincentivizing third party funding since funders would like to know that their investment is worth it.

There could be instances where despite similar costs, the amount that is awarded varies. How does one justify the disproportion in funder's reward if funders in both instances can only take 10%? The implication is that funders will likely only accept viable briefs with promising large rewards while refusing to fund claims with less monetary rewards, though viable. This will defeat the aim of access to justice and therefore inhibit behavior modification.

Another reason why awarding a percentage of the class's award is flawed is its potential to fan the flame of litigation rather than settlement. When a funder is in the picture, the class's stake is higher and there is a tendency for the class to strive to claim an amount that will remedy the wrong that has been done to them while also having sufficient funds to reward the funder without having recourse to amicable resolution. While amicable resolution may not be possible in all class actions, it is expedient that TPF Agreements are regulated in a way that does not discourage it, otherwise the defendant's interest and those of the representative plaintiffs (who could suffer a reduction of their claim by a harsh adverse cost awards even though the claim may have succeeded) is affected<sup>[35]</sup>.

### 4. Reasonable and Fair Limits

Section 33.1 of the Ontario Class Proceedings Act lists factors the court needs to consider in approving a TPF. They are:

1. the agreement, including indemnity for costs and amounts payable to the funder under the agreement, is fair and reasonable,
2. the agreement will not diminish the rights of the representative plaintiff to instruct the solicitor or

control the litigation or otherwise impair the solicitor-client relationship,

3. the funder is financially able to satisfy an adverse costs award in the proceeding, to the extent of the indemnity provided under the agreement, and
4. any prescribed requirements and other relevant requirements are met; and

(b) it is a term of the agreement that the funder shall be subject to,

1. the same confidentiality requirements in respect of confidential or privileged information in the proceeding to which the representative plaintiff would be subject, and
2. the deemed undertaking rules set out under the rules of court, as if the funder were a party to the proceeding."

Of the above conditions, the first condition which requires evaluating whether the amount the funder is claiming in the TPF is reasonable, is usually the most herculean since the others are relatively easier to prove. The difficulty faced by the courts in this regard is understandable, however it appears this difficulty is because of the misplaced basis for rewarding the third-party funder. The funder's reward should be justifiable on the basis of the service actually rendered by the third party rather than on the likely judgment sum. This has the effect of encouraging the representative plaintiff to explore avenues that will avoid the award of excessive cost, hence ensuring that the goal of the suit is not lost in the pursuit of other pecuniary objectives.

#### 1. A "service rendered" based perspective:

To determine the reasonability of the TPF, the court is to balance the need for access to justice against the risk of exploitation<sup>[36]</sup>. While courts have recognized that using a third-party funder likely leads to greater recovery to the class than would have been the case if class counsel had entered a typical contingency fee arrangement<sup>[37]</sup>, it is crucial that TPF agreements are critically examined to guard against improper use. The jurisprudence so far on the subject shows that the emphasis is in what portion of the potential recovery the third-party funder should reasonably be entitled to and not what compensation the third-party funder has earned<sup>[38]</sup>. Though similar, there is a fine line between the two thresholds. While the former analyzes reasonability of the amount (or as in most cases, the percentage or fraction of the global recovery) claimed by the third-party funder in relation to the global recovery, the latter analyzes the reasonability of the amount claimed by the third party funder in relation to the cost (in terms of time, expenditure and risk) undertaken by the third party funder. Evidently, the thresholds are distinct. The problem with an analysis based on the amount of global recovery is evident in the cases above. That is- it is difficult to ascertain what is reasonable. As with the usual problems of the reasonability test, in whose view is the reasonability examined: the court, the class, the funder or even the lawyer. The third party's reward should be the amount that "reasonably" compensates the funder for the cost and time expended in litigation and for agreeing to bear the risk of an adverse cost award and not for a "reasonable" portion of the global recovery. The funder is not a party to the suit and is by all standards, a disinterested party to the claim, having suffered no wrong. The funder is therefore not entitled simply to a percentage of the monetary award which is

given to the class based on what the class has proved to be entitled to, resulting from the wrong(s) done to it by the defendant. The emphasis should be on the reasonability of return on actual investment and not by reaping from where it has not sown- namely a portion of the award simply. Rather, a precise amount that is deductible from the global recovery should be named.

