

CD corporate disputes

JUL-SEP 2017

www.corporatedisputesmagazine.com



Inside this issue:

FEATURE

Infrastructure dispute resolution

EXPERT FORUM

**Resolving tax disputes with
regulators**

HOT TOPIC

**Managing and resolving hedge fund
and private equity fund disputes**

PERSPECTIVES

BUSTING THE LITIGATION FUNDING MYTHS

BY **MAURICE POWER**

> FERGUSON LITIGATION FUNDING

Litigation funding is a fast-growing sector, with investors placing more funds into the market, new providers emerging and the courts acknowledging the value provided by the funders. However, there are many misconceptions and misunderstandings about what litigation funders do, who they can assist and how much they expect to get paid for their services. It is important that these myths be exposed and the most common concerns about litigation funding addressed.

“Litigation funders are only interested in multi-million pound claims.” For several litigation funding organisations, this is true. They will have a minimum claim value that needs to be exceeded before they would consider offering assistance.

However, for the majority of funders, this is not the case. Providing that the litigation is meritorious, passes the funder’s risk assessment and, upon success, will generate enough to satisfy the costs of the action (both in terms of legal and funders fees), while leaving the claimant with sufficient return for taking the action, then there are many funders which will look at claims of all sizes.

Where the claim is too small to satisfy these criteria, there are funders that will be open to taking an assignment of the claim, to pursue themselves.

“The funding supplied is a loan which has to be repaid with interest.” The funding supplied is a non-recourse investment in the litigation. Should the case be lost, then there is nothing to repay as

the funder has accepted this risk when making its offer of funding. If the case is won, then the terms agreed in the litigation funding agreement, between the claimant and the funder will apply. *"I can afford to pay for my own legal costs, therefore funding does not apply to me."* This is true, however many claimants will look to use litigation funding to reduce the financial risk associated with litigation or to remove the need for their finances to be tied up in, what could be, a lengthy legal process.

Another benefit of using a litigation funder is that the funder will not make an offer of funding unless it is convinced that the case is likely to win, therefore the claimant receives an independent view of the prospects of success.

"The funders expect extortionate fees for providing assistance." All funders have their own views on how to structure the fee for their assistance; by taking into account the amount of investment needed, the likely length of the litigation and the level of risk present. In many cases the fee will be an agreed percentage of any win or a multiple of their committed investment.

With competition increasing in the market, funders are now becoming more

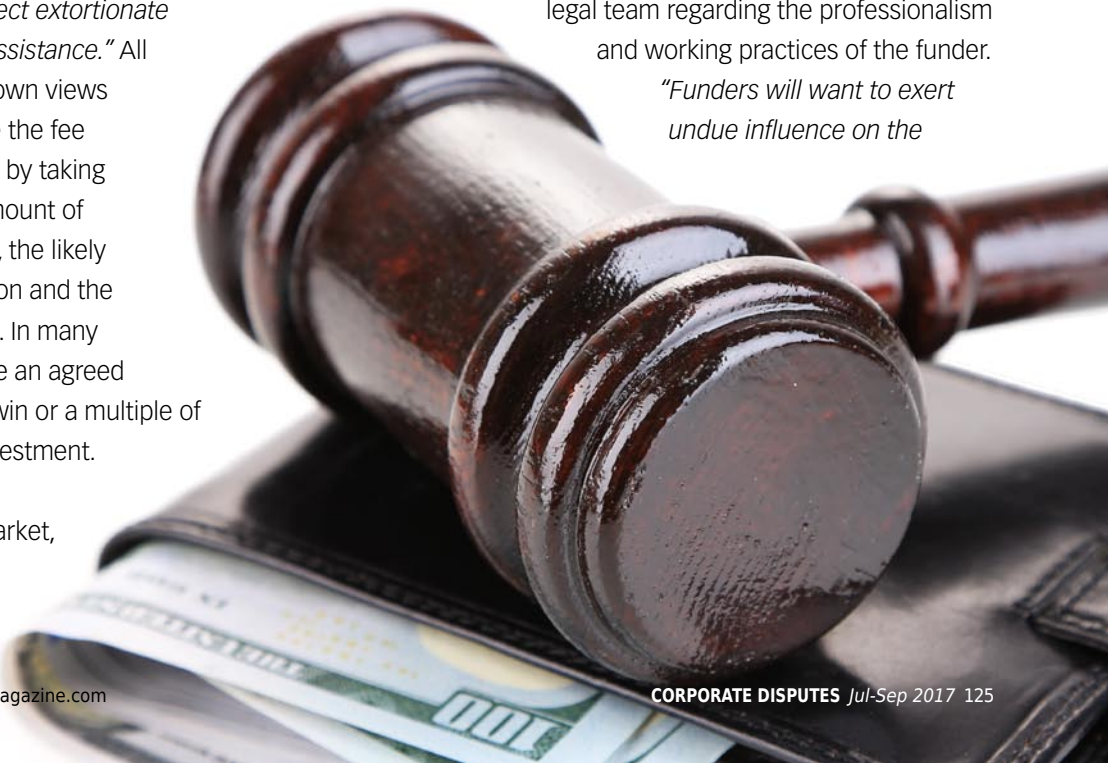
creative in providing fee structures which better align the interests of the claimant and the funder.

