Queen Mary
University of London

A REVIEW OF LITIGATION FUNDING IN ENGLAND AND WALES

A LEGAL LITERATURE AND EMPIRICAL STUDY

A Report

for submission to the

Legal Services Board

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TABLE OF CONTENTS

Part III

THE REGULATION OF LITIGATION FUNDING

Part IV

FUNDING STRUCTURE AND SOURCES

Part V

MANAGING, AND PAYING FOR, THE COSTS OF FUNDED CASES

Part VI

MATTERS TO DO WITH THE SUCCESS FEE

Part VII

SAFEGUARDS FOR THE FUNDED PARTY

Part VIII

CONCLUSION

APPENDIX A

APPENDIX B
CASE TABLES

[compiled by Shrutika Gandhi, Research Assistant for the Project]

APPENDIX C

APPENDIX D

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This Research Report owes its existence to the input of a great many people whose information, insights and experiences enriched the report significantly. As both an empirical, as well as a literature review, project, the value and quality of such a Report is largely governed by the *extent* and the *honesty* of the insights given by those who are closest to the field which is the subject of consideration – and, in that respect, the Report benefitted from a richness in both.

Thanks are particularly due to Ms Susan Dunn, Chairperson of the Association of Litigation Funders (ALF), who provided interviews regarding the operation of the ALF, who gave generously of her time to explain ALF-related data which was not hitherto in the public domain, and who also, in her role as Chairperson, encouraged ALF funder members and others to get involved in the Project.

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The law is stated as at 21 March 2024.

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EXECUTIVE SUMMARY

This Report explores the topic of litigation funding, specifically from the perspective of the regulatory objectives of the Legal Services Board, as stipulated in section 1(1) of the Legal Services Act 2007. Particularly pertinent to the interaction of litigation funding and these regulatory objectives are those of: protecting and promoting the public interest; promoting access to justice; and protecting and promoting the interests of consumers.

The Report encompasses a rapid literature review, and it also presents new and hitherto unpublished information and data about litigation funding, derived from: (1) an analysis of court cases involving litigation funding, and (2) an empirical study which entailed the distribution of various questionnaires, interviews, follow-up meetings, correspondence, and other interactions, with participants in the litigation funding industry. To be clear, there are *many* participants in this nook of English litigation funding: the litigation funders themselves (whether or not members of the Association of Litigation Funders); ATE insurers; litigation brokers and advisers; law firms whose clients use the services of litigation funders; and, of course, the clients themselves.

The research undertaken for this Report has identified over 40 cases which have used litigation funding since 2019. Most of these have been in the collective actions space, whether under the collective proceedings regime in which exclusive jurisdiction is vested in the Competition Appeal Tribunal; or under the group litigation order (GLO) regime in the High Court; or under the representative action, also the province of High Court jurisdiction. The most common types of defendants have been large consumer technology companies, utility providers, car and truck manufacturers, and banks and financial institutions. The research indicates that, probably by virtue of both the competition between litigation funders and the economics of the sorts of cases which funders typically fund and which can entail significant costs, the funders' return-on-investment is very rarely above 50%.

Litigation funding in England and Wales is presently self-regulated via membership of the Association of Litigation Funders (ALF) and via the members' compliance with the ALF's *Code of Conduct for Litigation Funders*. Some funders whose activities include the management of investments are FCA-authorised; but such authorisation is not required in respect of funding activities alone. The Code has been revised several times since its promulgation in 2011, most recently in 2018. Self-regulaton includes a complaints procedure (introduced in 2011) which has been invoked only four times. Notably, there are a

number of litigation funders operative in England and Wales who are not ALF members – and law firms, and funded clients, are perfectly content to enter into litigation funding agreements (LFAs) with these non-ALF members. The ALF-related membership procures a number of advantages for each of the parties to 'the funding triangle', *viz*, funded client, the funder, and the law firm – but that membership is not the 'badge of honour' that was envisaged when the Code was promulgated in 2011.

As a result of the research undertaken for this Project, the following insights relating to the regulatory objectives were gained:

- *Protecting and promoting the public interest:* litigation funding serves the public interest by funding litigation that would (and could) not otherwise be funded. It also provides a means whereby legal grievances affecting a significant proportion of the population can be tested. This testing of the meaning of law, of legislative provisions, and of common law precedent, is (it is suggested) in the public interest;

- *Improving access to justice:* for those using litigation funding, their 'day in court' becomes a tangible prospect, a prospect which underlines that the substantive law means nothing if there is no means by which to test it. However, litigation funders carefully choose a minority of cases (between 3% and 5% of funding opportunities), which means that litigation funding is not a solution that could be scaled up to provide access to justice to a large proportion of the population across a wide range of subject matters, types of grievances, and value of claims. Moreover, the costs of litigation may be considerable, thereby reducing the return-on-investment to litigation funders. Outward success occurs where funded clients have their 'day in court' and obtain a favourable judgement or obtain a settlement in their favour. But in reality, when the costs of pursuing the action are taken into account (and the funder will be entitled to reimbursement of those costs under the typical 'waterfall distribution clause' in an LFA), the ultimate compensation available to the funded client may be quite small, or even inadequate to address the detriment which they have suffered. Litigation funding offers consumers a hitherto unobtainable route to access to justice where there are more widespread but lower levels of detriment; but in all cases (whether in the collective actions space or in the individual litigant scenario), the economics of the case matter;

- *Protecting and promoting the interests of consumers:* a significant amount of litigation funding has been used to challenge alleged or proven anti-competitive conduct, where consumers have suffered financial detriment in different markets as a result of that infringing behaviour. The re-adjustment of those markets is a by-product of private actions; compensatory redress always remaining the *primary* objective

of such litigation. In the best interests of the consumers of legal services (and of the courts themselves, having regard to the overriding objective of civil procedure as embodied in the Civil Procedure Rules), litigation funding provides an learned filter regarding the merits of potential cases, and of the prospects of enforcing a judgment if one is obtained. The mere fact that litigation funding has been employed provides confidence to the funded client (and warning to the defendant) that the merits of the claim should, by definition, have a better-than-probabilities prospect of success;

■ *Promoting competition in the provision of legal services:* the research undertaken for the purposes of this Project did not find any evidence of a 'closed shop arrangement' between litigation funders and law firms who represent clients in need of litigation funding. There is, however, an acknowledged tension within the industry between deterring new entrants to the litigation funding market and protecting law firms and their clients when setting minimum capital adequacy and fluidity thresholds. Similarly, any attempt to impose the compulsory submission to self-regulation could both reduce the number of funders and reduce potential competition for those who seek to access the market for the funding of legal services (a risk that applies to formal regulation of the industry too);

■ *Encouraging a strong and effective legal profession:* for the law firms who make use of litigation funding, it provides a considerable degree of financial resilience to law firms, by assuring a cash flow to the funded client's law firm by which to pay its own-side legal fees and those disbursements (e.g., counsel's fees, court filing fees, expensive expert witness reports) needed to prosecute the action; and it also provides financial protection to the opponent's legal team, by frequently undertaking the financial burden of paying adverse costs, security for costs, and other costs awards which may be ordered against either the funded client or against the funder directly. The involvement of a litigation funder may also encourage effective costs-budgeting by the law firm who is in receipt of the litigation funding;

■ *Increasing the public understanding of citizens' rights and duties:* litigation funders are not in the business of providing public legal education, but the public prominence of cases such as women's equal pay claims against uber-supermarkets, and of the sub-postmasters such as Mr Bates whose livelihoods and reputations were ruined by defective software, inevitably promotes the awareness of citizens' rights. The widespread participation in collective actions (and accompanying medi attention of such claims) may also yield a greater awareness of the potential infringement of substantive law, albeit that it is inevitable that some consumers may not be aware of the claim which is prosecuted on their behalves;

■ *Promoting the prevention and detection of economic crime:* it may be difficult for law firms, ATE insurers, or litigation funding brokers, to know the provenance of the funds that their litigation funders are

using. There is an undoubted risk of litigation funding being used to launder money. Conducting anti-money laundering (AML) and know your customer (KYC) checks may prove onerous for law firms and for other parties, but it is part-and-parcel of the stringent AML measures which have existed in England since 2017.

Finally, this Project has been conducted against the backdrop of the UK Supreme Court decision in *Paccar*. On 26 July 2023, the UKSC ruled, by majority, that a litigation funder's LFA was a damages-based agreement (and hence, subject to the onerous drafting requirements which that legislation entails), at least where the funder's success fee was calculated as a percentage of the financial benefit recovered by the funded client. As a result, thousands of LFAs up and down the country were rendered unenforceable where they did not so comply. At the time of writing, the Litigation Funding Agreements (Enforceability) Bill 2024 has been introduced for First Reading, and which seeks to reverse the decision in *Paccar*. Should this occur, then litigation funding is likely to develop further as a niche, but vitally important, feature of legal services provision.

LIST OF ABBREVIATIONS

ALF	Association of Litigation Funders of England and Wales
AML	anti-money laundering
ATE	after-the-event
BIS	Dept of Business, Innovation and Skills
BTE	before-the-event
C	claimant
CA 1998	Competition Act 1998
CAT	Competition Appeal Tribunal
CFA	conditional fee agreement
CJC	Civil Justice Council of England and Wales
CJQ	*Civil Justice Quarterly*
CLAF	contingency (or contingent) legal aid fund
CLJ	*Cambridge Law Journal*
CLSA 1990	Courts and Legal Services Act 1990
CPR	Civil Procedure Rules
D	defendant
DBA	damages-based agreement
E&W	England and Wales
EWCA	Court of Appeal of England and Wales
EWHC	High Court of England and Wales
FCA	Financial Conduct Authority
FSMA 2000	Financial Markets and Services Act 2000
GLO	group litigation order
HMCTS	His Majesty's Courts and Tribunals Service
HMRC	His Majesty's Revenue and Customs
KC clause	a dispute resolution mechanism to be resolved by King's Counsel
LSA 2007	Legal Services Act 2007
LSB	Legal Services Board
LSG	*Law Society Gazette*
KYC	know-your-client
M	million

MOJ	Ministry of Justice
OUP	Oxford University Press
PRA	Prudential Regulation Authority
SME	small-and-medium-enterprise
SRA	Solicitors' Regulation Authority
UKSC	Supreme Court of the United Kingdom
WIP	work-in-progress

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PART I

INTRODUCTION

1. BACKGROUND TO, AND OUTLINE OF, THE REPORT

(a) Why the Report was commissioned

This report has been commissioned by the Legal Services Board (LSB), which is the oversight regulator of legal services in England and Wales. The report consists of a rapid literature review and empirical study on the nature of litigation funding from a consumer perspective, and considers litigation funding as it relates to the LSB's regulatory objectives ('the Project').

Those regulatory objectives – both wide-ranging and potentially engaged by a number of issues arising in litigation funding – are as follows:

The LSB's regulatory objectives:[1]

(a) protecting and promoting the public interest;
(b) supporting the constitutional principle of the rule of law;
(c) improving access to justice;
(d) protecting and promoting the interests of consumers;
(e) promoting competition in the provision of services [those provided by authorized persons who carry out reserved legal activities]
(f) encouraging an independent, strong, diverse and effective legal profession;
(g) increasing public understanding of the citizen's legal rights and duties;
(h) promoting and maintaining adherence to the professional principles:
  i. that authorised persons should act with independence and integrity,
  ii. that authorised persons should maintain proper standards of work,
  iii. that authorised persons should act in the best interests of their clients,
  iv. that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorized persons should comply with their duty to the court to act with independence in the interests of justice, and
  v. that the affairs of clients should be kept confidential.
(i) promoting the prevention and detection of economic crime.[2]

Of the abovementioned objectives, those of promoting the public interest, the interests of consumers and access to justice particularly resonate for this Project. The LSB has a sector-wide strategy for reshaping legal services to better meet society's needs,[3] and to that end, the LSB is particularly interested in the

[1] Per: Legal Services Act 2007, s 1(1) and (3).
[2] Inserted by the Economic Crime and Corporate Transparency Act 2023, ss. 209(2), 219(1)(2)(b) on 26 Oct 2023. The term, 'economic crime', is defined by s 193(1).
[3] As explained at: https://legalservicesboard.org.uk/our-work/reshaping-legal-services-a-sector-wide-strategy.

benefits and the risks, disadvantages or harms of litigation funding. Given the scope of the Project, each section of this Report will be linked to the regulatory objective/s which apply to the point of litigation funding being discussed.

The LSB seeks a number of discovery points to which this Report is responsive:

Per: Invitation to Tender:[4]
We also want to know about the nature of such funding. For example, in terms of the types of legal issues it is used to address. We are interested in learning if the source of funding influences the approach taken by the litigator and the experience of and outcomes on consumers. We want to know about the characteristics of the people who use litigation funding, including their social, cultural, economic and demographic characteristics and whether they are at greater risk of vulnerability. We are also interested in evidence of litigation funding providing access to legal services and therefore justice that, for whatever reason, users would otherwise be unable to access. We also want to know about the characteristics of who tends to be the other party that the litigation funder and their user(s) are facing. A further area of interest to us is the nature of any regulation on influencing litigation funding, including any quasi-regulatory influence exerted by the Association of Litigation Funders. The review should consider the benefits of litigation funding (a) to people and businesses who use it (or might use it), the wider public interest or to increasing access to justice; and (b) in supporting any of the other regulatory objectives. The review should consider the risks, disadvantages or harms of litigation funding (a) to people and businesses who use it (or might use it), the wider public interest or to increasing access to justice; and (b) in supporting any of the other regulatory objectives.

It is anticipated that the output of this Project will provide a firm starting point for the LSB to better understand and consider the evidence and inform its regulatory policy thinking. By extension, it is also anticipated that the Report will also inform the discussion with regulators, professional bodies, government and wider stakeholders.[5] Indeed, subsequent to the Invitation to Tender published by the LSB, the government announced, on 4 March 2024, that it was –

[4] Per: Invitation to Tender (ITT) issued: 19 Dec 2023, particularly paras 13–17.
[5] Ibid, para 7.