It is proper at this point to recall why third-party financing became necessary, *viz-* to fund the litigation and to bear the risk of a loss or an adverse cost award by providing indemnity for same. Since these are the services that the third party is being paid for, it goes to show that the reasonability of funder's fees must necessarily be pegged to the above as the standard of measurement. As had been earlier illustrated, no fixed percentage can be termed universally reasonable and this is because the reasonability of the funder's claims is primarily affected by factors such as: the level of risk undertaken, the period of the litigation and the costs undertaken.

In rewarding the third party for undertaking the cost of counsel fees and disbursements, most TPF agreements insert a ceiling amount beyond which the funder will not be responsible<sup>[39]</sup>. Hence, this amount is determinable and effectively keeps class counsel and representative plaintiff in check not to be unreasonably extravagant, providing one worry less for the courts in the determining what is a reasonable return for the third-party funder in consideration of its undertaking to fund counsel fees and disbursements.

Financing a class action involves litigation risks and the enormity of this risk varies on a case-by-case basis. The court's concern in this regard is that the funder does not profit excessively from the class suit. On the converse, the third party's concern is that its proportion adequately rewards the risk it has borne with reasonable return on its investment. Litigation risk includes<sup>[40]</sup>: the risk that the class may fail to establish that the defendant breached the law as alleged, otherwise known as liability risk; the risk that the class may fail to show that compensable damage arose from the defendant's breach of the law, otherwise known as causation risk; the risk that the class may fail to prove that there is a compensable loss or damage and that same is claimed, or the quantum recoverable is significantly less than expected, otherwise known as quantification risk; the risk that the class action may not satisfy a condition precedent or procedural requirement such as the certification stage, otherwise known as procedural risk and the risk that the respondent may have insufficient assets to satisfy the judgment debt, otherwise known as recovery or enforcement risk. Risk pricing and analysis is a developed concept in several industries using refined processes to estimate the value of each risk because it is crucial that the proportion claimed by the third-party funder is logically deduced. As part of the condition for the approval of a TPF agreement, the court considers whether the representative plaintiff received independent legal advice on the agreement. Consequently, it is important that lawyers offering such legal representation will need to engage risk analysts to ensure that the litigation risk is adequately priced. Although the law does not mandate the court to request that the independent legal advisor carries out a risk analysis, such is necessary in evaluating the reasonability of the funder's claim and arriving at proper advice. However, a discussion on litigation risk analysis goes beyond the scope of this paper. It suffices that a proper risk analysis will reveal the

cost of a third party funder bearing these risks in a class action, which the court can take into consideration in determining the reasonability of the funder's compensation.

## 2. A cost perspective

Another way of evaluating the price of this risk is to consider the amount the third party is providing as indemnity, otherwise, an "improper motive" may in fact have been created, giving room for funders to fuel dispute solely for their pecuniary interest. With the exception of enforcement risk, the other litigation risks could result in an adverse cost award against the class<sup>[41]</sup>. The amount the third party is willing to pay in the event of an adverse cost award is an insight into the value the said third party funder has priced the litigation risk it has undertaken.

The amount of indemnification is typically contained in the TPF agreement, and ought to reflect the possible amount the court may award in cost against the class. The determination of the amount awardable in cost is within the discretionary power of the court and determined on a case-by-case basis with consideration to certain factors, and as such, does not solve the problem of how much a funder should lay claim to as compensation for undertaking the litigation risks, however, a consideration of the factors for awarding costs gives perspective to the limits of reasonableness.

The basis for awarding cost is fairly settled because the purpose of costs in the administration of justice are: to indemnify the successful litigants for the costs of litigation; to facilitate access to justice; to discourage vexatious and frivolous suits and defences; to discourage and sanction inappropriate behaviour by litigants in their conduct of the proceedings and to encourage settlements<sup>[42]</sup>. Again, the fact that security for cost could be provided<sup>[43]</sup> shows that it is possible to estimate the range of what an adverse cost could amount in, giving the court a bird's eye view into the value the third party has placed on the litigation risks undertaken.

