

Litigation Funding

Contributing editors

Steven Friel and Jonathan Barnes



2017

GETTING THE
DEAL THROUGH 

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DEAL THROUGH 

Litigation Funding 2017

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Preface

Litigation Funding 2017

First edition

Getting the Deal Through is delighted to publish the first edition of *Litigation Funding*, which is available in print, as an e-Book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print and online. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford Litigation Funding, for their assistance in devising and editing this volume.

GETTING THE 
DEAL THROUGH 

London
November 2016

England & Wales

Steven Friel, Jonathan Barnes and Lara Bird

Woodsford Litigation Funding

1 Is third-party litigation funding permitted?

Yes, third-party litigation funding is permitted, and endorsed by the judiciary and policymakers as a tool of access to justice. While English law continues to discourage funders from ‘controlling’ the litigation that they fund, the courts have a generally positive attitude to third-party funding.

The historic, and long-abandoned, prohibition of third-party litigation funding was rooted in the ancient concepts of maintenance and champerty. Maintenance is third-party support of another’s litigation. Champerty is a form of maintenance in which the third party supports the litigation in return for a share of the proceeds.

At the start of the twentieth century, maintenance and champerty were both crimes and torts. Following the Second World War, the law on funding of civil litigation changed dramatically. The introduction of legal aid in 1950 created a state-funded exception to the historic prohibition on litigation funding. Further exceptions came with the growth of insurance and trade union-funded litigation. The Criminal Law Act 1967 abolished the crimes and torts of maintenance and champerty. While those principles continue to exist in the public policy relating to litigation funding, their scope has been much reduced, and they apply nowadays only to discourage funders from exerting undue control over the litigation that they fund. So-called ‘no win, no fee’ arrangements between litigants and lawyers (in effect, another form of litigation funding) were introduced in the early 1990s and substantially liberalised in 2000.

R (Factortame Ltd) v Secretary of State for Transport was a case taken against the United Kingdom government by a company of Spanish fishermen who claimed that the United Kingdom had breached European Union law by requiring ships to have a majority of British owners if they were to be registered in the UK. The case produced a number of significant judgments on British constitutional law. In 2002, the Court of Appeal in *Factortame* (No. 8) [2002] EWCA Civ 932 explained that only those funding arrangements that tended to ‘undermine the ends of justice’ should fall foul of the prohibition on maintenance and champerty. In other words, reasonable litigation funding arrangements entered into with professional and reputable third-party funders who respect the integrity of the judicial process are perfectly lawful.

In its 2005 decision in the case of *Arkin v Borchard Lines*, the Court of Appeal was again sympathetic to the position of professional litigation funders as tools for access to justice. The *Arkin* case is referred to in more detail in question 18.

In a landmark ruling in 2016 (*Essar Oilfields Services Limited v Norscott Rig Management* [2016] EWHC 2361 (Comm)), the English Commercial Court upheld the decision of an arbitrator (former Court of Appeal judge, Sir Philip Otton) to allow a successful claimant to recover its third-party litigation funding costs from the losing defendant as ‘other costs’ under section 59(1)(c) of the Arbitration Act 1996.

2 Are there limits on the fees and interest funders can charge?

Litigation funding is now a well-established part of the English litigation landscape. There are a large number of professional litigation funders in London, and the market is competitive. From a commercial perspective, therefore, there is a lot of downward pressure on funders’ success fees. A litigant with a good case should readily be able to find litigation funding on attractive commercial terms.

In addition to the competitive limit on a funders’ success fee, the principles of maintenance and champerty arguably apply so as to render unenforceable litigation funding arrangements where, even if the litigant’s case is wholly successful, the funder’s return is significantly greater than the litigant’s return.

3 Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

The voluntary Code of Conduct for Litigation Funders was launched by the Civil Justice Council, a government agency that is part of the Ministry of Justice of England & Wales, on 23 November 2011. This Code sets out the standards of practice and behaviour required of members of the Association of Litigation Funders (ALF). Membership of the ALF is voluntary, however, most of the more long-standing, professional third-party funders in the London market have joined. The Code includes provisions ensuring the capital adequacy of funders, the limited circumstances in which funders may be permitted to withdraw from a case, and the roles of funders, litigants and their lawyers.