> *considering options for a wider review of the [litigation funding] sector and how third-party litigation funding is carried out. This could consider whether there is a need for increased regulation or safeguards for people bringing claims to court, particularly given the growth of the litigation funding sector over the past decade.*[6]

Hence, the area of litigation funding is clearly under increased scrutiny domestically – a trend which has been recently evident in Europe too, by virtue of the Voss Report,[7] and studies by the German Federal Consumer Protection Board,[8] the International Legal Finance Association,[9] the European Commission's recent mapping study,[10] and the European Law Institute's investigation into litigation funding.[11] It is hoped that this Report will contribute to the thinking about the sector in England going forward.

However, it is important to reiterate that this Report is merely an information study prepared for the LSB, and that the LSB has no position as to whether or not litigation funding should be the subject of increased regulation. Furthermore, the LSB has no power to undertake any such regulation, given that litigation funding is not a 'reserved activity' under its scope of activity.[12]

The LSB has stipulated that this Report should focus on litigation funding *in England and Wales*[13] used by individual consumers or small businesses, and that reference to issues arising in the litigation funding of arbitration would also be of interest.[14] For that reason, the research, both doctrinal and empirical, which underpins this Report focusses upon the operation of litigation funding in this domestic jurisdiction

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6 See: MOJ, HMCTS, and the Rt Hon Alex Chalk KC MP, 'New law to make justice more accessible for innocent people wronged by powerful companies' (*Press Release*, 4 Mar 2024).

7 Axel Voss (Committee on Legal Affairs), *Recommendations to the Commission on responsible private funding of litigation* (2020/2130(INL), dated 27 Jul 2022).

8 As disclosed by one of the participant funders to this Project, by email dated 23 Feb 2024.

9 ILFA, *Resourcing the Rule of Law in Europe* (Jun 2023).

10 As outlined in the media: Marialuisa Taddia, 'EU Commission plans litigation funding study before any regs' (*LAW360*, 28 Jun 2023).

11 Susanne Augenhofer and Sara Cockerill (Mrs Justice) (Project Co-reporters), *European Law Institute Third Party Funding of Litigation Project* (progress of this wide-ranging and important study is discussed at: https://backend.univie.ac.at/index.php?id=174162; with a meeting on Draft Principles held on 5 Dec 2024, as explained at: https://europeanlawinstitute.eu/news-events/upcoming-events/events-sync/news/third-party-funding-of-litigation-project-draft-principles-discussed1/?no_cache=1&cHash=d6a3a060b58bcec38626d0d510c3362f; and with the Project's final report expected Sep 2024.

12 See: Legal Services Act 2007, s 12 and Sch 2.

13 Any references to 'England' in this Report should be taken to mean 'England and Wales', unless otherwise indicated in the particular context.

14 ITT issued 19 Dec 2024, para 11.

(and, to the extent relevant, participants in the empirical study were asked to disregard their funding experiences in other jurisdictions).

In addition, the LSB has requested that special attention be given to the use of litigation funding by 'individual consumers or small businesses'.[15] Hence, whilst litigation funding is used by: employees, those involved in marital, custody or other familial disputes; and large corporations, that is not where the focus lies. However, it is undeniably the fact that many of the issues confronting litigation funding – its risks, benefits, advantages and costs – apply, regardless of whether it is SMEs, individual consumers, or large corporations who are using litigation funding services.

(b) An outline of the Report

In his review of civil litigation costs in 2009, Sir Rupert Jackson wrote that 'the institution of third party funding was beneficial in that it promoted access to justice'.[16] Fast-forward 15 years, and Lord Thomas stated in Parliamentary debate that:

> *the Horizon scandal, and the miscarriage of justice that occurred, would never have been uncovered if there had not been litigation funding to support Mr Bates and others when they brought their action … if you were to read what Mr Bates said in his article recently in the Financial Times, you would see from the perspective of someone seeking access to justice why litigation funding is important.*[17]

Litigation funding – that is, the application of non-recourse funding to funded clients, in return for a success fee, whether calculated as a percentage-of-recovery of the financial benefit recovered, or a multiple of the costs invested in the claim – is an important 'dish' on the 'funding menu'. The precise meaning of 'litigation funding', and its distinction from other forms of funding in English litigation, is canvassed in ***Part I*** of the Report.

To note, litigation funding is not for every case. In fact, as this Report shows, it is not for *many* cases. This is borne of the economics which apply to litigation funding as a form of 'non-correlated financial

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15 See ibid, para 11.
16 *Review of Civil Litigation Costs: Final Report* (Dec 2009), ch 11, para 1.2.
17 See: Digital Markets, Competition and Consumers Bill: HL Committee Stage (Day 4, 31 Jan 2024).

asset', and of the stringent screening criteria to which litigation funders subject the claims which are 'pitched' to them. However, for those relevant cases for which it is economically and legally suitable, litigation funding frequently poses the *only* alternative. In essence, there is no other funding mechanism by which to commence or to conduct the litigation. Hence, notwithstanding low volume coverage, this places litigation funding as a centre-piece of the 'access to justice' objective.

In particular, litigation funding supports a wide range of collective actions in England – whether under the collective proceedings regime for anti-competitive infringements (alleged or proven) whose jurisdiction is vested in the Competition Appeal Tribunal (CAT); or under the 'group litigation order' regime operative (post-the Woolf reforms) since 2000; or under the longstanding but legally troublesome representative rule. These claims may involve several million class members. Individual consumers or SMEs have neither the financial nor legal clout to institute an action against a 'Goliath' in society (say, Apple, Amazon or Facebook) – but aggregated as a class, and with legal representation and a litigation funder in support, these claims are possible. ***Part II*** of the Report examines the types of claims, and the types of claimants and defendants, who typically feature in modern-day litigation which is supported by litigation funders.

The regulation of litigation funders is a 'hot topic' at the time of writing. On 4 March 2024, the government announced that it planned to undertake a review as to whether a 'wider review of the sector' was warranted, and whether there was 'a need for increased regulation or safeguards for people bringing claims to court, particularly given the growth of the litigation funding sector over the past decade'. Meanwhile, in ***Part III***, this Report deals with *the reality of litigation funding as it exists*. That is a landscape of self-regulation, courtesy of voluntary membership of the Association of Litigation Funders (ALF), and the ancillary requirement of ALF members to abide by the *Code of Conduct* of Litigation Funders. Supplementary to this is the judicial ad hoc monitoring of funders' litigation funding agreements (LFAs), as and when required. After all, champerty[18] may have been abolished as a tort and as a crime in 1967, but the ramifications of a champertous funding agreement continue to stalk modern English litigation, for a finding of champerty can render the LFA unenforceable as being against public policy. Important components of self-regulation are timely reviews of the *Code of Conduct*; and a rigorous and workable

[18] Champerty has been judicially described in this way: where a person, with improper motive, and showing wanton or officious intermeddling, becomes involved with disputes of others in which the person has no interest whatsoever, and where the person stipulates for a share of the proceeds: *Trendtex Trading v Credit Suisse* [1980] 1 QB 629 (CA) 654. For a detailed examination of the doctrine, see: Mulheron, *The Modern Doctrines of Champerty and Maintenance* (OUP, 2023), Part I, and with further definitions and case law sources at 3–5.

complaints procedure. Both exist in English funding; albeit that there are some funders who do not perceive the benefits of ALF-membership to be 'worth the candle', for reasons espoused in this Part.

The funding structures of litigation funders, and the sources of their funding, are explored in ***Part IV***. The demarcation of funders' entities, so as to incorporate 'funders' subsidiaries' and 'associated entities' of the funder, is part of the modern structure of litigation funding in England, as reflected in the *Code of Conduct*. Legal ramifications may flow from that demarcation. The sources of funding for English litigation funders varies hugely, from US University endowment funds to pension funds, and from 'family offices' who are constituted by high-net-worth individuals to international hedge funds.

Part V examines the way in which litigation funders actually fund a claim. It is an essential part of a funder's obligations that a funded client's own-side costs and expenses will be funded. That enables the case to be brought. However, funding the opponent's costs, should they arise, is equally important in a costs-shifting jurisdiction – fairness demands that a successful opponent recover its reasonable costs. Whilst English law dictates that it is the funded client who is actually liable for those adverse costs at law, the involvement of a litigation funder changes that dynamic in two important respects: either the litigation funder takes on those funded client's liabilities by way of contractual liability, via the terms of the LFA; or that funder may become liable to pay those opponent's costs liabilities by virtue of a costs award against the funder directly.

Part VI then discusses the various matters relevant to the funder's success fee. This may be calculated by either a percentage-of-recovery formula or by a multiple-of-costs formula. This issue has been hugely impacted by the *Paccar* (UKSC) decision, which declared that the former were damages-based agreements (DBAs) within the meaning of that legislative regime. This immediately rendered the vast majority of LFAs entered into up and down the country unenforceable, against public policy, and champertous, as not complying with the DBA legislation (as, prior to the *Paccar* decision, funders did not realise that they had to so comply). As of 4 March 2024, the government announced that it intended to reverse the decision in *Paccar*, and on 19 March, a relevant Bill was introduced to Parliament in First Reading. Pending that reversal, however, funders have had to pivot from percentage-of-recovery LFAs to multiple-of-costs LFAs, which pivot has not necessarily been kind to the funded client. Quite the reverse, in many cases.

The litigation funding landscape has been well-established in English law since the early 1990s, and by virtue of case law analysis, certain 'safeguards' for the funded client have been judicially endorsed. These were encapsulated in the very first version of the *Code of Conduct for Litigation Funders* (promulgated in November 2011), and remain as part of the current 2018 version. Independent advice to the funded client, a defined input by the funder into settlement discussions, no inappropriate control of the funded litigation – all are recognised anti-champerty measures associated with litigation funding. The adherence to these measures in the Code assist to support the judicial thinking that a funder will not have strayed over the 'champertous' line. ***Part VII*** examines the various safeguards for the funded client which exist under the self-regulation of litigation funding in England.

Finally, ***Part VIII*** relates litigation funding, in all of its aspects, back to the regulatory objectives of the Legal Services Board. Whilst that Board does not have the power to regulate litigation funders, and nor does it hold any opinion regarding that matter, the interplay between litigation funding and lawyers' representations of funded clients impacts upon those objectives, and against a backdrop which is rapidly changing post-*Paccar* (and, potentially, post-the legislative reversal of *Paccar*).

2. METHODOLOGY

This Research Project, conducted over five (5) weeks, is comprised of **three** aspects: empirical research; preparation of informative case tables; and a literature review.

The ***empirical aspects*** of this Research Project are derived from a variety of sources. Detailed Questionnaires were sent to a number of categories of recipient: (1) ALF funder members; (2) non-ALF funders; (3) law firms; (4) ATE insurers; and (5) litigation brokers/litigation funding advisors. In the five (5) weeks permitted for the Project, a number of responses were forthcoming, which have been woven into the Report as and where appropriate. Following receipt of the completed Questionnaires, the research team followed up with some of the Respondents, either by Teams meetings or by telephone, to clarify some comments or responses contained in the Questionnaires. Confidentiality was a key pillar in preparing this Report, requiring that each respondent to the Questionnaires was given a random number known only to the research team, and that number is referred to where responses are noted in the Report. Additional to the follow-up meetings, the research team met a number of funders, legal practitioners, industry representatives, brokers, ATE insurers and other persons interested in or involved with the litigation funding industry, whose insights greatly added to the depth and interest of the Report.

Insofar as ***case law*** is concerned, this Report does not purport to be a doctrinal case law analysis of issues affecting litigation funding, albeit that case law is cited as and where appropriate to substantiate a point which may have arisen during the course of the empirical research. However, in order to gain a more comprehensive understanding of the users of litigation funding on the claimant side, and the types of opponents who have been the subject of funded cases, an extensive check of a number of case law databases was undertaken in order to assemble a detailed table of cases in which funders have been involved over the period of 2019 to the present. These are contained at ***Appendix B***.

Insofar as the ***literature review*** is concerned, both ‘standard’ and ‘grey’ sources were examined, and these sources are footnoted as and where appropriate.

More details of the methodology are contained in ***Appendix A*** of the Report.

3. LITIGATION FUNDING

(a) Definition

Essentially, litigation funding:

> *involves a third-party financing some or all of the legal expenses of one or more legal disputes in exchange for a share of the proceeds recovered from the resolution of the dispute(s).*[19]

Litigation funding occurs where:[20]

- the funder has no pre-existing interest in or connection with the subject matter or with the funded client (other than via the provision of the funding itself);
- the funder is engaged in the business of funding litigation on commercial terms for a share of the proceeds;
- the funder's return on capital invested is typically a percentage share of the financial benefit recovered or a multiple of the sums invested by the funder; and
- the funding is provided on a non-recourse basis (i.e., such that if the funded action fails, then the funder does not require that the funds advanced to the funded party will be repaid to it).

It is, therefore, distinct from a number of other forms of third party funding which do not share one or more of these characteristics:[21]

The form	How it differs
ATE insurance and BTE insurance	Although both ATE and BTE insurers may fund the funded client's own-side costs (*some* modern ATE policies provide for that) and pay any adverse costs awarded against the funded client as litigation funders do, funders do not insure for an adverse outcome (and nor are their activities governed by the

[19] Alex Lempiner, *A Practical Guide to Litigation Funding* (Woodsford Litigation, 2022).

[20] This definition is drawn from composite sources and reproduced from: Mulheron, *The Modern Doctrines of Champerty and Maintenance* (OUP, 2023) 30.

[21] Each of these is discussed, by reference these non-shared characteristics, in: ibid, ch 2C.