"Litigation funders are unregulated and cannot be trusted." The government has recently stated that the case has yet to be made for bringing in statutory regulation for third-party litigation funding.

The Association of Litigation Funders (ALF) has a voluntary code of conduct for its members, however, membership is not mandatory and the majority of funders have chosen not to become members, preferring to rely on the terms of their litigation funding agreement to provide comfort and protection for the claimant.

When choosing to work with a litigation funder, it is always prudent to seek the advice of your legal team regarding the professionalism and working practices of the funder.

"Funders will want to exert undue influence on the



claim." A professional and reputable funder will always want to review the progress made in the claim, however, as it is only providing the funds by which a claimant can pursue a claim, it is unable to intervene, instruct or advise the acting solicitors.

"Having funding will reduce the chances of the claim settling." On the contrary, the presence of a funder in the claim will show the defendant that an experienced third party believes the claim is strong and that the claimant is well funded and able to go the course.

In many cases, the presence of a funder in the action will incentivise the defendant to settle the claim through some form of alternative dispute resolution rather than incurring the cost of a lengthy court action.

"Litigation funders will only consider funding all the legal costs." Though this may be true for some funders, the majority will take a flexible view of the claimant's needs. Many are able to fund only the disbursements or a percentage of the legal fees.

Ensure the funder is given clear indication of the claimant's requirements and concise budgets from the instructed legal team during the application stage. Then, it is likely that a mutually beneficial offer will be made.

"Funding poses a threat to the legal system and access to justice." In actual fact, the opposite is true.

The use of third-party litigation funding has been ratified in the courts on numerous cases.

With the gradual withdrawal of legal aid and the implementation of the Jackson reforms in the Legal

"If any application for funding is supported by all the relevant documents and a detailed cost budget from the acting solicitors, then there is no reason why an offer of funding cannot be made within days."

Aid Sentencing and Punishment of Offenders Act 2012 (LASPO), many are denied the opportunity to pursue justice through the courts by the prohibitive cost of such action. Using a third-party to fund the action is the only option left to many claimants wishing to pursue meritorious claims.

"Funding encourages frivolous litigation." It is difficult to see how this would be the case because, as they are risking their money, all funders will only offer funding to cases that they believe have a high probability of success.

"Funding is only available before proceedings are issued." Most funders will be happy to provide assistance at whatever stage the case is at. Provided they are supplied with enough information to make

an informed judgement on the merits of the case and to form an opinion on the risks involved, then they would be willing to fund the action at any stage.

“Funders are only interested in commercial disputes.” Provided the funder believes that the case has a high probability of success, the defendant has the ability to pay and that the case will generate enough to satisfy the legal and funding costs, while leaving the claimant with a return which justifies the action, then most funders will be happy to review funding applications from other areas.

“Funders would require after the event (ATE) insurance to be taken out when offering funding.” Since the implementation of the Jackson reforms, through the LASPO, the cost of ATE, which protects a claimant against adverse costs should they lose the case, is now not recoverable from the defendant. Therefore, the cost of ATE has to be factored in when the claimant is deciding whether to pursue an action.

In cases where the return is likely to be substantial, there will always be sufficient funds to justify the cost of ATE, and many funders will insist on the presence of ATE before making an offer. However, in cases where the return is likely to be low, then there will not be a large enough return to fund the ATE premium and legal costs, while leaving any return for the claimant.

In these lower value cases, where the funder is satisfied to the strength of the case, it may, as part of the funding offer, indemnify the claimant against adverse costs and assume the risk of losing.

“All applications for funding need to be accompanied by counsel’s opinion before consideration.” All funders will look to be provided with as much information as possible to enable them to assess the merits of the case and identify the probability of success. If counsel’s opinion is attached then it would make this review process easier, however, most funders will seek their own advice on the merits of the case before making any offer of funding.

“Decisionmaking by litigation funders is a slow, lengthy and tedious process.” If any application for funding is supported by all the relevant documents and a detailed cost budget from the acting solicitors, then there is no reason why an offer of funding cannot be made within days.

However, several funders have various internal risk committees or panels which can create delays in reviewing and approving applications.

These are but a few of the common misconceptions among interested parties seeking to explore alternative litigation financing. With a more informed and transparent market, we believe litigation funding will become an even more invaluable tool, providing greater access to justice. **CD**



Maurice Power
Managing Director
Ferguson Litigation Funding