4 Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

The Solicitors Regulation Authority (SRA) Handbook is made up of two parts: the SRA Principles, which are mandatory principles and underpin all areas of legal practice, and the SRA Code of Conduct 2011. This Code sets out an outcomes-focused regulatory system for solicitors and establishes mandatory outcomes that must be achieved in appropriate circumstances in order to comply with the SRA Principles. The Code contains a number of provisions relevant to solicitors advising on funding. These include, chapter 1 on client care, chapter 3 on conflicts of interest, chapter 6 on your client and introductions to third parties, chapter 9 on fee sharing and referrals and chapter 11 on relations with third parties.

It is accepted that solicitors have an obligation to advise litigants on all reasonable funding options, including insurance and third-party funding. A failure to do so could result in sanction by the SRA, and potentially also liability for professional negligence. At least one major English law firm has announced that they are actively looking to represent clients with professional negligence cases against their former lawyers who had failed to discuss litigation funding options with them in advance of prior litigation.

5 Do any public bodies have any particular interest in or oversight over third-party litigation funding?

The ALF, founded in November 2011, is an independent body charged by the Ministry of Justice, through the Civil Justice Council, with delivering self-regulation of dispute resolution funding in England and Wales. The ALF actively engages with government, legislators, regulators and other policymakers to shape the regulatory environment for dispute resolution funding, including litigation and arbitration.

The ALF has been charged with administering self-regulation of the voluntary Code of Conduct for Litigation Funders that are a members of the ALF and it also maintains the complaint procedure to govern complaints made against members by funded litigants.

Most professional litigation funders in London are staffed by solicitors and other professionals (eg, chartered accountants) who will ordinarily be regulated by their professional bodies.

And, of course, litigation funding necessarily exists in the context of litigation or arbitration proceedings, in which the relevant court or tribunal will have oversight.

6 May third-party funders insist on their choice of counsel?

In deciding whether or not to fund a case, third-party funders will take into account the expertise of the litigant's choice of counsel. If a funder does not think that the litigant's legal team is suitable, the funder can choose not to fund. Alternatively, it is open to the claimant to change legal team in order to persuade a funder to invest.

Once invested in a case, a third-party funder must not exercise undue control over the litigation, including making demands as to choice of counsel. To do so would risk offending the remaining vestiges of the principles of maintenance and champerty. This point is reflected in clause 9.3 of the voluntary Code of Conduct for Litigation Funders, which provides that members of the ALF must not seek to influence the funded party's solicitor or barrister to cede control or conduct of the dispute to the funder.

7 May funders attend or participate in hearings and settlement proceedings?

Yes, subject to objections from the judge, tribunal or mediator with authority over the relevant proceedings, it is perfectly lawful for funders to attend, and there are often good reasons why they should do so. Just as it has long been accepted that insurers and reinsurers with a financial interest in proceedings should be welcome to attend mediations and other settlement discussions, it is becoming more and more common for third-party funders to also attend.

8 Do funders have veto rights in respect of settlements?

The voluntary Code of Conduct for Litigation Funders states that the litigation funding agreement shall note whether (and if so how) the third-party funder may provide input into the litigant's decision in relation to settlements. It is standard for English litigation funding agreements to provide that third-party funders will be kept abreast of settlement discussions and offers, and some agreements will also provide that settlement offers within a given range will be considered reasonable and should be accepted.

9 In what circumstances may a funder terminate funding?

For members of the ALF investing in English litigation, the only permissible circumstances for terminating funding are set out at clause 11.2 of the voluntary Code of Conduct for Litigation Funders. First, where a third-party litigation funder reasonably ceases to be satisfied on the merits of the dispute. Second, where the funder reasonably believes that the dispute is no longer commercially viable. For example, where costs have escalated significantly, or the likely recovery has reduced significantly, from what was anticipated at the outset. Third, where the funder reasonably holds the view that there has been a material breach of the litigation funding agreement by the funded litigant.

Clause 12 of the Code provides that, in the absence of the circumstances described in clause 11.2, the litigation funding agreement shall make clear that there is no discretionary right for a funder to terminate the agreement.

In circumstances where the Code does not apply, for example, because the funder is not a member of the ALF, the principles of maintenance and champerty arguably apply to prohibit the funder from using the threat of terminating funding as a means of exercising undue control over the litigation.