	Prudential Regulation Authority). Nor do insurers do commonly[22] obtain a return-on-investment which is referable to the amount of financial benefit recovered. Moreover, insurers cover *potential* exposure, whereas funders provide non-recourse funding as and when it is incurred
'Conscience' funders	Conscience funders provide funding on a non-recourse basis and may obtain a return-on-investment which is based upon a percentage/multiple basis, but are not engaged in the business of funding (albeit that the relationship between the funder and the funded client may be either familial or friendship, or a strictly business)
Litigation lenders	Whilst litigation funding is 'non-recourse funding', litigation loans are usually repayable whether or not the funded client is successful in the litigation (whereby the loan is usually provided as a facility which allows the funded client to draw down what is needed to pay costs and disbursements, and interest is charged only on the amount drawn down and not on the full loan)
Crowd-funders	*Donation*-based funding occurs where contributors give money without receiving anything in return; whereas *reward*-based funding enables contributors to receive tokens, products, services or money in return for their donations, and either may be utilised for the funding of litigation; but the mechanism is different – via a platform which is case-specific, and which enables a group of contributors collectively to enable a litigant to raise a fighting fund to cover that funded party's legal costs, usually up to an agreed stage in the litigation
Trade associations and unions	Although these funders usually offer litigation funding on a non-recourse basis, they rarely obtain a return-on-investment via a percentage/multiples method, and in any event, have a pre-existing connection with the funded claimant, given that membership of the association/union is a strict pre-requisite for the provision of funding

To note, mainstream litigation funding entails that the funder takes *a share* of whatever the funded client recovers by way of financial benefit (whether by way of judgment or settlement), where that 'share' amounts to the funder's overall 'success fee'.[23] However, a more unusual funding model is where the funder takes *an assignment* of the funded client's original claim, such that the assignor transfers the claim in its entirety for the funder to pursue in its capacity as assignee. In such cases, the assignee may pay a consideration upfront, or share the recovery with the assignor in a pre-agreed percentage split fashion, or be paid a combination of the two. Assignments of bare causes of action from the aggrieved claimant to

[22] The author understands from funder participants in this Project that, occasionally, an ATE premium may be based on a percentage of the financial benefit recovered.

[23] As will be discussed later in the Report, this 'success fee' has two main components: the return of the capital which the funder invested or spent on the case, and the return-on-investment or profit that the funder makes on the case (see Section 17, 'The measure of "success" for a funder').

another party are disallowed in England by virtue of the operation of the rules of champerty, unless the assignee has a 'genuine commercial interest' in the subject matter of the cause of action and the assignment is not contrary to public policy nor does it otherwise suborn the integrity of the legal process.[24] However, funders are readily able to take assignments of another's cause of action in two distinct scenarios. First, a judgment in the funded client's favour can validly be the 'thing' assigned because it represents 'the fruits of the litigation'[25] (and this has occurred in English litigation to date[26]). Secondly, a liquidator, administrator or trustee-in-bankruptcy of a company has a range of statutory powers[27] to sell causes of action in order to recoup some money for the company's aggrieved creditors and other parties, and a funder may purchase those causes of action as assignee (again, this model of funding is well-recognised and practised in England[28]). To confirm, this more unusual involvement of *the funder as assignee* lies outside the scope of this Report, and will not be considered further herein.

(b) A brief history of litigation funding in England

As a concept, litigation funding emerged as a serious form of funding in England in the 1990s,[29] and received a staunchly positive endorsement by the House of Lords in *Giles v Thompson* in 1994.[30]

However, it was primarily in the 2000s that the industry received a significant uptick in both activity and credibility, courtesy of a number of different sources and events which coalesced to provide the industry with gravitas. In addition to a line of appellate authority[31] which served to ensure that the mere fact that

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[24] Discussed in detail in: Mulheron, *The Modern Doctrines of Champerty and Maintenance* (OUP, 2023), ch 7,a nd the primary and secondary sources cited therein.

[25] Pursuant to the rule in *Glegg v Bromley* [1912] 3 KB 474 (CA).

[26] Pursuant to an order of Mr Justice Robin Knowles (dated 30 Jul 2018) in the matter of: *Harbour Fund III LP v Kazakhstan Kagazy plc* (Matter CL-2018-000446) in which Harbour was given permission to 'take over sole conduct of all negotiations and proceedings in connection with [the judgment obtained against the defendant]' (copy on file with the author).

[27] Per: Insolvency Act 1986, s 167(1) (vesting power in the liquidator 'to sell any of the company's property by public auction or private contract'), and s 436 (defining the 'property' which can be sold to include a 'cause of action'). Sch 4 to the Act deals with power of a liquidator in a winding up, and Sch 5 deals with powers of a trustee in bankruptcy. Administrators have the power to assign a company's claim under para 60 of Sch B1 to the Insolvency Act 1986.

[28] See, e.g., the discussion by the the funder, Manolete Partners plc, of its funding model, available at: https://manolete-partners.com/how-we-work/the-manolete-method. Cases funded via this method are also noted in Appendix B4 of this Report.

[29] See discussion in: S Friel, *The Law and Business of Litigation Funding* (Bloomsbury Professional, 2020), ch 2; and *Cook on Costs 2021*, ch 10.

[30] [1994] 1 AC 142 (HL).

[31] Specifically: *Faryab v Smyth* (CA, 1998); *Stocznia Gdanska SA v Latreefers Inc* [2000] EWCA Civ 36; *Factortame* [2002] EWCA Civ 932; *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655.

litigation finance had been provided by a stranger entity in return for a promise in the share of the proceeds of the funded litigation did not render that funding contract unenforceable,[32] various key events occurred:[33]

- an increasing number of litigation funders and brokers entered the market, and hedge fund interest in backing commercial litigation considerable expanded;[34]
- a consultation by the Office of Fair Trading endorsed litigation funding in private actions for breaches of competition law,[35] which was a significant endorsement by the government;
- the most senior civil judge at that time extra-judicially expressed 'in principle' approval for regulated litigation funding;[36]
- a very high-profile and high-quantum professional negligence claim was bankrolled by a litigation funder,[37] which generated widespread, and emotive, media interest;[38]
- major litigation practices in London moved to make use of litigation funding for their clients;[39]
- the Civil Justice Council (CJC) threw its support behind litigation funding, initially describing it (in 2005) as a 'last resort means of providing access to justice',[40] and then revised this view (in 2007) to state, with much less reservation, that '[p]roperly regulated third party funding should be recognised as an acceptable option for mainstream litigation'[41]; and
- a potentially problematical provision in the Solicitors' Code of Conduct 2007, which may have prevented solicitors from referring clients to a litigation funder in respect of personal injury claims because of the prospect of disciplinary sanctions, was quietly revoked.[42]

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32 *London & Regional (St George's Court) Ltd v MOD* [2008] EWHC 526 (TCC) [103] (Coulson J) (citations omitted), and citing from the summary in: *Mansell v Robinson* [2007] EWHC 101 (QB) (Underhill J).

33 Drawn from: Mulheron, *The Modern Doctrines of Champerty and Maintenance* (OUP, 2023) 30–31.

34 Described by reference to relevant funders in: Mulheron, 'Third Party Funding of Litigation: A Changing Landscape' (co-authored with P Cashman) (2008) 27 *Civil Justice Quarterly* 312, 314–16.

35 *Private Actions in Competition Law: Effective Redress for Consumers and Business* (Apr 2007) 27–28.

36 Sir Anthony Clarke MR, quoted in, 'Drive for transparency on third-party funding' (*LSG*, 14 Feb 2008) ('I am in principle a supporter of third-party funding, provided that appropriate regulation is put in place').

37 *Stone and Rolls Ltd (in liq) v Moore Stephens (a firm)* [2007] EWHC 1826 (Comm) (claim for £69.5M against accountancy firm Moore Stephens by the creditors of Stone and Rolls). The funder was IM Litigation Funding.

38 See, e.g. 'Litigation funding: Foul Play?' (*Accountancy Age*, 25 Oct 2007); 'Biggest-ever independently-funded case promises litigation revolution' (*Legal Week*, 11 Jan 2007); 'Negligence claims could reach new heights with litigation funding trend' (*Best Practice*, 15 Feb 2007).

39 Noted in: 'Herbert Smith litigation team set to open door to third-party funding' (*Legal Week*, 30 Aug 2007); 'Is third-party funding a step too far?' (*Legal Week*, 27 Sep 2007); 'External Funding Booms as Litigators Plot Upturn' (*Legal Week*, 30 Mar 2008).

40 *Improved Access to Justice: Funding Options and Proportionate Costs* (2005) 49, and recommendation 13.

41 *The Funding of Litigation: Alternative Funding Structures: A Series of Recommendations to the Lord Chancellor* (Jun 2007) 53, and recommendation 3.

42 Rule 9.01(4) of the Solicitors' Code of Conduct 2007, 'Referrals of business'.

Today, litigation funding is a self-regulated industry,[43] and has evolved into a landscape where it is not only the impecunious for whom such funding can offer access to justice. Big corporations who are seeking to lay off litigation costs from their own balance sheets are just as likely to use litigation funding, as discussed in the next Part.

[43] As discussed in Part III, especially Section 8, 'The self-regulation model'.

PART II

THE SCOPE, TYPE,
AND METHOD OF CASES FUNDED

4. THE ROLE OF LITIGATION FUNDING IN THE COLLECTIVE ACTIONS SPACE

This Section has implications for several of the LSB's regulatory objectives, viz: improving access to justice, promoting and protecting consumers' interests, protecting and promoting the public interest, and increasing the public's understanding of a citizen's (especially a consumer's) legal rights:

The main points:

- **Litigation funding has been important to all collective actions regimes in England, because the aggregate of consumer or SME claims into a class of represented persons requires substantial funding of legal costs and disbursements; and because 'how else' are these claims to be funded, with no ready alternatives available. Hence, litigation funding provides a niche route, where no other funding options are available;**
- **Several high-profile consumer collective actions – in addition to litigation associated with the Post Office Horizon and 'Diesel-gate' diesel emissions scandals – have been supported by litigation funding. The prominence accorded to these consumer cases has enhanced the public's understanding of their rights (or the potential for airing their grievances);**
- **Whether the consumers are enfranchised and engaged in the collective action in which they are involved depends upon the extent to which the court orders the dissemination of notices, the construction of a website by the class representative for the information of class members, etc – all of which the funder is obliged to fund;**
- **The funded cases are often about broader consumer interests, and their results may influence consumer markets, as well as the development and enforcement of the rule of law;**
- **However, there are considerable downsides associated with the litigation funding of consumer and SME collective actions (e.g., cases tend to have long duration, jurisprudence is still 'being made' under the CAT collective proceedings regime, the cases are very costly to bring, the adverse costs risk is significant should the case lose), all of which render it a problematical (i.e., risky) space in which to litigation-fund at the present time.**

A key purpose of the LSB's commission of this Research Report is to evaluate the extent to which litigation funding is providing support in order for the grievances of consumers to be addressed. In that regard, the

regulatory objectives of the LSB – 'protecting and promoting the interests of consumers'[44] and 'improving access to justice'[45] – should *particularly* be tested against the activities of litigation funders.

In order to do that, the research team compiled several tables which illustrate a wide-ranging sample of cases across various courts. These are contained in ***Appendix B***. For the purposes of constructing these tables, jurisprudence from the following courts was scrutinized via case law databases:[46] the High Court of England and Wales (encompassing the King's Bench; Commercial Court; Chancery Court; Administrative Court; Admiralty Court; Technology and Construction Court; the Business and Property Court; the Regional Business and Property Courts; and the Family Division); the Court of Appeal; and the Supreme Court/House of Lords; a limited number of Upper Tribunals, plus the London Commercial Court (formerly, the London Mercantile Court), Patents Court, Senior Court Costs Office, Court of Protection, and the Intellectual Property Enterprise Court.[47] Of course, given that arbitrations are strictly private, the question as to whether litigation funding has been used to fund these is difficult to ascertain from the public domain, but given that the High Court has jurisdiction to hear certain matters arising from arbitrations,[48] those types of cases were searched for too.

(a) Why litigation funding *really* matters in this context

As the tables at Appendix B1, B2 and B3 show, by far the greatest preponderance of litigation funding-supported consumer cases has occurred in the collective actions space – whether pursuant to the collective proceedings regime for competition law grievance (follow-on or stand-alone),[49] or under the group litigation order regime,[50] or by virtue of the representative action regime.[51] This is entirely expected – for two reasons.

