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Quarterly

A REVIEW OF LEGAL FINANCE

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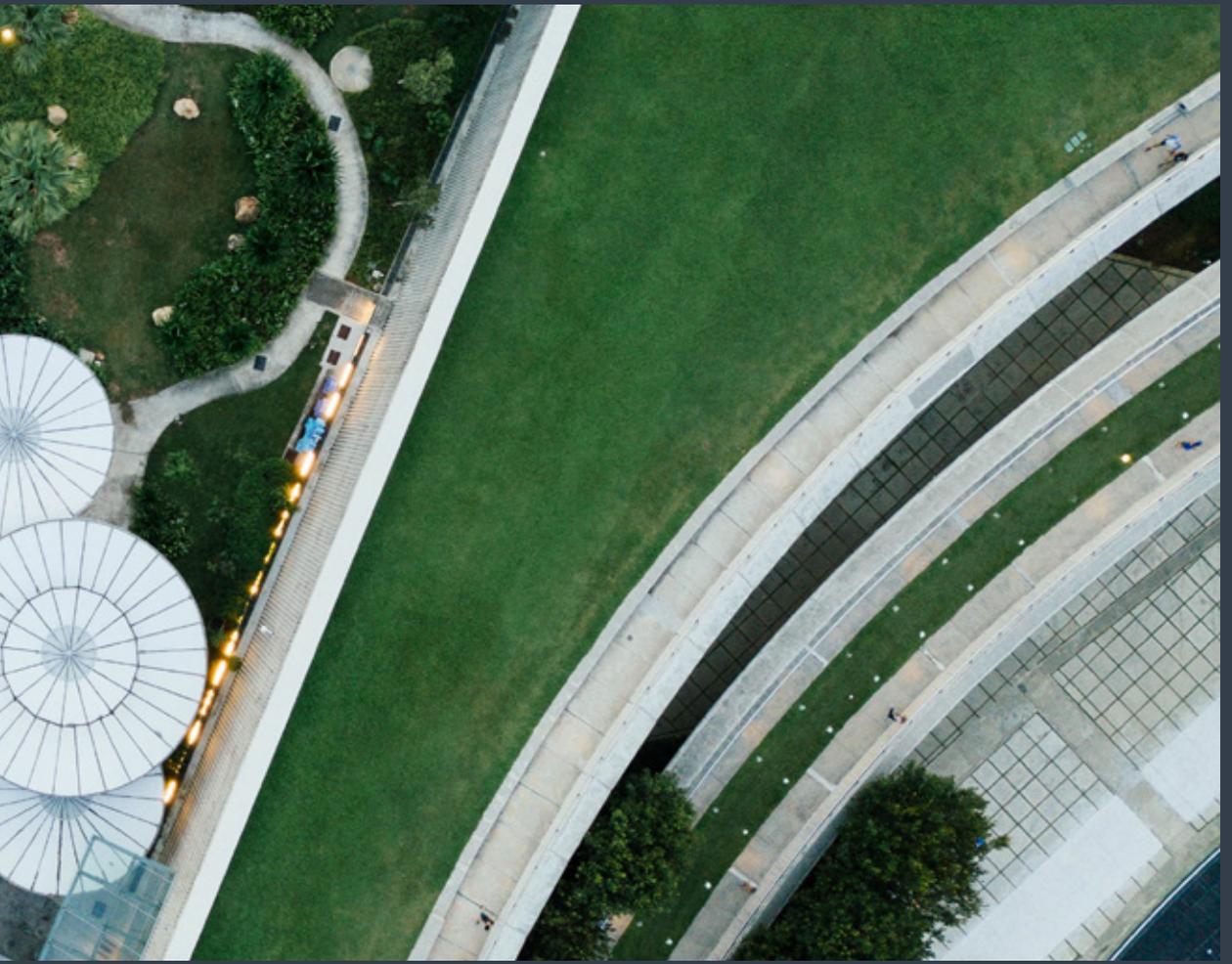
THE NEW WAVE
LAW FIRM CFO





ROUNDTABLE

Asset recovery roundtable: Post-pandemic trends in offshore markets



In June 2021, Daniel Hall and Michael Redman, Managing Directors and co-leads of global corporate intelligence at Burford, posed questions on major legal developments in the offshore markets over the past 18 months and economic trends that will play out in the markets post-pandemic to leading litigators, insolvency practitioners and financial professionals in the region.

