Manolete
— PARTNERS PLC —

Litigation Finance 2019

A Client's Options for Funding Litigation

- Option 1:- Self-funding (payment of standard fees whether fixed fee or hourly rate)
- Option 2:- Litigation Finance (payment of standard fees)
- Option 3:- Conditional Fee Agreements (CFA) coupled with After The Event (ATE) insurance (only in England & Wales)
- Option 4:- Damages Based Agreements ('DBAs').

Assessing the available Options

- **Option 1**:- *Self funding* *means the claimant bears all of the costs risk alongside the adverse costs risk of losing the litigation.*

- **Option 2**:- *Litigation Finance* *covers all legal expenses, including experts. Generally speaking the funder assumes the risk without exercising control over litigation, in return for share of winning proceeds. Nothing for the client to pay if he/she loses. May not be appropriate for all cases, usually most appropriate for large commercial disputes*

- **Option 3**:- *CFAs are imperfect*
  - *CFAs do not cover the costs of experts and counsel who are often reluctant to be on a CFA*
  - *ATE insurance very rarely provides funding for own side costs and deferred premiums increasingly rare*
  - *Success fees ceased to be recoverable post April 2013 and post April 2015 in the case of Insolvency.*
- **Option 4**:- *DBAs* *are also imperfect. Like CFA's, DBAs do not cover the costs of experts or ATE premiums and most barristers reluctant to act under a full DBA, much like solicitors on large cases*

What is litigation finance?

- **Litigation finance** *is where a third party with no prior connection to the litigation agrees to finance all or part of the legal costs of the litigation in return for a fee payable from the proceeds recovered by the funded litigant if successful. Funding legal costs in this way is sometimes referred to interchangeably as* ***"litigation funding"*** *or as* ***"litigation finance"*** *or as* ***"third party funding".*** **Third Party Funder = TPF**

- *"Funding is beneficial and should be supported. It promotes access to justice*."**LORD JUSTICE JACKSON**
- *"...[litigation funding is a] judicially sanctioned activity perceived to be in the public interest*." **LORD JUSTICE TOMLINSON**

Timeline of litigation finance in England and Wales:

- **1880**: *Seear v Lawson*, funding endorsed in the context of personal bankruptcy.
- **1967**: Champerty decriminalised and no liability in tort (s14 Criminal Law Act 1967) but no impact on public policy issues.
- **2003**: *R (on the application of Factortame) v Secretary of State for Transport, Environments and the Regions (No 2)*, Court of Appeal: ***"the mere fact that litigation services have been provided in return for a promise in the share of the proceeds is not by itself sufficient to justify that promise being held to be unenforceable".***
- **2005**:*ARKIN V BORCHARD LINES LTD & ORS [2005] EWCA CIV 655*
- **2010**: Jackson Report, Chapter 11
- **2011**: Code of Conduct and formation of Association of Litigation Funders with the Civil Justice Council
- **2011**: Client Care provisions of the SRA Code of Conduct 2011 (IB(1.16))

See http://www.harbourlitigationfunding.com/funding-map/GB

Litigation finance providers in the UK

THERIUM.

Burford

VANNIN CAPITAL

WOODSFORD
LITIGATION FUNDING

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Calunius
Capital

BALANCE
LEGAL CAPITAL

Black Hammer Capital

AUGUSTA

Why should a solicitor know about Litigation Finance?

- Solicitors may be of the view that their commercial client is solvent and therefore doesn't want finance or need finance.
- *However: Did you ask them about it or are you making that assumption on their behalf?*
- Finance doesn't work for every type of case but solicitors will look certainly good if clients are fully informed about funding options as it shows clients that solicitors really are very clear about how they address payment for your costs. In any event, they can readily say no to such finance offers.

Why should a solicitor know about Litigation Finance?