First, for individually, a consumer (or SME) with a relatively small measure of alleged damage is not a desirable funding proposition at all, whereas in aggregate, a class of consumers may be (although not

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44 Legal Services Act 2007, s 1(1)(d).
45 Ibid, s 1(1)(c).
46 The following databases were checked: Westlaw UK; Lexisnexis Butterworths; Bailii; The National Archives case law database; the Competition Appeal Tribunal; and cross-checked against the GLO database.
47 Note that actions in the Employment Tribunal were excluded from study in this Report.
48 Pursuant to CPR 62.2, which supports the Arbitration Act 1996.
49 The new regime, contained in Sch 8 of the Consumer Rights Act 2015, is mostly contained in Pt 1, ch 4 of the CA 1998. A new set of rules for collective proceedings and collective settlements was inserted in the Competition Appeal Tribunal Rules 2015 (SI 1648/2015) (the 'CAT Rules 2015'). The new regime took effect 1 Oct 2015.
50 Contained in CPR 19.21–19.26, and introduced into the CPR on 1 May 2000.
51 Currently contained in CPR 19.8, formerly CPR 19.6.

assuredly) more 'fundable'. When recommending the new regime for opt-out collective proceedings for competition law infringements in 2013, the government did so precisely to facilitate better access to justice for consumers than existed before the reforms:

> *it is very clear that the current system of collective redress does not work. Consumers are not currently getting redress for breaches of competition law. It appears unlikely that simply tinkering with the opt-in system would deliver the desired access to justice … Consumer groups have been clear that they would not take another case under an opt-in system … [and] It is also clear that there are some cases that could only ever be brought on an opt-out basis in practice.*[52]

The Secretary of State made it plain that the concern applies equally to SMEs, and that '[c]hallenging anti-competitive behaviour is costly and complex, well beyond the resources of many businesses, particularly SMEs'.[53] To render that hope for better consumer and SME redress a reality, litigation funding has been the funding method of choice in every single case filed under the CAT regime to date. Judges have accepted that this is what the government intended. In *Merricks v Mastercard Inc*, the Court of Appeal stated that, 'the power to bring collective proceedings … was obviously intended to facilitate a means of redress which could attract and be facilitated by litigation funding',[54] an observation which was then cited by the Supreme Court in *Merricks v Mastercard*.[55]

Secondly, the preponderance of litigation funding in the collective actions field is entirely expected for another reason best summarised as: 'how else?'. When the three aforementioned collective actions regimes were established, none of them was accompanied by a 'seeding fund' or CLAF-type fund by which to pursue these cases (of the sort which had been established or recommended elsewhere[56]). In the opt-out actions which have predominated in the CAT thus far, class members are immune from having to provide own-side funding or adverse costs cover.[57] Lawyers' funding via DBAs were vehemently rejected by the

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52 BIS Dept, *Private Actions in Competition Law: Government Response* (Jan 2013), para 5.12.
53 The Rt Hon Vince Cable, 'Foreword', ibid, at 3.
54 [2019] EWCA Civ 674, [60].
55 [2020] UKSC 51, [98].
56 Mulheron, *Class Actions and Government* (CUP, 2020), ch 4, 'Government as Class Actions Funder', discussing the Ontario Class Proceedings Fund, and the fund recommended by the Hong Kong LRC for its proposed class action in 2012.
57 CAT Rules 2015, r 98.

government for opt-out collective proceedings.[58] As the only legislatively-stipulated *cy-près* beneficiary of the collective proceedings regime,[59] the Access to Justice Foundation is unlikely to use undistributed residues to fund other litigation on behalf of consumers on a collective basis (and nothing compels that it should). Moreover, before-the-event (BTE) insurance, which many consumers will hold via contents insurance, mobile phone contracts, or car insurance, is typically excluded for group actions of any sort.[60] Hence, in the absence of any of these other funding avenues, litigation funding is the **only** remaining viable option for most of the collective actions which are instituted in England.[61]

Having said that, however, two caveats should be mentioned. First, the lawfulness of a litigation funder being able to take any of a client's recovery of financial benefit (whether obtained via judgment or settlement) in any action pursued under the representative rule[62] remains very unclear, given that the rule is a creature of court rule, and is not a legislative enactment that can change the substantive law in any material way. Essentially, even if there is permission to create an aggregate class-wide assessment of damages (a 'pot of money' awarded to the class), there is no clear legal authority which would entitle a funder to take a share of that pot, absent the contractual authorisation of each and every class member. That prospect is unrealistic where a class may number in the millions. Whilst this topic lies beyond the scope of this Report,[63] it is an important one which was not resolved by the UKSC in *Lloyd v Google LLC*,[64] and until it is definitively decided, it will bedevil the use of litigation funding under the rule.

Secondly, the use of litigation funding under the group litigation order (GLO) regime is predicated on the basis that an LFA must be entered into between funder and *each group member*. This is because the GLO mechanism is a true opt-in arrangement, whereby each class member must affirmatively signal their wish to the sue the defendant/s, and their individual actions are grouped together as a form of case-managed collective litigation.[65] Again, absent any aggregate assessment (or 'pot') of damages under the rules-based

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58 CA 1998, s 47C(8).

59 Per: CA 1998, s 47C(5).

60 CJC, *The Law and Practicalities of Before-the-event Insurance: An Information Paper* (the author chaired this Civil Litigation Review Working Group of the CJC, and was principal author of that report).

61 Discussed in: Mulheron, ''The Funding of the UK's Class Action at a Cross-Roads' (2023) *King's LJ* (published online 5 Jan 2023, hard copy forthcoming].

62 Currently contained in CPR 19.8, formerly CPR 19.6.

63 It is covered by the author in detail in: 'Creating, and distributing, common funds under the English representative rule' (2021) 32 *King's LJ* 381.

64 The issue was expressly left open, and the article at ibid was cited, but not engaged with: [2021] UKSC 50, [83].

65 Examined by the author previously at: 'Some difficulties with group litigation orders - and why a class action is superior' (2016) 24 *CJQ* 40.

GLO regime,[66] and the inevitable opt-in nature of that regime, necessitates individual LFAs so that a litigation funder has a contractual entitlement to be paid by each group member, should a financial benefit be recovered. As the ALF has noted, the decision in *Paccar* has had an enormous impact on GLO litigation:

> *Group actions in the High Court, such as some of the RBS Rights Issue litigation and the current Diesel-gate cases being funded on behalf of thousands of consumers by ALF members involve LFAs with each group member. Appropriate amendments to the LFAs can be made in response to Paccar (at substantial time and cost) …* [67]

By way of snapshot, the summary tables below provide key frequencies and totals of where litigation funding has been used in the collective actions space in England:[68]

Summary table #1: Number of funded cases	
Collective proceedings under the CAT regime	27
GLO regime	10
Representative actions	3
TOTAL (2019–)	**40**

Summary table #2: Type of defendants sued	
Banks and financial institutes	5
Utility providers (water, comms, post, railway, transport)	8
Tech giants (Apple, Facebook, Amazon, Google, Sony)	12
Pharma	2
Car and truck manufacturers	6
Credit card companies	3
Other	4
TOTAL (2019–)	**40**

66 Currently contained in: CPR 19.21–19.26.

67 ALF, *A Note in Response to Paccar* (prepared interested parties, copy on file with the author) at p 5.

68 This is across all of the collective proceedings regime, the GLO regime, and the representative actions regime, for the period 2019–present. For the collective proceedings regime, related cases were treated as a single case, for the sake of convenience in illustrating types of claimant classes and defendants sued.

Teasing these out in more detail:

(b) The types of consumers, and the types of defendants sued

It is evident from the tables B1,[69] B2[70] and B3[71] of ***Appendix B*** that many of the defendants sued in these collective actions cases are well-resourced, indeed 'Goliath-type', entities against whom, without the support of litigation funding to provide own-side costs and cover against adverse costs (either directly or via ATE insurance), the consumers would be powerless to sue. As a sample, the defendants to these actions have comprised the following:

- tech social media platform providers such as Facebook, and Apple;
- tech giants such as Amazon and Google;
- utilities (e.g., water, phone, postal) companies;
- banks, financial institutions, and other financial service providers;
- transport (e.g., train, shipping) companies;
- upstream manufacturers supplying to utilities providers;
- telecommunications companies offering either landline or mobile network services;
- major car and/or truck manufacturers; and
- major credit card providers (e.g., Mastercard and Visa).

In other cases, the defendants have been very sectoral-specific in relation to a particular class of consumers. For example, these have included:

- music instrument companies responsible for re-selling instruments;
- cryptocurrency exchange companies; and
- mobility scooter retailers.

Under the collective proceedings regime in the CAT, there has been a relatively even split between stand-alone and follow-on actions.[72] However, in the case of the latter, it is worth noting that it means that there

69 'Collective Proceedings in the Competition Appeal Tribunal', at Appendix B1.
70 'Representative Proceedings in the High Court', at Appendix B2.
71 'Group Litigation Orders in the High Court', at Appendix B3.
72 As noted by Ben Tidswell, Judicial Member of the Competition Appeal Tribunal (speech delivered at Class Actions Event (BCLP Offices, 28 Feb 2024)).

has been a finding of infringement by either the domestic or European competition regulator, accompanied by a (often substantial) civil fine. In that regard, both the *enforcement of consumer rights* following on from that infringement (i.e., whether damage can be proven to have been suffered by the consumer class or SME class), as well as *deterrence against future infringing conduct*, were key aims of that new regime, according to the government at the time:

> *Breaches of competition law, such as price-fixing, often involve very large numbers of people each losing a small amount, meaning it is not cost-effective for any individual to bring a case to court. Allowing actions to be brought collectively would overcome this problem, allowing consumers and businesses to get back the money that is rightfully theirs – as well as acting as a further deterrent to anyone thinking of breaking the law.*[73]

By facilitating follow-on actions being brought, the availability of litigation funding serves to protect and to promote those public interests which are by-products of litigation, *viz*, the enforcement of the substantive law, and the achievement of deterrence via private action.

Turning to the claimant side of things, in some of the claims instituted on behalf of consumer classes, SMEs have joined as an alternative sub-class (e.g., as in the case of *Evans v Barclays Bank*,[74] re the FX exchange transactions dispute, and in the case of *Ad Tech Collective Action LLP v Alphabet Inc and Google LLC*,[75] where the claim alleged that all UK-based publishers of websites and apps that received revenue from the sale of online display ads may have suffered financial losses due to Google's practices).

However, many (indeed, most) of the collective claims which have been supported by litigation funding have been solely consumer-focussed. In many cases, the consumer class straddles the entire cross-section of the population. Examples include:

- people who buy boundary fares on trainlines and who get charged twice for part of the journey;
- people who use Facebook and disclose sensitive (and economically useful) data to that social media giant for the right of access to part of the platform;
- people who buy products via the Amazon marketplace through its Buy Box feature;
- people who use buy goods and services at any retailer which accepts Mastercard;

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73 BIS, *Private Actions in Competition Law: A Consultation on Options for Reform: Government Response* (Jan 2013), at p 6, 'Executive Summary'.

74 (CAT, Case number: 1336/7/7/19).

75 (CAT, Case numbers: 1572/7/7/22 1582/7/7/23).

- landline customers of a major telecommunications company;
- mobile phone and smartphone owners for a variety of disputes;
- people who purchase computer games or other content from app stores;
- purchasers of diesel motor vehicles whose nitrogen oxide ('NOx') emissions performance were inaccurate because of illegal 'defeat devices' used to defeat regulators' tests.

None of these consumer class actions would have been possible to institute without the use of litigation funding. Unsurprisingly, the consumer classes have been huge in some the cases (e.g., 19.5M users of the UK Play Store in *Coll v Alphabet Inc*;[76] 'several million' in *Lloyd v Google LLC*;[77] and 46.2M in *Merricks v Mastercard Inc*[78]), at least as stated at the outset of the action.

Some groups of aggrieved consumers have been much more restricted, but have often been vulnerable (say, medically or financially) or because those consumers have had much less bargaining power vis-à-vis the defendant, for example:

- the buyers of used cars who entered into punitive financing agreements;
- those who trade on the FX exchanges and who incur fees which were illegally price-fixed and about which they had no way of knowing;
- those who travel the London-Brighton train route and who may have no realistic alternative mode of transport by which to make that journey regularly;
- those who used the permanent contraceptive device Essure and suffered complications allegedly due to its use;
- the users of the Seroxat anti-depressant medication; and
- various independent sellers (individuals and entities) who were seeking to use the Amazon marketplace to sell particular products which Amazon had colluded with another tech giant to have removed from that marketplace, thus impacting upon their ability to sell those products at a reasonable price.

The huge variety in the subject matter of the consumer claims brought as collective actions is notable – but so too is the reality that they are very, very expensive to fund, both in respect of own-side

[76] (CAT, Case number: 1408/7/7/21).
[77] [2021] UKSC 50, [1], [67].
[78] Noted in the very first decision in the saga: [2017] CAT 16, [1].

costs and adverse costs (should the claim fail). Equally too, they are very expensive to defend (indeed, the claim re Seroxat noted above failed, giving rise to a partial indemnity costs order against the claimants and in the pharmaceutical defendant's favour[79]). As will be emphasized later in the report,[80] the reasonable protection of a defendant in respect of its costs is one of the underpinning principles of a costs-shifting jurisdiction such as England's. Meeting that burden (or facilitating that the burden be met by paying for ATE insurance) is a key aspect of a litigation funder's role. The public interest demands fairness in funding **both** sides of expensive disputes.

Finally, before leaving this section of consumer claims, it is important to note that in very few of these cases under the CAT regime has an outcome been reached, whether by settlement, judgment or withdrawal. That regime is still very nascent, which (as mentioned in the empirical feedback below) renders it a fairly risky investment for litigation funders until both principle and practice become more evolved.

(c) Communicating with class members: the funder's responsibility

A key role of the funder in collective actions is to fund the expensive own-side disbursements necessary for the proper conduct of the action. In all such actions (but especially in the case of opt-out collective proceedings under the CAT regime, where the notice regime is set out statutorily[81]), notices will be mandated at certain stages of the proceedings, such as at the point of certification or at the point of a settlement proposal. The funder must fund the costs of those notices, in accordance with their obligations under the LFA. Additionally, the class representative customarily sets up a host website, an important role of which is to disseminate information to the class members,[82] and again, the expense of doing so typically falls to the funder.

In collective actions of all types, it is not the funder's responsibility to decide when, and how, to inform class members of the proceedings; that is the court's role and responsibility. However, it *is* the funder's responsibility *to fund* the information dissemination that the court orders.

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79 *Bailey v Glaxosmithkline (UK) Ltd* [2019] EWCA Civ 1924.

80 See Part V, Section 15, 'The funded client's potential financial liabilities to the defendant'.

81 CAT Rules 2015, rr 81 and 94(4)(f).

82 These websites are increasingly sophisticated and well-designed – and expensive. See, e.g., the comprehensive website for the *Merricks v Mastercard* dispute, available at: https://www.mastercardconsumerclaim.co.uk/.