Q.

A recent act in the Cayman Islands, the Private Funding of Legal Services Act 2020 (PFLSA), which came into force in May 2021, permits third-party funding in a much wider range of proceedings and allows law firms to enter into contingency fee agreements. How do you anticipate this law changing the way law firms interact with their clients and how will it benefit both the claimant and the representing attorney?

John O’ Driscoll:

The issue prior to PFLSA was that litigation funding agreements were subject to advance approval by the Grand Court on a heavily restricted basis. They were all but unknown in commercial cases as a result of the continued existence of maintenance and champerty as criminal offenses, and the availability of litigation funding remained scarce. With the increased certainty provided by PFLSA, we anticipate an increase in claims. However, there is likely to be a short delay in uptake initially as the act specifically applies only to causes of action which have accrued since it came into force.

Laura Hatfield:

In reality, litigation funding has been available for over 15 years (particularly in the insolvency space), but PFLSA removes the need to carefully avoid landmines of champerty and maintenance lurking around alternative financing—which often adds a layer of costs in obtaining advice and court confirmation. The law also allows for contingency fee arrangements, either based on value of recoveries or an uplift on normal fee rates as a success fee. Cases that were unable to proceed because of a lack of finance

can do so, and claimants will get compensation where otherwise there will have been none.

Christopher Smith:

PFLSA is still in its infancy, but if it achieves its intended purpose, it should allow for a much wider use of litigation finance and flexible fee arrangements between claimants and their attorneys. From a claimant’s perspective, the most obvious benefit is that it allows claims to be brought that might otherwise have been difficult to pursue due to a lack of resources. From the attorney’s

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[Because of PFLSA] cases that were unable to proceed because of a lack of finance can do so.

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—LAURA HATFIELD,
BEDELL CRISTIN

perspective, the main benefit is commercial given the uplift in fees in the event of a successful claim. It remains to be seen what appetite Cayman Islands' attorneys will have for increased risk versus potential increased recovery in these new contingency fee arrangements.

Matthew Brown & Jonathon Milne:

Nowadays, litigation funding and other alternative fee arrangements are commonly viewed as necessary components of a sophisticated and high-functioning legal system. The Grand Court of the Cayman Islands has expressly recognized the shift in the tide of public interest. The principal objective of the act is to remove any lingering uncertainty in relation to the status of litigation

funding in the Cayman Islands. The introduction of clear parameters through bespoke legislation is likely to bring benefits to claimants, funders and their attorneys.

While the Cayman Islands is among the first offshore jurisdictions to implement specific litigation funding legislation, they have the benefit of learning from and following the lead of other sophisticated onshore common law jurisdictions, such as the UK and Australia.

Tim Prudhoe:

The act is welcome and overdue; the tensions inherent in a contingency “onshore” will be no different in Cayman. The main impact will be the improved access to justice.

Q.

Do you believe that the PFLSA may act as a trigger for other jurisdictions in the Caribbean Islands to create their own versions of the law? If so, how do you see this changing the litigation finance and legal landscape?

Matthew Brown & Jonathon Milne:

Cayman Island decisions on third party funding are definitely being seen and emulated in other jurisdictions. For example, courts in the British Virgin Islands (BVI) have expressed support in general terms for third-party litigation funding. In late 2020, In the Matter of Exential Investments, Inc., a third-party litigation funding agreement was approved in the BVI. Citing the Cayman Islands decision of Segal J in *A Company v. A Funder* (2017), Honorable Justice Jack in the

BVI Commercial Court held that a proposed funding arrangement to be entered into between liquidators and a third party funder was “essential to ensure access to justice.”

Christopher Smith:

While the recently sanctioned funding agreement between BVI liquidators and third-party funders is relatively new, it is expected to increase the appetite for third party funders to get involved in litigation in the BVI. The increasing prevalence of

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