10 In what other ways may funders take an active role in the litigation process?

In a February 2016 publication, 'International Arbitration: 10 trends in 2016', the arbitration team at international law firm Freshfields Bruckhaus Deringer LLP stated that third-party litigation funding 'is here to stay, and not just for small or cash-strapped claimants ... [T]he involvement of a funder adds an additional layer of diligence at an early stage of the process, leading to greater rigour in risk and cost-benefit assessments.'

This comment reflects the maturity of the litigation funding market in London. While the early discussions about litigation funding, informed by the historic principles of maintenance and champerty, tended to focus on how to limit the funder's involvement in the litigation process, it has come to be recognised that, in addition to financial assistance, funders can also bring a lot of professional expertise to the proceedings. It remains the position in English litigation that funders should not 'control' the proceedings, but it is nonetheless acceptable that they provide input.

11 May litigation lawyers enter into conditional or contingency fee agreements?

Yes. Conditional fee agreements (CFAs) have been permitted since the 1990s. In a CFA, some or all of the lawyer's fees are conditional on success. In the event of a success, the solicitor is entitled to payment of the conditional fees, plus a further uplift. The maximum uplift is 100 per cent of base rates. The Law Society publishes a model CFA and related guidance.

Damages based agreements (DBAs) were introduced in England as part of the Jackson Reforms in 2012. DBAs are similar to the American concept of contingency fee agreements. In a DBA, if the case is successful, the lawyer's fee is calculated as a percentage (capped at 50 per cent in commercial cases) of the financial benefit obtained; if the case is lost, no fee is payable to the lawyer. DBAs were envisaged by Lord Justice Jackson in his report *Review of Civil Litigation Costs* (December 2009) as an important litigation funding option. They have, however, been used relatively infrequently. The lack of popularity relates in part to the slow speed at which lawyers adopt new business models, and in part because of uncertainty as to how the rules governing DBAs apply in practice.

12 What other funding options are available to litigants?

The availability of legal aid has been significantly restricted in recent years. However, it is still available for some types of litigation, including judicial review.

Litigants who are members of a professional body or a trade union may benefit from a legal assistance scheme.

And various insurance policies, for example, home or car insurance policies, may contain legal expenses coverage.

13 How long does a commercial claim usually take to reach a decision at first instance?

Civil justice statistics for the third quarter of 2014, the most recent period available, stated there was an average of 56 weeks between a fast or multi-track claim (ie, higher value claims) being issued and the claim going to trial.

14 What proportion of first-instance judgments are appealed? How long do appeals usually take?

There are no accurate, up-to-date statistics on the proportion of first-instance judgments that are appealed.

The length of time from the date an appellant's notice is issued in the Court of Appeal to the date the appeal is likely to be heard varies from two months in urgent matters to around 18 months in very complex, non-urgent matters. The majority of appeals are resolved within nine months.

15 What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

There are no statistics on the proportion of High Court judgments or arbitration awards that require contentious enforcement proceedings.

It is relatively easy to enforce judgments or awards against defendants within the jurisdiction of England and Wales. Civil Procedure Rule 70 contains general rules about enforcement of judgments and orders. The methods of enforcement available to a judgment creditor include:

- seizing a judgment debtor's assets;
- third-party debt orders;
- charging orders;
- attachment of earnings;
- insolvency proceedings;
- appointment of a receiver;
- writs of sequestration; and
- orders of committal.

16 Are class actions or group actions permitted? May they be funded by third parties?

Yes and yes. In English litigation, there are a number of ways in which multiparty claims can be pursued. The following procedures are covered by Part 19 of the Civil Procedure Rules:

- Multiple joint claimants can proceed using a single claim form where their claims can be 'conveniently disposed of in the same proceedings'.
- Multiple claims can be managed under a group litigation order (GLO) where the claims have 'common or related issues of fact or law'.
- Representative actions are permitted where one or more claimants can represent other claimants with the same interest, for example, beneficiaries of a trust.

There is no direct equivalent in English law to the US shareholder class action, but the Companies Act 2006 introduced changes to directors' duties and the derivative claims that may be brought against them.

Recent changes to English competition law give rights to individuals (consumers and businesses) to bring private damages actions and to allow authorised class representatives to bring collective actions on their behalf in the Competition Appeal Tribunal (CAT).

All of the above types of group action may be funded by a third-party litigation funder.