(d) The ongoing risks of funding collective proceedings

For the purposes of this Project, litigation brokers and funders were asked for feedback as to how the funding of collective actions in general are being viewed – for, after all, the achievement of consumer or SME redress depends upon litigation funding actually working 'at the coal-face':

Empirical feedback – from brokers and from funders:

- Lots of focus and energy remains re the CAT collective proceedings and the GLO regime, where we are seeing funding appetite starting to recover following ***the turbulence caused by Paccar***.[83] That said, funders continue to seek out other claim types which are **not** so exposed to the same budgetary, logistical and duration issues, such as more 'straightforward' or 'vanilla' commercial litigation and arbitration, but where for whatever reason, strong funding opportunities continue to be comparatively rare and harder to come by;
- The key attraction for funders, especially in a variable economic climate, is the prospect of ***a settlement within a reasonable timeframe*** – the long duration of collective proceedings cases has a depressing impact on funders' returns, and this can affect the willingness to fund;
- The CAT regime is ***still very nascent***, with only one settlement to date, and no judgments. Also, key decisions are still being made which impact hugely on funders (e.g., on the priority of distribution under s 47C(6)[84]). Hence, the regime is still risky territory for funders and for their class representative clients;
- Ironically, in very large quantum cases such as collective proceedings represents, ***defendants are less likely to settle***, meaning that the funding costs could really escalate. It is a factor that we have to take into account in accepting or declining funding applications in the collective actions space.

As one funder put it, the CAT regime is one in which the funders are funding the '*education of the market as to what key words and phrases of the statutory language actually mean*', and in an environment where

[83] *R (on the application of Paccar Inc) v Competition Appeal Tribunal* [2023] UKSC 28 (26 Jul 2023) (Lords Reed, Sales, Leggatt and Stephens; Lady Rose dissenting).

[84] Per: *Gutmann v Apple Inc* [2024] CAT 18 (13 Mar 2024).

a defendant is willing to '*take every point, because that will exert pressure on the class representative, given that the amount of capital invested increases with every interlocutory application and appeal taken*'.[85]

[85] Funder #0153, interview dated 26 Mar 2024.

5. NON-CONSUMER CASES

This Section has implications for several of the LSB's regulatory objectives, viz: improving access to justice, protecting and promoting the public interest, encouraging a strong and effective legal profession, and increasing the public's understanding of a citizen's (especially a consumer's) legal rights.

The main points:

- **Employees, parties to (high-value) marital disputes, tax-payers, and creditors, have all benefited from the use of litigation funding, whether in an individual or a collective actions capacity. For these parties too, access to justice is enhanced by the availability of litigation funding, even if outside the 'consumer space' – and, indeed, many of the employee and marital cases simply could not be brought, absent litigation funding;**
- **Large corporations may also use litigation funding, simply to lay off the cost and the risk of the costs of litigation to another party and to remove those from their balance sheets. A panoply of funding options for litigation is in the public interest, whichever party is seeking to use legal services. Indeed, by a funded client's decision to lay off the costs of pursuing expensive litigation to a well-financed litigation funder, an opponent has excellent prospects of its adverse costs being paid should the claim fail, a matter which is crucial to the effective functioning of the legal profession;**
- **The use of litigation funding in arbitrations is difficult to verify with any accuracy, given their private conduct, but appeals from arbitral awards has thrown up an interesting point regarding costs recovery. Any right to recovery of costs from the opponent to litigation impacts the 'bottom line' for the funded client (as that party recovers more of the financial benefit if the opponent has to cover some of the costs).**

(a) Non-consumer claims by individuals or corporations

A number of individuals who do not fall within the definition of 'consumers of goods and services' have also benefited from litigation funding. Quite apart from the already-mentioned Horizon scandal which was

the subject of *Bates v Post Office*,[86] several of these are referenced in the tables contained in Appendix B4.[87] They have included:

- Parties to a marital breakdown and a claim for a financial settlement, particularly by the wife who may hold no assets in her own name, and hence be unable to obtain a litigation loan in order to pursue litigation to enforce a judgment in respect of financial or property settlement;
- Taxpayers who alleged misrepresentation and misleading advice against their advisors, in respect of a supposed 'tax-efficient' scheme to which the HMRC objected;
- Uber drivers who were not being paid minimum wage or holiday pay, following a Supreme Court ruling;
- A large class of female employees (c. 100,000) who sought and obtained equal pay rulings against five supermarkets in the Employment Tribunal; and
- Disputes with company administrators as to the order of preference among creditors of the company following administration;

As the table at Appendix B4 shows, some corporate claimants have utilized the support of litigation funding, in a variety of contexts:

- a creditor dispute against an insolvent company's administrators;
- a commercial lending dispute arising out of an exclusivity agreement, where the would-be purchaser lost out on obtaining the necessary borrowing to purchase a landmark London property;
- a dispute between a company and its former directors accused of fraud;
- a dispute about whether a bank engaged in misconduct regarding its FX transactions; and
- a claim by thousands of UK businesses that, by virtue of unlawful and anti-competitive interchange fees charged by Visa and Mastercard, they suffered financial losses.

The use of litigation funding by corporations is becoming more commonplace. As one litigation partner puts it, *'[i]t's now a way for large corporates to manage risk on their balance sheets and de-risk litigation expense and adverse costs exposure*',[88] and a funder agrees:

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86 [2019] EWHC 871 (QB).

87 'Litigation Conducted in the High Court and Specialist Courts and Tribunals of England and Wales', at Appendix B4.

88 Stephen Elam, partner at Cooke, Young and Keidan, as quoted at: *Litigation Funding – the UK Rankings* (2023).

> *litigation funding is no longer merely a lifeline for those claimants for whom funding is a financial necessity. Non-recourse funding to pay the costs of dispute resolution also benefits those claimants who have ample resources, but simply do not have the risk appetite, or cash flow, to invest in a long drawn out litigation or arbitration.*[89]

Whilst this Research Project is particularly focused on the consumer perspective, it is worth noting that a funder's involvement in large-scale commercial litigation between corporates carries with it merits-vetting of the funded client's claim; arrangements for the payment of adverse or security for costs are commonly part of the litigation funding; and due diligence enquiries re enforceability are all-important. This level of (permissible) control by the funder[90] assists the work and the interests of the lawyers who are pursuing these suits on behalf of their clients, and provides the defendant's legal team with the assurance that, even if the funded claim is ultimately unsuccessful, it had sufficient merit to pass a great deal of experienced legal scrutiny. Ensuring that the courts are not vehicles for inappropriately-commenced litigation; and facilitating the assured and prompt payment of legal fees (whether to the funded client's law firm as own-side costs or to the defendant's legal team following an adverse costs order), are very important aspects of a funder's responsibility. Together, these assist the achievement of a 'strong and effective legal profession',[91] for whilst this concept may often be seen to involve a 'competent' legal profession,[92] it also involves a requirement that the legal profession be *resilient*, and that cash flow for staffing, operational costs, training, etc, can adequately be met.

One final point should be made under this section: under modern civil procedure, the courts are obliged, by virtue of the overriding objective, to deal with cases 'justly and at proportionate cost'.[93] This includes 'ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence'.[94] Furthermore, '[t]he parties are required to help the court to further the overriding objective.'[95] A funder's involvement – so as to address the 'David versus

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89 Alex Lempiner, *A Practical Guide to Litigation Funding* (Woodsford Litigation, 2023), at p 2.

90 Dealt with later in the Report at: Part VII, Section 24, 'Not taking over control of the proceedings'.

91 To quote the LSB's regulatory objective at: Legal Services Act 2007, s 1(1)(f).

92 See, e.g., the LSB's *Statement of Policy – Ongoing Competence* (issued under s 29 of the LSA 2007, and dated 28 Jul 2022), which 'sets expectations … relat[ing] to ongoing competence, which in this context means the necessary and up-to-date skills, knowledge, attributes and behaviours to provide good quality legal services' (at para 2). This statement was specifically linked to the regulatory objective in s 1(1)(f).

93 CPR 1.1(1).

94 CPR 1.1(2)(a).

95 CPR 1.3.

goliath'-type scenarios, and to ensure that factual and (often very expensive) expert evidence can be prepared for testing and cross-examination – is relevant to the achievement of that objective.

(b) The use of litigation funding in arbitration

In the context of arbitrations, which are purely private proceedings, the use of litigation funding has been difficult to ascertain. However, it is possible to ascertain from case law databases where an appeal from an arbitral award, pursuant to section 68 of the Arbitration Act 1996, has been made to the High Court, and where litigation funding was used in the preceding arbitration and for the appeal hearing itself. These cases are shown in ***Appendix B***.[96]

An interesting point has arisen in the context of litigation funding in arbitration, *viz*, the potential recovery of the funder's success fee in English-seated arbitrations, but where in English litigation, there is a bar upon the recovery of a funder's success fee. Of course, since 1 April 2013, a law firm cannot recover from the defendant its success fee under a CFA, and an ATE insurer cannot recover the cost of its ATE insurance premium from the defendant either. Sir Rupert Jackson recommended that success fees and ATE premiums should cease to be recoverable from unsuccessful opponents in civil litigation, but rather, should be paid to the solicitor from the damages recovered.[97] The Government accepted the recommendation, noting that 'Sir Rupert is convinced that if recoverability were abolished, then success fees and ATE insurance premiums would become subject to market forces.[98] Claimants would shop around for lower success fees and ATE insurance premiums', rather than simply expect the defendant to pay those sums regardless. A funder's success fee is analogous to both of these scenarios, albeit that Sir Rupert Jackson did not consider the recoverability of a litigation funder's success fee whatsoever. In any event, the funder's success fee is potentially permitted in arbitrations, and is a point which has come to *judicial* attention via appeal hearings of arbitral awards, and where such recovery has been judicially endorsed. As always, whether it is *the defendant* or *the client* who pays the funder's success fee makes a considerable difference to the amount which the funded client recovers. In any event, this interesting dichotomy which has emerged as between English-seated arbitrations and English litigation merits closer attention later in this Report.[99]

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96 'Arbitration Appeal Proceedings in the High Court', at Appendix B5.

97 *Review of Civil Litigatio Costs: Final Report* (Dec 2009), ch 10, [4.20].

98 MOJ, *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales* (CP, Nov 2010) [64]. That was Sir Rupert's view too: ibid, ch 10, [5.9].

99 See Section 21, 'Recovering the funder's costs from the defendant in a successful claim'.

(c) An enhanced appreciation of citizen's rights

One of the LSB's regulatory objectives is to increase the public understanding of the citizen's legal rights.[100] Some collective actions which are borne of litigation funding – whether or not in the strict 'consumer rights' category – manage to achieve that same objective via de facto means, in that the issue transposes from the litigious sphere into the public domain. It enters into the public consciousness in a way that would rarely happen, absent the litigation.

The Post Office Horizon litigation, as portrayed in a widely-watched ITV drama,[101] is an obvious example. But less noticeably and no less importantly, the success of equal pay claims among lowly-paid women who work at supermarkets[102] or Uber drivers who should be entitled to the minimum wage, paid holidays and workplace pension provision,[103] received mainstream media attention. Additionally, the VW litigation[104] was the first 'diesel-gate' emissions case brought in England, and at the time of its commencement, was the largest GLO in English legally history, with approximately 90,000 claimants. It spawned subsequent GLO actions against other car manufacturers, with many hundreds of thousands of claimants concerned.[105] The costs of advertising, recruiting and managing those group actions was funded by the relevant litigation funders.

Hence, the very fact that litigation is commenced and publicised (and which is unlikely to have been possible, absent litigation funding) can serve to enhance citizens' own awareness of their rights. Litigation is rarely acknowledged to have that purpose,[106] but it can certainly have that by-product, especially when brought on a collective scale.[107]

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100 Legal Services Act 2007, s 1(1)(g).

101 Per: *Bates v The Post Office* (ITV, 2 Jan 2024). The programme explored the history of the dispute and canvassed the compensation schemes. Some of this detail is also available in the wider public domain at: https://corporate.postoffice.co.uk/en/horizon-scandal-pages/post-office-compensation-schemes; and 'Post Office scandal explained' (*BBC News*, 11 Jan 2024).

102 See, e.g.: A Asthana, 'Boost for claimants in Asda equal pay case that could cost supermarket £1.2bn' (*ITVX News*, 1 Aug 2023). The claim is funded by Therium.

103 See, e.g.: S Butler, 'Uber drivers entitled to workers' rights, UK Supreme Court rules' (*The Guardian*, 19 Feb 2021). The case was funded by Harbour. The decision referred to is: *Uber BV v Aslam* [2021] UKSC 5.

104 *Crossley v Volkswagen Aktiengesellschaft* [2021] EWHC 3444 (QB), and cited in Appendix B3.

105 These GLOs are also noted in Appendix B3.

106 Seven purposes have been judicially espoused in English law as to why litigation is brought: see Mulheron, *Principles of Tort Law* (2nd edn, CUP, 2020) 9–13, but as far as the author is aware, the goal of raising public awareness has never been cited as being one of them.

107 See the discussion of the interaction between litigation, public awareness, and subsequent consumer claims in: C Scott and J Black, *Cranston's Consumers and the Law* (3rd edn, Butterworths, 2000) 102–10.

6. CRITERIA FOR, AND RATES OF, FUNDING

This Section has implications for several of the LSB's regulatory objectives, viz: improving access to justice, promoting the interests of consumers, and supporting the rule of law.