- SRA Code of Conduct - a solicitor must put their client in an ***informed*** position to make decisions about how to manage their fees.
- It would **not** be appropriate to rely solely on the fact that engagement letter includes a reference to the existence of these products. Something more substantial is certainly required.
- Failing to explain to a client that they may be able to secure non-recourse funding for their claim or insurance that will reimburse them for a portion of fees, and adverse costs in the event of a loss, may mean that the lawyer has not put the client in an informed position and has, therefore, not met their professional obligations.

When might a potential claimant wish to use litigation finance?

Litigation finance = *cash to pay their legal costs because without it they would not be able to afford to pursue a claim at all*. Conversely may be able to finance costs but litigant *appreciates the significant additional support provided by a litigation funder such as*:

1. ***Shared risk in pursuing the claim*** (even though they will have to pay a share of the awarded damages to the funder if they are successful).
2. ***Legal budgets are stretched*** and third party funding allows a company with multiple claims to finance more actions than their limited budget may otherwise allow.
3. ***commercial convenience*** **-** financing litigation becomes an off balance sheet item due to its non-recourse nature – i.e. it is not a loan/serviceable

Are there any ethical constraints on litigation finance?

Those involved in litigation funding (such as solicitors, counsel or Judges) need to be mindful of three key areas in particular:

- Champerty/Maintenance
- Conflicts of Interest.
- Confidentiality and privilege.

Champerty/Maintenance

Maintenance: *'the procurement, by direct or indirect financial assistance, of another person to institute, or carry on or defend civil proceedings without lawful justification.'*

Champerty: has been described as an aggravated form of maintenance in which the maintainer received *'a share of the proceeds of the action or suit or other contentious proceedings where property is in dispute.* ** *i.e. maintenance for profit* **

Barretry: *"A common barretor is a common mover or stirrer up or maintainer of suits, quarrels, or parties, either in Courts, or in the country, in Courts of Record, and in the County, Hundred, and other Inferior Courts."* ** *i.e. barretry = serial maintenance* **

Champerty and Maintenance

Litigation finance document is first reference point to determine whether the finance arrangement is champertous.
Relevant factors include (but not necessarily limited to):

1. *The extent to which the funder controls the litigation.*
2. *The level of communication between the funded party and the solicitor.*
3. *The extent to which the funded party is provided with information, and is able to make informed decisions about the litigation.*
4. *The amount of profit that the funder stands to make relative to the total damages.*
5. *Whether there is a risk of inflaming damages.*
6. *Whether there is a risk of distorting evidence.*
7. *Whether the funder is regulated.*

Consequences of Funding Agreement breaching Champerty

1. Finance Agreement - void and unenforceable as a matter of public policy. The TPF will be unable to enforce the agreement against the funded party.
2. As the successful funded party would be under no enforceable liability to its funder, as a result of the indemnity principle, it would be unable to recover costs from its opponent.
3. The circumstances of the case may give rise to grounds justifying a costs order (under section 51 of the Senior Courts Act 1981) against the litigation funder, possibly for the entire costs of the litigation.

Conflict of Interest

Solicitor = No 

+ must act in client's best interest at all times.

Such fundamental obligations can't be impaired by any financial interest or commercial relationship (*Outcome 3.2*).

Solicitor must ensure that their obligations aren't compromised by the structure and contents of the **finance agreement**. Helpful to avoid giving the funder too much influence over critical decisions in the litigation. Minimises the risk of conflicts of interest, as well as champerty.

Duty of confidentiality and privilege

- Solicitor should not disclose information to a prospective funder unless they have explained the risks of doing so and obtaining the client's informed consent.

- Handing over documents to a prospective funder could mean you are waiving privilege in them, if the funder does not go on to fund the litigation.

- If the third party funder ultimately provides funding, it is likely that common interest privilege will apply.

- Best solution = ask the potential funder to sign a confidentiality agreement!

What is litigation finance available for?

- Litigation finance can be used in both litigation and arbitration. Costs must follow the event.

- Used primarily by commercial claimants, although claims brought by individuals and even public bodies can sometimes be funded.