The limitation to this approach however is that funders may be inclined to indicate minimal fees for indemnity while making robust allowance for lawyer's fees and disbursements which are necessary factors to consider in determining their reasonable compensation. Moreso, section 31.1(9)(a)(iii) of the Ontario Class Proceedings Act which outlines the factors the court is to consider before approving a TPF, provides as follows: that "the funder is financially able to satisfy an adverse costs award in the proceeding, to the extent of the indemnity provided under the agreement..." Hence, the third party need only show that it is capable of satisfying the amount it has indicated that could be applied towards indemnifying the class for a possible adverse cost award in the TPF. But it is doubtful that a representative plaintiff would agree to such an arrangement since it exposes him/her to huge risk which was one of the reasons funding was sought for. Besides, a legal advisor will likely advise against such funding arrangement.

Another problem with the costs is the peculiarity of costs in class actions. In class actions, generally, costs are assessed according to the same rules that govern individual actions. The court balances the need to encourage seemingly meritorious class action with the need to discourage institution of vexatious suits<sup>[44]</sup>, however, the factors in Section 32 of the CPA are given special weight by the court in class actions.<sup>[45]</sup> By that provision, the court should consider whether the class action is a "test case, raised a

novel point of law or involved a matter of public interest.” In other words, courts are to consider these in reading section 131 (1) of the *Courts of Justice Act*. The implication is that in such cases mentioned in section 32, adverse costs awards will be minimal or even absent even though judgment was given against the class.

Understandably, the instances in Section 32 pose greater risk of loss to third party funders if their reward is to be based on the amount they could be liable in cost since a novel point may have been raised and the likely absence of a cost award renders the high risk it has taken unrewarded in the event of a successful claim. However, it will be recalled that at the point of entering into the agreement, it is not yet certain that the claim will be found by the court to have raised a novel issue or amount to a test case. Consequently, in considering the reasonability or otherwise of the funder’s claim, the court should consider the reasonability of the funder’s claim in the light of what an adverse cost award in a non-novel case could be, otherwise third party funders may be discouraged from funding cases that appear to raise novel issues. If judgment is in favour of the defendant and the case is found to be a novel case, the funder is absolved from paying costs; on the converse, if the action is found not to raise novel issues, the defendant is liable to pay the cost it had provided indemnity to pay should such award be made against the class. Of course, if judgment is in favour of the class, the funder pays nothing, rather gets rewarded with the amount the court had approved that took cognizance of the factors that have been discussed in this section.

It is acknowledged that there are provinces in Canada that operate “no cost” regimes such as Manitoba, Saskatchewan, British Columbia and the Federal Court. The above discussed approach may be unsuitable to assess the reasonability of the funder’s claim and it is hoped that further research will reveal the best approach.

### Third Party Funding of Class Action in Nigeria

#### 5. The Law and Practice of Third-Party Funding in Nigeria

The practice of third-party funding is not prevalent in Nigeria. Besides the fact that there is no legislation that expressly permits or prohibits third-party funding as of the time of writing. In Nigeria, TPF is frowned at by the courts based on the common law principles of champerty and maintenance which: (i) prohibit a third party from funding litigation between disputants (in which the funder has no legitimate interest); and (ii) render an agreement to provide such funds illegal and void, on the ground of public policy<sup>[46]</sup>. The latin maxim, “*interest reipublicae ut sit finis litium*” (it is in the interest of the State that there be an end to litigation) underpins public policy and permitting litigation funders could result in significant spikes in litigation, and potentially more of the otherwise unmeritorious claims. Presumptively most litigation funders could view the suits as an investment, thereby incentivizing a more than passing interest in the outcomes of claims they funded, and all attendant implications flowing there from<sup>[47]</sup>. Being common law principles, until contrary statutory provisions are enacted, the principles of champerty and maintenance are applicable in Nigeria.

In *Oloko v. Ube*<sup>[48]</sup>, *Edozie JCA* held thus:

*at common law, champerty is a form of maintenance that occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit or other*

*contentious proceedings where property is in dispute. An agreement by a solicitor to provide funds for litigation in consideration of a share of the proceeds is champertous.*

The Nigerian Court of Appeal added the following in *Egbor&Anor v. Ogbebor*<sup>[49]</sup>:

It is undisputedly established law that it is champertous when one person decides to pursue and pay the costs of another’s lawsuit in exchange for a part of the settlement money. The champertous relationship, however, must be supported by the facts and cannot be based on an individual’s impression of what he believes the relationship to be. To put it another way, the facts must demonstrate that the Respondent volunteered to continue the action by covering the litigation costs in exchange for a share of the settlement in order for the case to be considered champertous.