The main points:

- **Due diligence enquiries by a funder tend to focus around five matters – and unless these are met, funding is strictly declined (unless some 'special fund' for non-profit cases is being utilized by the funder);**
- **Inevitably, litigation funders tend to take on the cases that have reasonable prospects of success and good prospects of enforceability – meaning that those funded clients the recipient of the funding (whether consumers or others) have a higher probability of securing access to justice;**
- **The acceptance rates of pitched cases is extraordinarily low, and very consistent, amongst litigation funders – only between 3% and 5% of all funding opportunities pitched are accepted. Hence, it goes without saying that a great many cases in which the prospects are not as high, or for which enforceability may present issues, have to secure other forms of funding in order to proceed, away from litigation funding. These other sources arenot plentiful or easy to access, given the relative paucity of legal aid, the frequent disallowance of before-the-event insurance for collective claims of any type, and the inherent difficulties of an law firm's funding long and complex litigation on a CFA or DBA basis. In that regard, litigation funding remains a relatively niche, and valuable, source of funding;**
- **Litigation funders' 'investment committees' or 'advisory boards' typically contain commercially-experienced silks who provide a further layer of scrutiny as to the feasibility of the pitched claim. By 'certifying' those claims as worthy of pursuit, these influential committees and board seek to uphold and to enforce the rule of law by sanctioning the use of litigation funding, including (frequently) the acceptance of adverse costs, should the claim fail.**

(a) Screening and rates

It would be a mistake to think that litigation funding is the panacea for consumer grievances on a widespread scale. The reality is quite the opposite. Litigation funders accept very few funding opportunities which are pitched to them. Whilst the cases referred to in the previous section could not have been brought without litigation funding support – thereby enabling the objective of 'access to justice' – they are in the tiny minority of cases which law firms (or claimants directly) bring to litigation funders.

This is due to the stringent criteria for funding which are applied by funders and by their investment committees/advisory boards. As one litigation funder succinctly puts it:

> *We fund claims which are seeking a monetary outcome or an easily-liquidated asset (such as shares or real property) from a defendant who has the ability to pay.*[108]

It is often said[109] that the funding provides an extra layer of scrutiny, of 'due diligence inspection' of the claim – and, to reiterate, due diligence enquiries do not fall foul of champerty law,[110] and are embodied in the *Code of Conduct for Litigation Funders* (hereafter, 'the ALF's *Code of Conduct*') as being permissible for that very reason.[111] Still, five funding criteria <u>really</u> matter to a funder's screening process:[112]

Criterion	**What it means**
Merits	This depends upon factual and expert evidence likely to be adduced, the strengths and weaknesses of the substantive law underpinning the claim, and includes the prospect of any defences or counterclaims which may be

[108] Augusta Ventures, 'Which cases are suitable for funding?' (see: https://www.augustaventures.com/what-we-do/faqs/).

[109] *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144, [29].

[110] Champerty occurs where a person, with improper motive, and showing wanton or officious intermeddling, becomes involved with disputes of others in which the person has no interest whatsoever, and where the person stipulates for a share of the proceeds: *Trendtex Trading v Credit Suisse* [1980] 1 QB 629 (CA); *Giles v Thompson* [1994] 1 AC 142 (HL); *London and Regional (St George's Court) v MOD* [2008] EWHC 526 (TCC) [12].

[111] See cl 18.

[112] As evident from the information provided at several funders' websites: see, e.g.: Woodsford Litigation at https://woodsford.com/wp-content/uploads/2022/09/A-Practical-Guide-Litigation-Funding.pdf; Harbour Litigation Funding, 'Funding Criteria', available at: https://www.harbourlitigationfunding.com/working-with-us/what-we-look-for/; and see too, Exton Advisors, 'What makes a claim suitable for litigation funding?', available at: https://extonadvisors.com/what-makes-a-case-suitable-for-litigation-funding/.

	brought – merits of 60% success rate are mentioned on various funders' websites
The claimant	The funder will look at the claimant's litigation experience and history (if any), including whether the claimant, as a funded client, is likely to act rationally, particularly with respect to giving instructions and considering settlement offers
The costs to recovery ratio	If a claim requires £1 million in funding support, then the claim value (the expected damages) will need to be a multiple of that (10x, 8x, 4x, are typical)
Claim value	Funders typically insist on a minimum claim value (£3M, £5M, £10M, are all mentioned by various funders)
Enforceability	Funders will check whether the proposed defendant could be rendered 'judgment-proof' – proposed defendants must have the means to satisfy a judgment, award or settlement, and be located within jurisdiction or where enforcement can be otherwise realistically achieved

There are notable exceptions to this table, in that a funder may choose to 'dispense with the criteria of funding for profit, with the sole purpose of facilitating access to justice', as part of the funder's corporate and social responsibility charter,[113] where specific cases appeal to the funder as being an example of 'commitment to the pursuit of justice and the rule of law'.[114] On the point, it has been urged by one senior judge recently that litigation funding 'presents as access to justice but, with exceptions, doesn't seem to go after big gaps in justice', and that funders might wish to think about, say, developing 'a new funding model directed to a particular area or court user, allowing us to reserve legal aid or pro bono resources to help others'.[115] As aforementioned, an example of that sort of initiative is already in existence, and no doubt more conversations around that area will occur within the litigation funding industry in the future.

Under present mainstream litigation funding, however, the screening criteria are applied rigorously. For the purposes of this Project, funders were asked about their rates of declination of applications

[113] See, e.g.: Therium Access, a fund commenced by Therium Funding in 2019 for such cases, and discussed further at: https://www.therium.com/therium-access/. The Advisory Committee of Therium Access is chaired by Lord Falconer, former Lord Chancellor.

[114] It is said that the fund 'will focus on the advancement of human rights, equality and diversity, as well as the protection of children, the elderly, the disabled, asylum seekers and other disadvantaged groups': 'Litigation firm Therium to fund not-for-profit cases as legal aid slashed' (*Daily Mail Online*, 11 Mar 2019).

[115] Sir Robin Knowles CBE, 'Justice, and access to it' (The Advocate Lecture, 14 Mar 2024), paras 82 and 83.

considered. The rate of cases funded, as a fraction of the cases which are pitched to the funders as being 'meritorious', is extraordinarily low:

Empirical feedback – rates of acceptance:
Funder #3418 – **2%** of all cases pitched; *Funder #6239* – **10%** of all cases pitched; *Funder #1938* – **4%** of all cases pitched (of the 1,183 claims submitted over the past five years); *Funder #8421* – **3%** of all cases (only about 5% of all cases itched are referred to the funder's investment committee for further scrutiny; and of those, about 66% are accepted, constituting 3% of all cases pitched); *Funder #2613* – **3%** of all cases pitched; *Funder #2288* – **6%** of all cases pitched.

The disconnect between the funder's due diligence and that conducted by law firms was a key theme of the feedback obtained during the course of this Project. One funder despaired that:

> *law firms generally do a terrible job of evaluating their claims. They take an overly optimistic view about everything. They pay little or no attention to enforceability, or where the defendant is located. They also take an overly optimistic view of the claim value, whilst mis-calculating the costs budgets for each stage*.[116]

Nevertheless, the tiny scope of funded cases by litigation funders means that proposals for *other* funding streams – quite apart from the other options of CFA funding, DBA funding, BTE insurance, ATE insurance, crowd-funding, litigation loans, union and association funding, and hourly retainers paid by the

[116] Per: Funder #2613, via interview dated 22 Feb 2024.

client, and ignoring the largely defunct legal aid stream[117] – inevitably continue to generate attention amongst judges,[118] commentators[119] and scholars.[120]

(b) Investment committees and advisory boards

It is important to appreciate that the purpose of investment committees and advisory board set up by litigation funders is multifarious. Certainly, such expertise is invaluable to 'weed out' cases that do not fulfil the funder's funding criteria – but the committee also serves as a validation of claims selection for the funder's investors. Harbour Litigation Funding explains this thus:

> *Our investment committee includes highly experienced Queen's Counsel whose insights and scrutiny help validate a claim, and help build confidence and reassure a board, shareholders or creditors, that the case has good prospects.*[121]

Of course, the implicit benefit for a defendant is that highly-experienced litigators will only give the 'green light' to cases that they consider to have good prospects of success, rendering it unlikely that the case will be frivolous or unmeritorious. The investment committee is an important 'reality check', which benefits parties other than the funded client.[122]

A sample website check of legal expertise embedded in investment committees:	
Harbour Litigation Funding[123]	Robert Howe KC, who regularly appears in all divisions of the High Court, in commercial arbitrations, and at appellate level; Nigel Jones KC, a highly experienced mediation advocate who also sits as a commercial arbitrator and mediator; and Paul Lowenstein KC, Chairman of Bar Disciplinary Tribunals

[117] Per: a survey commissioned by the MOJ and conducted by PA Consulting, and published 25 Jan 2024, as reported in: 'It's Official: civil legal aid provision is withering away' (*LSG*, 26 Jan 2024). The reduction of legal aid for consumer disputes was also catalogued in: Civil Justice Council, *The Law and Practicalities of Before-the-Event (BTE) Insurance: An Information Study* (Nov 2017), section A2.

[118] Sir Robin Knowles CBE, 'Justice, and access to it' (The Advocate Lecture, Lincoln's Inn, 14 Mar 2024).

[119] See, recently: Roger Smith and Nic Madge, 'Proposing a National Legal Service' (*Legal Action Group*, 3 Apr 2023), available at: https://www.lag.org.uk/article/213862/proposing-a-national-legal-service.

[120] Mulheron, 'Collective Actions: Some Implications of Claimant-free Actions: Distributing Undistributed Residues' (Paper presented to the Competition Appeal Tribunal's 20th Anniversary Conference, Downing College, Cambridge, 4 May 2023).

[121] 'About Us', available at: https://www.harbourlitigationfunding.com/about-us/.

[122] Alex Lempiner, *A Practical Guide to Litigation Funding* (Woodsford Litigation, 2023), at p 1.

[123] See: https://www.harbourlitigationfunding.com/our-team/.

Balance Legal Capital[124]	Lord David Gold, former Senior Partner of Herbert Smith Freehills, and appointed to the House of Lords in 2011; and the pre-eminent litigator, Ian Terry, previously Head of Dispute Resolution and worldwide Managing Partner at Freshfields, and who is an accredited mediator at One Essex Court
Winward Capital[125]	Stephen Auld KC, chairman of the Advisory Committee with experience in wide range of commercial and chancery work

[124] See: https://www.balancelegalcapital.com/team/lorddavidgold.

[125] See: https://www.winward.uk/advisory-committee.

7. ALTERNATIVE FUNDING METHODS: HYBRID DAMAGES-BASED AGREEMENTS AND PORTFOLIO FUNDING

This Section has implications for several of the LSB's regulatory objectives, viz: improving access to justice, the robustness of the legal profession, and protecting competition in the provision of legal services.

The main points:

- **Under a funder's hybrid DBA model, the funder enters into an LFA, not with the funded client, but with the law firm who is representing the funded client; there is no contractual relationship between the funded client and the funder;**
- **The funder's hybrid DBA model has enjoyed mixed use since its development in the English market, with some funders questioning the ethos of the law firm becoming a *commercial* counterparty to a tri-partite agreement between client, funder and law firm, whilst others perceive of it as a workable way of supporting the legal profession. The litigation funder pays the law firm's monthly bills, assumes the risk itself of the claim of the funded client failing altogether, and has provided non-recourse funding throughout. Wherever risk is shifted from the profession to the litigation funding industry, it improves the robustness and resilience of the law firms concerned;**
- **Similarly, portfolio funding is a relatively recent concept in the litigation funding market. It is practiced by some (not all) litigation funders, whether via a funding facility to the funded client or to a law firm; but there is no direct evidence that due diligence enquiries are reduced in respect of cases funded via that method. Rather, it permits a litigation funder to offset a case which may have lower prospects of success against those that have higher prospects, thus improving access to justice for the former category of cases which might, otherwise, be unable to be funded.**

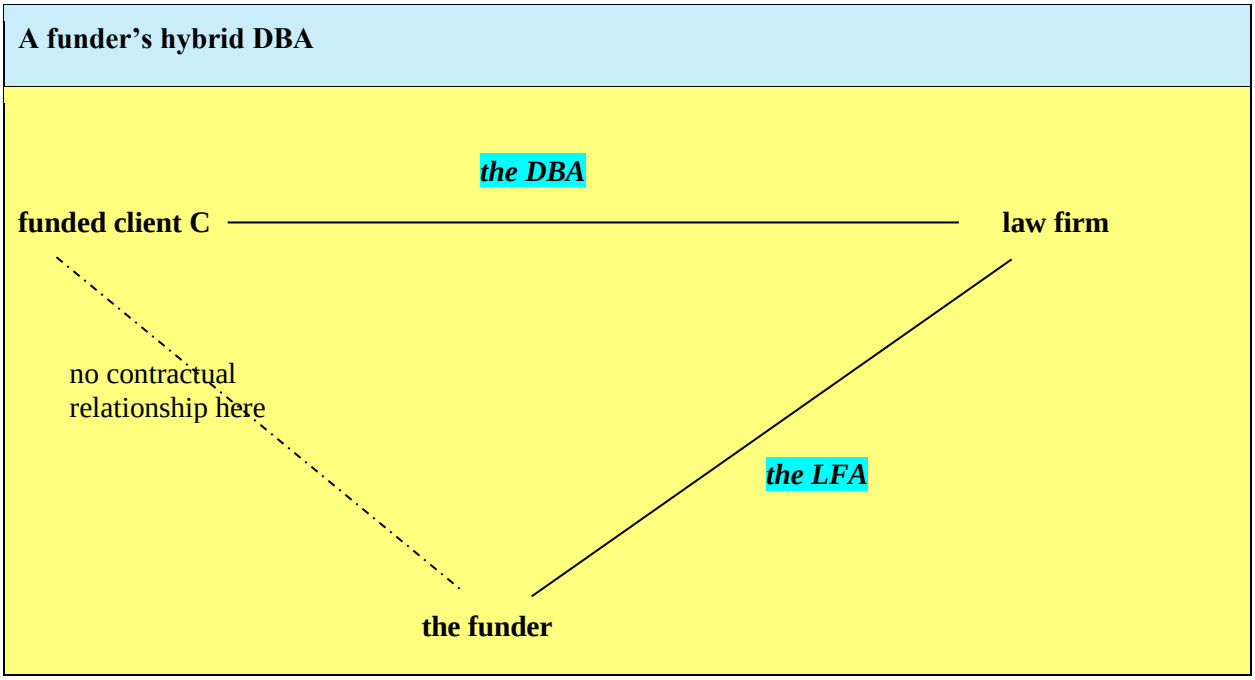
Under the traditional single case funding model, the funder provides non-recourse funding to a client whose grievance requires financial assistance in respect of a particular matter. At a minimum, the funder will pay

own-side disbursements (e.g, court filing fees, expert witness fees) and the legal costs which are payable by the client to that client's legal team.[126]

However, **two** different funding models have gained traction in the past few years: the hybrid DBA; and portfolio funding. Some scrutiny of each is relevant for the purposes of this Project.