- Litigation finance does not typically work with a defendant as TPF's look to a "damages pot" for an investment return.

At what level of claims are litigation funders interested?

Some TPF's prefer = small number of large cases where returns can be substantial. May look to commit say 5m-£10m of capital for cases worth £100m+. Because their strategy is to focus on big claims, such TPF's may choose to have a minimum threshold for the value of the claim at circa £10m or a minimum capital commitment of £1,000,000. Many of them structure the funding return as the HIGHER of 30-40% of the GROSS proceeds or 6x costs

While this high value, low volume approach is preferred by some TPF's, others prefer to fund a far greater number of smaller claims at reduced margins of return. In this context a TPF might be able to fund as little as £25,000 in a claim worth £100,000.

What do litigation funders look for?

Good prospects of success**:** *commonly understood to be 60% or higher but percentage prospects of success are of limited value to litigation funder. Decision to underwrite is subjective. Case may be assessed in house or by external expert such as counsel. Views of solicitor putting claim forward will be taken into account. Also, defences and counterclaims will be considered and the position of any other party having an interest in the litigation.*

Enforcement: *need to ensure there will be a return on investment so creditworthiness of opponent comes into play. Availability of insurance or indemnity to meet claim against defendant and assets in jurisdiction of litigation or other favourable jurisdiction in the case of international work.*

What do litigation funders look for?

Experienced and credible legal team**:** *TPF will wish to assess the quality and experience of the proposed legal team.*

Positive cash outcomes and a favourable timescale: *How easy is it to turn a successful case into money? How long will it take to see a return? Generally 18-36 months is about the norm for most TPF's and as such there is a preference to avoid non-monetary claims or claims with significant preliminary issues.*

Size of the damages claim and proportionality: *TPF will be keen to ensure that there is potential to get sufficient return to recover costs, fees and make sure that there is enough for the claimant (such as say at least 50%) to allow the claimant to feel motivated to settle the claim if an opportunity should present itself.*

Absence of political or controversial subject matter: *TPF is not keen to become embroiled in legal test cases or with a political element. That can be left for Gina Miller!*

Litigation Finance and Insolvency

Main clients of TPF's specialising in insolvency are Insolvency Practitioners (IP).

Third Party Litigation funding or CFA/ATE may be the only tool to allow litigation to be pursued in nil asset cases.

Generally speaking, creditors are reluctant to throw good money after bad and fund cases.

IP's are business professionals and not in love with the potential claims they wish to pursue – they are not emotionally attached and do not desire a day in court.

IP's tend to have excellent professional contacts with solicitors, and this is advantageous to a litigation funder. Often the team will have worked together before.

In a funded action, the TPF will typically offer the IP an indemnity for adverse costs and there is no need for ATE. The indemnity is typically uncapped (no Arkin Cap issues for IP's) due to the special nature of the insolvency litigation marketplace.

Litigation Funding and Insolvency – cont

Generally speaking, IP's are experienced and efficient in terms of pushing claims forward.

Typically the IP will retain his own choice of solicitor
TPF's do not finance unmeritorious claims in the insolvency space to "overwhelm" the opposition

Since October 2015, TPF's (such as Manolete Partners PLC and others) can **purchase** claims which could only previously be litigated in the name of the Insolvency Practitioner – i.e. officeholder claims (as such, those claims are pursued as Assignees in the name of the litigation funder that has acquired them as the Claimant.). No champerty and maintenance issues in this model as statutory authority for the assignment exists.

The opportunity to purchase cases in this way (and the reduced asset values in cases) has reinvigorated the insolvency litigation marketplace and more actions against directors are now being pursued.

Funders in the insolvency litigation market set out below (some with larger balance sheets than others).

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HENDERSON & JONES

LCM EXPERIENCE COUNTS

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Thank you for listening

Andrew Cawkwell

Regional Associate Director (North East)

Tel: 07702 319421

andrew@manolete-partners.com