The aforementioned examples include legal disputes that were litigated in Nigerian courts.

#### Exception

Nigeria as a common law jurisdiction has the Champerty and Maintenance doctrine in full swing. The rationale is to prevent the “intermeddling” or interference of third-parties in litigation without just cause. This means agreements with outside lenders to fund a lawsuit will be declared illegal and unenforceable<sup>[50]</sup>.

#### Contingency Fee

Contingent fee agreements are fee agreements between a lawyer and client in which lawyer fees are deducted from income, possibly at a better than normal rate and for the most part on a ‘no-win no-fee’ premise. In a contingency fee arrangement, if successful, the lawyer receives payment of “normal” lawyer fees, which are fixed or a variable percentage of the award awarded to the client<sup>[51]</sup>.

However, legal practitioners are allowed to provide their services in consideration of a contingency arrangement to cover their professional fees<sup>[52]</sup>. Yet, they are not allowed to fund the litigation, per se.

The Rules of Professional Conduct 2007, which regulates the conduct of legal practitioners, only provides for contingency fee and not third-party funding. The term contingency fee is defined by the RPC as follows: -

“The fee paid or agreed to be paid for the lawyer’s legal services under an arrangement whereby compensation, contingent in whole or in part upon the successful accomplishment or deposition of the subject matter of the agreement, is to be of an amount which is either fixed or is to be determined under a formula”.

It is instructive to note that under Rule 50(4) RPC, a lawyer shall not enter into a contingent fee arrangement without first informing the client of the effect of such arrangement. For clarity, section 50(1) of the RPC is reproduced below:

“ A lawyer may enter into a contract with his client for a contingent fee in respect of a civil matter undertaken for a client whether contentious or non-contentious: provided that: -

- a. The contract is reasonable in all the circumstances of the case including the risk and uncertainty of the compensation;
- b. The contract is not
  1. Vitiating by fraud, mistake or undue influence or
  2. Contrary to public policy; and

c. If the employment involved litigation, it is reasonably obvious that there is a bonafide cause of action.”

Also, it appears that Non-Governmental Organisations (NGOs) are allowed to provide funds in support of litigation by or against indigent people, since this will not be based on commercial arrangement. For example, Olusoji O. Elias claims that he has established a legal funding firm in Nigeria called AetasLF, with the initiative of providing such support<sup>[53]</sup>.

### **Benefits of Third-Party Funding**

#### **Access to Justice**

The TPF can play an important role in bridging the gap in state-provided legal aid, which helps only vulnerable people. The availability of TPF allows plaintiffs who are unable to bear the financial burden of lawsuits to pursue their own claims and access the judicial system<sup>[54]</sup>.

#### **Mitigation of Risk**

The TPF provides means to mitigate and manage litigation risk by shifting responsibility for costs to the third-party funder. Thus, the TPF agreement transforms the potential risk into a negotiable asset.

#### **Second Opinion from Potential Third-Party Funders**

TPF helps reduce the number of unsubstantiated cases that are brought before courts or arbitral tribunals. Before financing potential claims, a third-party lender will obviously analyze the probability of success of the respective claims and the possibility of recovery and return. A third-party lender is unlikely to provide financial support if they do not consider the likelihood of success favorable. The Third Lender's assessment can provide a second opinion on the merits of a case and its strategic management.

#### **Support Class Actions**

A class action will require substantial financial assistance after the class action has been initiated. This means gathering potential class members, finding evidence related to the case, and paying other upfront costs. Plaintiffs must pay legal fees in advance to proceed with the class action. Consequently, potential representative claimants may not want to risk those amounts in the class action. The TPF provides financial relief to all class members and can be an important tool to enable a group of qualified plaintiffs to bring a class action.