(a) How the hybrid DBA works, and its utilisation

Under the hybrid DBA arrangement, the funder is not providing the financing to the client at all – but to *the law firm itself*. The funding arrangement which is now oft-described as a funder's hybrid DBA emerged in 2015.[127] It was developed against the backdrop of the amendment of 58AA(3) of the CLSA 1990 which permitted the use of DBAs for 'contentious business' from 1 April 2013.[128] The arrangements for the funders' hybrid DBAs may be diagrammatically shown as follows:



[126] As discussed later in the Report in: Section 14, 'Paying, and budgeting for, the funded client's own-side costs'.
[127] Much of the discussion in this section is derived from the analysis in: Civil Justice Council, *The Damages-Based Agreements Reform Project: Drafting and Policy Issues* (2015), Section 9.
[128] The Damages-Based Agreements Regulations 2013 were enacted pursuant to s 58AA(3) and (4).

Under this arrangement, the law firm enters into a DBA with its client, and then, alongside that fee agreement, the law firm arranges an LFA with the funder so that a portion of its fees are paid as the dispute progresses. Typically:

- the DBA between client C and law firm entails that, if C succeeds in the case, then the law firm takes the percentage of the recovery (say, 50%), under a DBA. That DBA will be capped according to the statutory caps set by the 2013 DBA Regulations. That money, paid under the DBA to the law firm, is held on trust, for payment to the litigation funder under the LFA;

- then, as between the law firm and the funder, there is the LFA under which the funder provides upfront non-recourse funding for WIP (usually, funding paid at a reduced hourly rate, to keep the law firm's activities funded during the course of the litigation), plus the funder will typically pay the law firm for the disbursements incurred by C in preparing for his case (e.g., experts, counsel, ATE premium). Then, if the funded client succeeds in the case, the funder is entitled to a success fee under that LFA, which is payable by the law firm. The law firm may also contract to pay back the money advanced by the funder, if C wins the case. That money to the funder is paid out of the trust funds which the law firm obtained under the DBA, such that the funder's success fee is paid out of the DBA cap. The funder cannot recover more than the DBA cap, such that the funder essentially 'obtains a proportion of a proportion';

- although the diagram shows that there is typically no contractual relationship between the funder and the funded client, this *might* sometimes happen, when the funder enters into two agreements – one of these being the LFA with the law firm under which the funder provides the upfront capital to the law firm which is acting itself on a DBA; and the second of these being a disbursements funding agreement between the funder and the funded client, under which the funder agrees to provide funding for other legal costs and disbursements (e.g., counsel's fees, experts' fee, court filing fees), in return for a payment from the funded client's financial recovery (net of the DBA payment which the funded client owes to the law firm as its payment for legal services rendered).

The fundamental reason for the development of the funder's hybrid DBA model was that it was a practical funding arrangement, especially for long-running commercial matters. The tri-partite arrangement means that the law firm can continue to pay its staff's salaries, its rent, its running costs, via the monies being paid to it by the funder under the LFA (usually paid on a monthly basis, upon invoices rendered by the law firm

to the funder). The law firm does not have to wait for the 'payday' when the client's claim finally nets some financial recovery. However, if and when that 'payday' does eventuate, the law firm recovers its success fee under the DBA and pays that into trust – and then, the funder takes *its* success fee under the LFA from those DBA monies in trust ('the % of the %'), and the law firm retains the rest of the trust monies as its 'fee' for having provided legal services to the funded client to prosecute the successful case.

For the purposes of this Project, funders were asked whether their funding entity had entered into a funder's hybrid DBA during the course of the period 2019–the present, and if so, were they in favour of the arrangement as a means of funding long-running litigation?

Empirical feedback – use of a funder's hybrid DBA:
Funder #6239 – no, we have not entered into a hybrid DBA at any point, preferring to fund the client directly; *Funder #1938* – in unitary cases, we have found that law firms are more likely to act on a CFA (and not a DBA) basis with the client, and that we enter into an LFA with the client directly; *Funder #3418* – yes, we have used hybrid DBAs during that period; *Funder #8421* – we've only used a hybrid DBA once, where the law firm was comfortable with the use of DBA funding with the funding client.

When asked what they saw as the advantages and disadvantages of the hybrid DBA model, not all funders were enamoured of it. Some saw real advantages for a number of reasons which are hitherto unexplained in the public domain:

Empirical feedback – advantages of the funder's hybrid DBA:

Funder #3418 –

- Hybrid DBAs mean that, with both law firm and funder acting on a contingency basis, their interests are completely aligned, both with respect to achieving a positive outcome for the client, and regarding the enforceability of any judgment or settlement obtained;
- A further advantage is that, where the opponent against whom a judgment or settlement is obtained is at risk of insolvency, it means that the law firm is likely to be a higher-priority creditor, thus protecting the interests of the funder too.

Funder #2288 –

- The law firm eliminates the risk that it will not be paid if the claim fails – this risk moves to the litigation funder, whose funding is non-recourse.

Funder #2613 –

- The hybrid DBA is useful where it would be highly impracticable for the funded client to enter into an hourly retainer agreement with the law firm; under the hybrid arrangement, the law firm receives funds from the funder throughout the duration of the claim.

Funder #1938 –

- Hybrid DBAs have come to be used for 'certain types of cases, where the law firm is building books of clients, and then are seeking funding against a share of its fees across multiple cases. Hybrid DBAs offer the law firm greater flexibility;
- There is also the potential for the law firm to make a larger success fee out of a DBA than under the more traditional CFA (with an uplift of 100% being all that is permitted there).

However, some funders did not favour the hybrid DBA concept at all, and preferred to steer well clear of it, unless the facts and circumstances aligned perfectly:

Empirical feedback – difficulties with the funder's hybrid DBA:

Funder #1938 –

- Our concern is that, in this tripartite relationship of client, law firm and funder, some of the checks and balances are being lost – with the law firm becoming both legal advisor and commercial counterparty to the client, and with the funder becoming a provider of working capital to the law firm.

Funder #3418 –

- The funder's hybrid DBA model is hampered by the fact that law firms are still somewhat wary of the complexities of DBAs, and are unwilling to engage in their use;
- Furthermore, because the funder's success fee has to be a 'percentage of a percentage', the claim needs to be of substantial value, or else the costs budget must be very low, so that the funder's fee can fit within the law firm's DBA success fee. Not many cases suit those parameters.

Funder #8421 –

- The model requires that the law firm be very comfortable with the intricacies of the DBA legislation and what it requires – and many are not!

Insurance brokers were also asked to what extent hybrid DBAs were being taken up in the modern funding market:

Empirical feedback – use of a funder's hybrid DBA – brokers' views:

- Many law firms remain conservative on litigation risk, which means that they take the traditional approach to funding, which is to have their client enter into the LFA with the funder, and the law firm will act on a CFA basis – this remains the most common approach to single case financing;
- However, some firms have an appetite for a different risk/reward profile that can be available under the hybrid DBA approach – entering into a DBA with their client is contingent on success (just as with a CFA), but the upside/reward if the claim succeeds is much greater for the law firm than if they had been acting on a CFA – this enables the law firm 'to capture a greater share of the upside on their cases than would be available under the traditional third party funding model'. If the law firm reduces its reliance on the funder under the LFA (by agreeing to a lower level of funding in return for a smaller success fee payable to the funder), then it means that the risk assumed by the law firm increases (they cannot call on funding if the costs increase or duration lengthens), but so could the rewards under the DBA arrangement with the client if the claim succeeds;
- But in the light of *Paccar*, we are seeing funders seeking greater diversity in their business models by embarking on hybrid DBAs so as to finance law firms directly, so that their return is a proportion of whatever the law firm recovers under a DBA with the client.

(b) Portfolio funding

By contrast with 'single case' funding, some funders may be willing to fund smaller-value claims via a portfolio-based approach. This entails the funding of a group of claims, some with very strong prospects of success and others with weaker prospects, and with the aim of being 'in the black' overall.[129] There are two types of portfolio funding.

Portfolio funding can be provided directly to a law firm to assist with its caseload. Where provided, it essentially amounts to an investment in that law firm's business.

[129] As explained in: 'Third party funding in international arbitration' (*Stephenson Harwood News*, 7 Sep 2020), available at: https://www.shlegal.com/news/third-party-funding-in-international-arbitration.

> *a law firm funding facility provides operational cash flow to cover the firm's overhead expenses and is supported only by the revenue to be generated from a portfolio of cases run by the firm on a contingency (or partial contingency) fee basis. Because a law firm portfolio facility allows the funder to diversify its risk across a range of cases, the pricing of the funder's return should be significantly lower than that of a claimant-side single case funding arrangement.*[130]

The model commonly looks like this:

> *where a law firm is running multiple cases on conditional or contingency fee agreements and wishes to hedge the attendant risk of such agreements, we can pay up to 100% of the value of the legal fees deferred by the law firm under its contingency fee agreement. In exchange, we take a pre-agreed share of the law firm's success fee.*[131]

Such funding may provide greater flexibility, lower pricing, and faster decision-making from the litigation funder than traditional single case funding permits. However, there are reservations from law firms to the portfolio method of funding – and that concern is **not** about any reduced assessment of the merits of the case by the funder, the concerns lie elsewhere.

> *It's a bit double-edged. There are clear benefits, particularly in terms of speed of access to funding. While this can be attractive to clients, there is a risk of complaints from clients who might query how law firm/funder relationships sit alongside the firm having an obligation to advise more broadly on funding and to give the client access to the wider market and a spread of appropriate funders with a view to achieving the best terms and the best deal.* [132]

Alternatively, portfolio funding can be provided to a particular funded client in respect of various disputes in which it may be engaged.[133] Typically, in such cases, where a claimant intends to bring multiple

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130 As explained in: Alex Lempiner, *A Practical Guide to Litigation Funding* (Woodsford Litigation, 2023).
131 Ibid.
132 Stephen Elam, partner at Cooke, Young and Keidan, as quoted at: *Litigation Funding – the UK Rankings* (2023).
133 Common, e.g., in the construction industry, where participants may be engaged in a number of disputes on separate building projects: Jed Savager, 'The future of third-party litigation funding' (*Pinsent Masons Out-Law Analysis*, 16 Mar 2022), available at: https://www.pinsentmasons.com/out-law/analysis/the-future-of-third-party-litigation-funding.

claims arising from different causes of actions, the litigation funder provides both funding and adverse costs indemnities for all claims in the portfolio.[134] For the purposes of this Project, two funders who engaged in portfolio funding for claimants were asked whether they would accept a lower merits threshold for such cases (i.e., below the balance of probabilities, as opposed to the usual 60% threshold), when balanced against other cases 'in that funding book'. Both responded 'no', and cited, in support of that, their obligations to their investors and/or shareholders to maximise the chances of recovery of a financial benefit.

[134] Harbour Litigation Funding, 'Portfolio funding', available at: https://www.harbourlitigationfunding.com/what-we-offer/products-2/#:~:text=Portfolio%20funding,-Where%20multiple%20claims&text=Law%20firm%20portfolio%20%E2%80%93%20where%20a,under%20its%20contingency%20fee%20agreement.

PART III

THE REGULATION OF LITIGATION FUNDING

8. THE SELF-REGULATION MODEL

The main points:

- **Since 2011, the regulation of litigation funding in England has been achieved via a model of self-regulation which is provided by oversight by the Association of Litigation Funders (ALF), and via compliance by ALF members with its *Code of Conduct for Litigation Funders* (and ancillary documents such as the Rules and Articles of Association, and the Complaints Procedure) which govern the conduct of the funder members of the ALF;**
- **Judicial oversight of LFAs, as and where required, provides a further source of ad hoc regulation;**
- **Otherwise, neither the Financial Conduct Authority nor the Prudential Regulation Authority supervise the fitness or conduct of litigation funders.**

The emergence of the voluntary regulation of litigation funding in England has been judicially described in these succinct terms:

> *In Chapter 11 of his Final Report of the Review of Civil Litigation Costs (2009), Lord Justice Jackson concluded that 'in principle, third party litigation funding is beneficial and should be supported' for five reasons, including that it promotes access to justice and, for some parties, may be the only means of funding litigation. He also recommended that a voluntary code be established, and that it be made clear that funding arrangements complying with such regulation would not be overturned on grounds of maintenance and champerty. The Civil Justice Council – an agency of the Ministry of Justice – published its Code of Conduct in 2011 which is administered on a self-regulatory basis by the ALF. In his sixth lecture on the Civil Litigation Costs Review Implementation Programme, Lord Justice Jackson stated that the Code of Conduct was a satisfactory implementation of his recommendations. … It is thus difficult to envisage how litigation funding conducted by a responsible funder adhering to the Code of Conduct could be construed to be illegal and offensive champerty or might be held to corrupt justice.*[135]

[135] *Akhmedova v Akhmedov (Litigation Funding) (Rev 1)* [2020] EWHC 1526 (Fam) [41[, [45] (Mrs Justice Knowles) (internal citations and references omitted).

As an introductory point, whilst the Code is described correctly in the abovementioned passage as having been drafted by a Working Group set up under the auspices of the Civil Justice Council,[136] the *Code* was, and is, the ***ALF's*** Code. It is that body which supervises, monitors and reviews the Code's terms in order to reflect 'best practice' of litigation funding (a topic to which attention will return shortly[137]).