In July 2016, it was announced that a £14 billion damages claim had been filed against MasterCard at the CAT, following the European Commission's finding in 2014 that MasterCard infringed EU law by imposing charges (known as 'interchange' fees) on businesses that accept MasterCard debit and credit cards. It is reportedly the first opt-out claim to be filed under the Consumer Rights Act 2015 on behalf of all UK consumers, and is backed by litigation funding.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation?

Yes. Under Civil Procedure Rule 44.2, the court has discretion as to whether costs are payable by one party to another, the amount and when they are to be paid. However, if the court decides to make an order in relation to costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, subject to some exceptions. There are a number of circumstances the court will have regard to, including the conduct of the parties.

In relation to domestic English arbitrations, the tribunal is under no duty to make an award as to costs, subject to any agreement between the parties. However, in practice, it is generally accepted that the tribunal should, unless the parties agree otherwise. If a cost award is made, unless otherwise agreed by the parties, section 61(2) of the Arbitration Act 1996 provides that the tribunal shall award costs on the general principle that costs should follow the event, subject to circumstances where this is not appropriate. That is, the unsuccessful party pays the costs of the successful party as well as its own.

18 Can a third-party litigation funder be held liable for adverse costs?

In English litigation, yes, but not in arbitration.

In the case of *Arkin v Borchard Lines*, the claimant had owned a shipping line that he said had been forced out of business by anticompetitive and unlawful behaviour. Third-party funding was obtained, with the funder to receive 25 per cent of the recoveries up to £5 million and 23 per cent thereafter. The claimant lost. The claimant was impecunious and not in a position to pay the defendants' costs. The role of the third-party funder, in particular the funder's liability to pay the defendants' costs, came to be considered by the Court of Appeal. It is an established principle of English law that costs follow the event. It was held 'unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action'. However, the Court of Appeal was concerned that there would be a denial of access to justice if this principle were taken too far. If a professional funder who had undertaken to fund a discrete part of litigation were potentially liable for all the costs of all the opponents, then no professional funder would be likely to undertake the risk. The Court of Appeal's solution was that a professional funder who finances part of a litigant's costs of litigation should be potentially liable for the costs of the opposing party

Update and trends

The number of products offered by litigation funders has increased significantly in recent years. In addition to 'classic' litigation funding (ie, funding litigation or arbitration on a case-by-case basis, where the funder's return is contingent on success), litigation funders now offer a number of financial products for claimants and their lawyers, including portfolio funding (where the funder's risk and reward is spread across a number of cases being pursued by a claimant or being handled by a law firm).

to the extent of the funding provided. In the *Arkin* case, the funder had spent £1.3 million on experts and supporting services, and would be ordered to contribute the same sum to opponents' costs.

Arbitration is a consensual process, founded in the contractual arbitration agreement between the parties in dispute. An arbitral tribunal has jurisdiction to make orders only in respect of the parties to the arbitration agreement. This is unlikely to include a third-party funder.

19 May the courts order a claimant or a third party to provide security for costs?

Security for costs by a claimant

An English court may order a claimant to provide security for costs. Pursuant to Civil Procedure Rule 25.13, the court may make an order for security for costs if it would be just to do so and one or more of the following conditions apply: the claimant is resident in a jurisdiction where it would be difficult to enforce a costs order; if a corporate entity, or acting on behalf of another, the claimant is impecunious; the claimant has withheld or changed his address with a view to evading the consequences of the litigation; or the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

Section 38(3) of the Arbitration Act 1996, and the rules of most arbitration institutions based in common law jurisdictions, including England, expressly provide that arbitrators may order security for costs. While, technically, Civil Procedure Rule 25.13 does not apply to arbitration, an English tribunal is likely to be guided by the approach referred to in the paragraph above.

Security for costs by a funder

Civil Procedure Rule 25.14(2)(b) allows an English court to make an order for security for costs to be given by any party who 'has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings'. This definition is likely to cover many litigation funding arrangements.

Given the contractual basis of arbitration, an arbitral tribunal may order a party to pay security for costs only if that party enters into the arbitration agreement pursuant to which the arbitration proceeds. A third-party litigation funder is unlikely to do so.