#### **Conclusion**

Countries appreciate the dynamics and the importance of Third Party Funding in the justice system as such many countries are silent. India did not expressly prohibited TPF and as such it is legal provided that the funding is not provided by the engaged attorneys. Some countries provide legal regime such as Singapore. Singapore permitted TPF in arbitration within the legal regime provided the funder conforms to the requirement under the Investment Arbitration Rules 2017. TPF is necessary for promoting class actions to achieve the objectives of class proceedings. Nevertheless, it is important that TPF agreements are regulated by the court especially in the amount claimed by the third party to guard against improper motive which will amount to champerty and have the effect of bringing public justice to disrepute. While it is important to reward the

funder for providing fund in the event that the class' claim succeeds, it is also essential that a third party is not allowed to intermeddle by laying claims to unfounded proportions or percentages of the global recovery which do not reflect the actual service rendered which are: providing finance for fees and disbursements, undertaking to finance the litigation as long as it subsists and agreeing to undertake the litigation risks associated with the class action, otherwise a case of “improper motive” can be made. Although many cases show the court's effort in limiting the funder's claim to what is fair, there will continually be a challenge when what is approved is a proportion of an amount yet unknown (the global recovery). Consequently, this paper has argued that the service being provided by the funder must be the primary factor considered in assessing the quantum of reward that is reasonable and that a percentage or fraction of global recovery does not serve the purpose. It is essential that the funder is not overly compensated, thereby, benefiting from a wrong (done by the defendant to the class) that it has not suffered. It is equally important that the funder is not under compensated, creating a disincentive for class action funding in the future. A precise amount arrived at having considered the service of the funder will make third party funding more attractive to funders as well as representative plaintiffs.

#### **Recommendations**

Given the myriad of ethical and procedural issues that will be experienced upon the introduction of TPF in Nigeria, the following submissions are made to aid a smooth welcome into the Nigerian legal landscape.

- Disclosure of conflict of interest with Third-Party Financiers: Arbitrators, counsel and third-party financiers should be strictly required to disclose if there is a conflict of interest in a TPF arrangement. Failure to disclose conflicts of interest would necessarily impact the enforcement of such arbitral awards/judgments in the degree to be determined by the necessary appellate body (the Award Review Tribunal/the High Court).
- Registration of Firms and Individuals involved in TPF.
- Regulation of agreeable interests in the proceeds of an arbitral award (what can be included in the TPF agreement as shareable proceeds and regulation of percentages. For instance, it would be unconscionable to have a Funder claim above 90% of the proceeds).
- Duty to Disclose TPF arrangements: Parties should be required to disclose if there are TPF arrangements to allow for discovery of conflicts of interest and malpractices.
- Provision for powers of Court to void a TPF agreement on grounds of public policy

