

Funders Keepers: Providing Disclosure Documents to Your Litigation Funder

The Eastern Caribbean Court of Appeal recently held, on appeal from the BVI, that a party to proceedings is entitled to share documents received in the proceedings with its litigation funder.

Background

The Eastern Caribbean procedural rules ("EC CPR") Rule 28.17 states that any document received by a party to proceedings can be used *"only for the purpose of the proceedings in which it is disclosed"* (unless the document is read to or by the court, is referred to in open court, or the court or the disclosing party gives permission). EC CPR 29.12 contains a similar provision, stating that a witness statement received by a party can be used *"only for the purpose of the proceedings in which it is served"*, subject to certain exceptions.

These provisions codify the common law principle that a party to proceedings gives a collateral or implied undertaking to use the information obtained only in the case at hand and not in any other civil or criminal proceedings.

In these proceedings, the court had granted a *Mareva* injunction against the appellant. In the usual way, this included an ancillary order for the appellant to disclose certain information regarding its assets to the respondent.

The respondent wanted to share this information with its litigation funder, which was not a party to the proceedings in that capacity.

Decision

In its ruling, the court confirmed that the central issue is whether *"what is being done is for the purpose of the proceedings, or some other purpose"*. In the instant case, applying the requirements as set out in EC CPR Rule 28.17 and 29.12, the court found that *"the use of the information by the litigation funders is ultimately in or for the purpose of the proceedings."*

The court also ruled that, even though the EC CPR provisions replace the common law implied undertaking, disclosure to the funder would also have been permitted under the implied undertaking. The purpose of providing the documents to the litigation funder was to *"consider proportionality and appropriateness of further litigation expenses in these proceedings"*, that was ancillary to the disclosure order and not for an ulterior purpose. The disclosure given set out the appellant's assets and the court held it was natural for the funder to take into consideration the value of the appellant's assets to offset awards and costs. It was deemed *"ancillary to the policing of the Mareva injunction."*

Further, the court ruled it is not enough for the disclosing party to allege a risk of harm from

onward disclosure; there must be evidence of real risk that the information could be shared with or used by third parties and that it will be prejudicial to the disclosing party. Absent any such risk, the allegation will be viewed as speculative.

Comment

This judgment provides helpful certainty for parties dealing with litigation funders, further bolstering the BVI's funder-friendly approach. It also reaffirms the wider principles governing the circumstances that a party to legal proceedings in the BVI can share disclosed documents and witness statements with a third party.

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