Method and amounts

In court proceedings, security for costs usually takes the form of a payment into court or the provision by the claimant of a bond. Other alternatives available in litigation, and also in arbitration, include payment into an escrow account, bank guarantees, parent company guarantees, payment into court or a solicitor's undertaking. See *Premier Motor Auctions Ltd & Anor v Pricewaterhousecoopers LLP & Anor* [2016] EWHC 2610 (Ch) (24 October 2016), described in question 21 below.

The amount awarded will usually be calculated by reference to the amount of costs the defendant would likely be awarded in the event that the claimant's case is unsuccessful. In arbitration, security may also be ordered in respect of arbitrators' fees.

20 If a claim is funded by a third party, does this influence the court's decision on security for costs?

The fact that a claim is funded is not, in itself, a ground on which a court may make an order for security for costs against a claimant under Civil Procedure Rule 25.13. A defendant may seek to argue that the fact that the claimant is funded is evidence that the claimant will be unable to pay the defendant's costs if ordered to do so, which is a ground on

which a court may make an order for security for costs against a claimant under Civil Procedure Rule 25.13(c). However, while many claimants who seek third-party funding are impecunious, many others are not, and the mere fact of litigation funding would not be sufficient. Such a fact should not, in itself, influence the court's decision.

While, technically, Civil Procedure Rule 25 does not apply to arbitration, an English tribunal is likely to be guided by the approach referred to in the paragraph above.

21 Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

Yes, ATE is both permitted and commonly used. There is a well-established and competitive market for ATE in respect of both litigation and arbitration.

As London is arguably the centre of the global insurance market, it is perhaps unsurprising that there are many other insurance products related to litigation and arbitration, including insurance for lawyers acting on contingency fee agreements, which covers the lawyers' fees in the event that the claim is lost, and judgment default insurance, which covers the risk that the defendant does not comply with a judgment against it.

As a general rule, London insurers will consider insuring any high-value risk relating to litigation or arbitration. There are specialist brokers who can liaise between litigants and insurers.

In *Premier Motorauctions Ltd & Anor v Pricewaterhousecoopers LLP & Anor* [2016] EWHC 2610 (Ch) (24 October 2016), Mr Justice Snowden declined to order security for costs where the claimant has the benefit of an ATE policy provided by an insurer with a good track record of paying claims. It was held that the defendants in this action failed to satisfy the court that there is reason to believe that the claimants would be unable to pay the defendants' costs if ordered to do so. The jurisdictional threshold under CPR 25.13 had not been crossed because it was not established that the relevant insurer would not pay under the policy if called upon.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

There is no general requirement for a litigant to disclose a litigation funding agreement to any opposing party or to the court.

A litigant may, of course, voluntarily choose to do so. The fact that a professional third-party funder has agreed to back a litigation or arbitration may send a strong signal to the defendant both that the litigant has financial backing to bring the case through to trial, and that an objective third-party believes the claim to be strong.

Civil Procedure Rule 25.14(2)(b) is referred to in question 19 above. In *Wall v The Royal Bank of Scotland PLC* [2016] EWHC 2460 (Comm), the claimant was ordered to reveal the identity of third-party funders in order that the defendant could consider an application for security for costs against them.

23 Are communications between litigants or their lawyers and funders protected by privilege?

This question has not been tested in the English courts, and there is, therefore, some uncertainty. The dominant view of practitioners appears to be that the litigant's privilege is protected in communications with a third-party funder by the common interest doctrine. A third-party funder may also be appointed as the litigant's agent for the limited purpose of reviewing and funding the case, which may add an additional layer of protection for the litigant's privilege.

24 Have there been any reported disputes between litigants and their funders?

There have been remarkably few publicly reported disputes between litigants and their funders. *Therium (UK) Holdings Limited v Brooke and others* [2016] EWHC 2421 is a rare example of such a dispute. In that case, a litigant was sentenced to prison for contempt of court after failing to obey court orders that arose from his alleged failure to pay his litigation funder a success fee following the settlement of his litigation.

The Association of Litigation Funders has a procedure for complaints against its members. This procedure has never been used.

25 Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

Litigants and their instructed lawyers would be well advised to do business only with professional, regulated and properly capitalised funders; for example, funders that are members of the ALF. These members have committed to comply with the ALF's voluntary Code of Conduct. This Code sets out clear and important rules governing the relationship between a funder and its client, and provides significant benefits to both parties, including clarity on issues such as case control, settlement and withdrawal.

WOODSFORD

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