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  5. Section 31(2) of the Ontario Class Proceedings Act 1992, S.O. provides as follows: Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims, 1992, 6.
  6. 2011 ONSC 1785 at para 28
  7. Law Society Act, R.S.O. 1990, c. L.8 Similarly, in Quebec, the Fonds d’aide aux recourcollectifs was established by Act Respecting the Class Action, R.S.Q. c. R-2.1 to assist Quebec plaintiffs with legal fees and disbursements in exchange for a percentage of the recovery in accordance with the regulations.
  8. Bringing Legal Help to People Across Ontario Annual Report, 2019. <<https://lawfoundation.on.ca/download/2019-annual-report/>>
  9. Law Society Act, ss. 59.2-59.3; Ont. Reg. 772/92, s. 5.
  10. Law Society Act, s. 59.5(1)(g) and Class Proceedings Regulation [Law Society Act], s. 10
  11. For instance, in *Marriott v. General Motors of Canada Company* (Ontario Superior Court, April), the funder demanded 7% of the proceeds of litigation (capped at \$15 million or \$10 million if the action were to be resolved before a pre-trial conference brief is filed. Also in *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364, the funder demanded 7% capped at \$5 million before certification and \$10 million after certification, 2018.
  12. See s. 32 and 33 of the Class Proceedings Act, 1992, S.O. 1992, 6. (as amended)
  13. The need for adequate representation is also evinced by the appointment of experienced counsel as was highlighted in *DeFazio v Ontario* (Ministry of Labour) CanLII 7403 (Ont Sup Ct J), 2007.
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  17. Aaron Dantowitz, Commercial Third Party Funding of Class Actions in Ontario: Eight Early Lessons presented at Second Annual Securities Litigation Practice Group Symposium The Advocates’ Society Thursday, September 13, 2012 ONLINE <[http://stockwoods.ca/wp-content/uploads/2012/01/Third\\_Party\\_Funding-Final.pdf](http://stockwoods.ca/wp-content/uploads/2012/01/Third_Party_Funding-Final.pdf)>
  18. *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364 (Dugal)
  19. Section 33.1(2) CPA *ibid*, See also *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129 (CanLII). (*Houle*)
  20. Examples are Claims Funding International (an Irish Funder), Redress and Harbour (a British funder), Galactic TH Litigation Funders LC (an American funder), and Omni Bridgeway (formerly known as Bentham IMF, an Australian funder)
  21. *Buday v. Locator of Missing Heirs Inc* CanLII 961 (ON CA), 1993.
  22. 9354-9186 *Québec Inc. v. Callidus Capital Corp.*, 2020. SCC 10 (CanLII), <<https://canlii.ca/t/j7c04>>
  23. *McIntyre Estate v Ontario* (Attorney General) 61 O.R. (3d) 257 (C.A.) at para. 23 [*McIntyre Estate*], 2002.
  24. RSO (1897) (the Champerty Act)
  25. [1939] SCR 446.
  26. Until 1953, champerty was a crime in Canada. Currently, they are torts in the common law jurisdictions of Canada. By the provisions of An Act Respecting Champerty RSO 1897, c 327, champertous agreements are unenforceable.
  27. *CanLII 41540* (ON SC) (*Meltzer*), 2009.
  28. *McIntyre supra*
  29. 16 O.R. (3d) 257, 1993.
  30. 61 O.R. (3d) 257 (C.A.) at para. 26 [*McIntyre Estate*], 2002.
  31. Usually, courts consider any demand exceeding 33.3% of the proceeds may be considered excessive even if the excess is caused by the disbursements. Thus, in *Drynan v. Bausch Health Companies Inc.*, (Ontario, August), the court considered a demand of 25% proceeds and disbursements capped at 33% to be reasonable, 2020.
  32. The court referred to John D McCamus, *The Law of Contracts* (Toronto: Irwin Law), 2005, 441-42.
  33. See for instance the case of *Dugal supra*
  34. O.J. No. 3315 (S.C.J.) see also *McIntyre Estate v. Ontario (Attorney General)*, *supra*, 2009.
  35. Notably, litigation funding is disallowed in family proceedings because it is crucial that rancor is discouraged.
  36. Agarwal RK, Fenton D. “Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context” 59 *Can. Bus. L. J.* 65, 2017, 81.
  37. *JB & M Walker Ltd. v. TDL Group* (Ontario Superior Court, February) (para. 26), 2019.
  38. Michael Legg, Class Action, Litigation Funding and Access to Justice Public Lecture Addressing Victorian Law Reform Commission Consultation Paper, Access to Justice — Litigation Funding and Group Proceedings - July [2017] UNSWLRS, 2017:57:15.
  39. In *Schenk v. Valeant Pharmaceuticals International Inc.*, ONSC 3215, although Justice McEwen found the LPF champertous, he did not agree with the defendant’s submissions that the funder was in control of the litigation because by the agreement, the funder could terminate funding if the representative claimant’s cost exceeded 25% of the budget. Hence, the court considered this reasonable, 2015.
  40. Michael Legg, ‘Ramifications of the Recognition of a Common Fund in Australian Class Actions: An Early Appraisal’ 91 ALJ 655, 2017, 666-669.
  41. Which the defendant can directly recover from the funder by Section 33.1(11) Ontario Class Proceedings Act *supra*
  42. *Justice Perellin McCracken v Canadian National Railway Company* ONSC 6838 at para 66, 2012.

43. See for instance, section 115 Court of Justice Act; section
44. Pauli v ACE INA Insurance Co., A.J. No. 883 (C.A) at para. 31. Other provinces have similar considerations, example Nova scotia allows the court to consider whether the cost award would further the judicial economy, access to justice or the behavior modification goals of class proceedings legislation-NS CPA,2004:40(2)(b)
45. Caputo v Imperial Tobacco Ltd., 2005 CanLII 63806 (ON SC), Joannis v. Barker [] O.J., 2003, 4081.
46. See MacksonIkeni v. Chief William Akuma Efamo & Ors 4 NWLR (Pt. 499), 318 where the Court held that it is a matter predicated on public policy that there must be an end to litigation, 1997.
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