(a) The ALF and its members

In 2011, self-regulation was a ground-breaking development which sought to provide protection for funded clients, for defendants, and for the perception and stability of the nascent industry as a whole. The obligations upon funders which are contained in its *Code of Conduct* had a tangible impact when it was first promulgated, in that most funders operating in England were required to modify the terms of their LFAs in order to ensure that they complied with the Code. By way of a couple of examples: more restrictive grounds of termination, and the insertion of a KC clause, were amended in various funders' LFAs, and capital adequacy requirements were adjusted for some.[138] Those were positive and welcome outcomes of the implementation of 'soft regulation' at the time.

When self-regulation of litigation funding was established, Sir Rupert Jackson was of the view that it should be sufficient, '[p]rovided that a satisfactory code is established and *that all funders subscribe to that code*',[139] and with the anticipation that 'solicitors will be advising their clients *only to enter funding agreements with litigation funders who sign up to the Code* and comply with its provisions.'[140] That, however, is not how the landscape transpired. Some funders chose not to join the ALF, and clients were (with appropriate legal advice) perfectly willing to enter into funding agreements with such funders on suitable terms. Indeed, it has been earlier suggested by this author[141] that any suggestion that litigation funders should be *compelled* to join the ALF and thereby subscribe to the *Code of Conduct* – and that law firms should **only** deal with ALF funder members when arranging funding for their clients – could potentially have raised allegations of anti-competitive conduct, similar to those which arose for

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136 For membership of the Working Party on Third Party Funding, and for its terms of reference, see: <http://www.judiciary.gov.uk/aboutthe-judiciary/advisory-bodies/cjc/third-party-funding>.

137 See Section 10, 'Review and complaints'.

138 As discussed in more detail in: Mulheron, 'Third Party Funding, Class Actions, and the Question of Regulation: A Topical Analysis' (2022) 2 *Mass Claims Journal* 5.

139 *Review of Civil Litigation Costs: Final Report* (Dec 2009), ch. 11, [2.12] (emphasis added).

140 *Sixth Lecture in the Civil Litigation Costs Review Implementation Programme* (RCJ, 23 Nov 2011) [4.1].

141 Mulheron, 'England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments' (2014) 73 *Cambridge LJ* 570, 579.

consideration in *Institute of Independent Insurance Brokers v Director-General of Fair Trading* (decided in 2001).[142] It must be noted that some participants in this Project vehemently objected to this suggestion.[143] Be that as it may, compulsory membership of the ALF has never been countenanced, with funders being free to choose whether or not to join and thus be bound by the *Code of Conduct*.

As an aside, although some litigation funders[144] are necessarily regulated by the Financial Conduct Authority in respect of their investment activities on behalf of investors who contribute to their capital funds, it is not necessary that a litigation funder be authorized insofar as *its litigation funding activities* are concerned.

At the time of writing, the ALF's website[145] confirms that it has 16 'funder members',[146] and eight 'associate members'. For the purposes of this Project, a Questionnaire in the form contained ***in Appendix D*** was sent to all ALF-funder members. The rate of response was over 50%. As part of that Questionnaire, both existing ALF members and new funders to the market were asked about the perceived advantages and benefits of ALF membership:

Empirical feedback – why join the ALF?

- It represents a 'badge of honour', especially to law firms, that our capital adequacy and cash fluidity has been checked – which may not matter to the bigger funders, but can help smaller funders;
- It enables a funder 'to be part of the conversation as to what happens to the industry in due course', and it is harder to make one's views heard if 'sitting outside the tent';
- The whole *Paccar* saga has shown that funders work better together when under an umbrella collegiate organization where views can be shared, strategies developed, and lobbying

[142] [2001] CAT 4 (Sir Christopher Bellamy (President), Ann Kelly, Adam Scott).

[143] For example, it was argued that membership of the ALF could be revisited in order to provide for different types of membership, depending upon the funders' sources of funding, and that the benefits of ALF membership would outweigh any costs of mandatory membership: via correspondence with a participant dated 28 Mar 2024.

[144] For example, Balance Legal Capital, Burford Capital, and Harbour Litigation Funding fall into this category.

[145] See the list at the ALF website: https://associationoflitigationfunders.com/code-of-conduct/documents/.

[146] These are (in alphabetical order): Asertis; Augusta Finance; Balance Legal Capital; Bench Walk Advisors; Burford Capital; Calunius Capital; Deminor Litigation Funding; Erso Capital; Harbour Litigation Funding; Innsworth; Omni Bridgeway; Orchard Global; Redress Solutions; Therium; Vannin Capital; and Woodsford Litigation.

resources deployed, with a common aim in mind (in that instance, the aim being to seek to reverse *Paccar* legislatively);

- It also means that we have ready access to ILFA (the International Legal Finance Association), which has a voice in the global funding community, which can be important when understanding trends in funding or legal developments in other jurisdictions;
- The ALF's purpose is to set benchmarks for best practice, and it is useful to be part of the organization to feed into what that best practice should amount to;
- It may provide some competitive advantage over non-ALF members, in giving law firms and funded clients more confidence in dealing with us.

However, it is also obvious from the discussions with law firms undertaken for the purposes of this Project – and from the list of cases in ***Appendix B*** – that some choose to 'do business' with non-ALF funders, and to that end, both law firms and funding brokers were asked – why? The reasons were quite varied:

Empirical feedback – from law firms and brokers:

- Sometimes the pricing of the risk offered by a non-ALF member (as reflected in the success fee) is better than the client could achieve from an ALF member;
- ALF members accept so few cases that sourcing funds elsewhere is often required if the case is to proceed at all – it often comes down to the availability of funding;
- In one case, the ALF member had withdrawn funding mid-way through the case, thus requiring the law firm to source funding from a non-ALF member because of the urgency of maintaining funding of legal costs and expenses whilst the case was at a critical juncture;
- Some non-ALF members are keen to commit to the relevant provisions of the *Code of Conduct* (say, re termination, capital adequacy, or input re settlement) as representing 'best practice', which renders the distinction between ALF and non-ALF membership less marked;
- The type of case also matters. It may be that, in a case before the CAT, more weight would be placed on the funder's membership of the ALF, whereas for a private arbitration, the funded client/law firm may be more willing to form their own view on the merits of a non-ALF funder.

By contrast, e.g., a construction case may not be as attractive to an ALF member, given the usually long duration of that type of case;

- For some law firms, the track record of the funder is what really matters, and if that funder is a non-ALF member, then that is not determinative.

(b) Judicial supervision

The role of judicial oversight must also be mentioned as being part of the overall regulation of litigation funding in England.

Where challenged (and even of its own volition), a court may be called upon to scrutinize, on an *ad hoc* basis, an LFA which has been entered into between the funder and the funded party.[147] In several cases, courts have had to opine as to whether or not various funding arrangements were champertous, having regard to the champerty factors which have developed under the case law, particularly in a line of authority since *Giles v Thompson* in 1994.[148]

Separately, under the UK's competition law collective proceedings regime for which exclusive jurisdiction is vested in the CAT, judicial oversight of litigation funding (and sight of the relevant funder's LFA) is compulsory. This is required because of the enactment of a certification criterion that requires the CAT to be satisfied that the class representative would be able to pay adverse costs and other costs awards if ordered to do so[149] (a criterion which can only be met by the backing of a funder, as a previous section of the Report has discussed[150]).

(c) Is the litigation funding market a 'closed shop'?

A question might be raised, as to the extent to which there is open competition, where some funders are not ALF-members carrying that 'badge of honour', even if by own-choice. Is it a 'closed shop' as between law

[147] The subject of detailed analysis in: *The Modern Doctrines of Champerty and Maintenance* (OUP, 2023), ch 5.
[148] [1994] 1 AC 142 (HL) 166 (the point was left open there, for it did not require decision).
[149] Per: CAT Rules 2015, r 78(2)(d).
[150] See: Section 4, 'The role of litigation funding in the collective actions space'.

firms and funders, not allowing new entrants or non-ALF members a 'look-in'? This point was considered throughout the research, and the following responses may be made:

- The tables in ***Appendix B*** set out numerous funded cases involving litigation funders – most of which are ALF members, but some of which are not. The law firms which act for the claimants (or class representatives) in these cases vary widely, as the tables demonstrate. There is absolutely no suggestion whatsoever of any 'closed shop' arrangement as between certain law firms and certain funders arising from the research undertaken to compile these tables;

- The reasons as to why law firms may choose to engage with a non-ALF member, set out above, indicate that *many* factors drive the law firm's choice of funder – quite apart from any past funding relationships which they may have shared with any particular funder;

- Further, the lawyer who represents the funded client is obliged ethically, by virtue of his or her obligations under the ALF's *Code of Conduct*, to identify and present alternative funding methods and sources of funding, so as to achieve the most desirable outcome for the client. For the purposes of this Project, law firms were asked what governs their choice of funder (quite apart from whether they are ALF members or not):

Empirical feedback – what drives the lawyer's choice of funder?

- ***Pricing*** matters, but it is not determinative;
- ***The funder's expertise*** in funding that type of claim – e.g., if they have done construction cases before, that means that they are familiar with the characteristics of that type of litigation;
- Whether the funder is ***sourcing its funding*** to capital investment or to a debt (borrowing) facility can be important;
- The number of cases to which the funder's capital is already committed matters (i.e., is the ***funding ring-fenced*** to my case or spread across a portfolio of cases?);
- The ***degree of transparency*** which the funder has demonstrated when enquiries are made, whether formally via AML checks or informally via questions from law firm or funded client;
- The ***history and longevity of the funder*** can also play a part, especially for a long case – 'these cases can take years to complete, so it is critical that the funder will be there for the duration'.

9. CAPITAL ADEQUACY REQUIREMENTS

The main points:

- **The ALF's *Code of Conduct* imposes two minimum thresholds of capital adequacy for each funder: access to £5 million of capital; and the ability to cover aggregate financial liabilities under all of its LFAs for a period of 36 months;**
- **Various ancillary reporting and auditing obligations must be fulfilled by funders who agree to be self-regulated in accordance with that voluntary framework;**
- **Funders within the industry have varying views as to whether the aforementioned two minimum thresholds are sufficient in the modern funding landscape;**
- **There is no backstop available – whether via an indemnity fund or financial compensation scheme – should a funder fail; and the regulation provided by the Prudential Regulation Authority/Financial Conduct Authority in respect of insurers has no application to funders, given that funders do not provide insurance services or products.**

(a) The existing minimum thresholds under the *Code of Conduct*

In the absence of any formal regulation of funders, the tasks of verifying the level of a funder's capital adequacy which the 2018 Code stipulates, and a close supervisory role in relation to the financing of funders generally, falls within the remit of the ALF's responsibility (either personally, or by delegation to suitable external parties such as auditors).

There are two essential capital adequacy requirements under its *Code of Conduct* for ALF members, *viz*:

- To ensure that they each 'maintain access to a minimum of £5 million of capital or such other amount as stipulated by the ALF'[151] (in fact, the Rules of Association put it slightly higher, stating that the funder 'small maintain a minimum of £5M of capital'[152]); and

[151] Version 2018, cl 9.4.2.

[152] Rules of Association (2014), cl 3.15.1. The reason for this distinction is sourced in the separation between 'funder', a 'funder's subsidiary', or a 'funder's associated entity', which is permitted under the Code, and which is explained in further detail later in the Report in Section 11, 'Corporate structure'.

- to 'maintain the capacity to cover aggregate financial liabilities under all of its LFAs for a minimum period of 36 months'.[153]

In addition, there are other checks and balances relevant to capital adequacy:

- to maintain the capacity to pay all debts when they became due and payable;[154]
- 'to accept a continuous disclosure obligation in respect of its capital adequacy' and to 'notify the ALF and the funded client if the funder 'reasonably believes that its representations in respect of capital adequacy are no longer valid because of changed circumstances';[155]
- to arrange annual auditing, and provide the ALF with an audit opinion about the funder's most recent annual financial statements;[156]
- to provide to the ALF with 'reasonable evidence from a qualified third party (preferably from an auditor, but alternatively from a third party administrator or bank) that the funder or funder's subsidiary or associated entity satisfies the minimum capital requirement prevailing at the time of the annual subscription';[157] and
- in general, to 'maintain at all times access to adequate financial resources to meet the obligations of the Funder, its Funder Subsidiaries and Associated Entities, to fund all the disputes that they have agreed to fund'.[158]

Further provisions, relevant to capital adequacy, were added to the ALF's 2014 Rules of Association, including a list of factors that the ALF may refer to, in order to determine whether a funder has 'adequate financial resources' (even where the funder has met the £5 million minimum capital adequacy), such as whether there is evidence of the funder being 'conservative' about capital and 'pessimistic' about when returns will be expected under its LFAs.[159]

Maintaining capital adequacy is a continuing, rather than a one-off, obligation. This is underscored by the fact that, under the Rules of Association, a funder must 'test its exposures whenever it makes a new

[153] Ibid, cl 9.4.1.2.
[154] Version 2018, cl 9.4.1.1.
[155] Ibid, 9.4.3.
[156] Ibid, 9.4.4.
[157] Ibid, 9.4.4.1.
[158] Ibid, opening para of 9.4.
[159] See: Rules of Association (2014), cl 3.15.5.

commitment under a LFA and thereafter at least monthly with respect to on-going commitments.'[160] As one participant funder put it, '*clients need to know that the funder will be good for the money on day 1, day 100, and day 1,000 – especially with more security for costs applications being made now*.'[161]

Empirical feedback – new applicants:

For the purposes of this Project, the ALF was asked to provide information as to how capital adequacy is dealt with when new funders seek to apply for ALF membership. It responded as follows:

- applications are dealt with by third parties, to ensure confidentiality of the applicant's capital and funding structures and proposed terms of funding;
- an accounting or auditing firm checks the capital adequacy of the new applicants, and if it meets the requirements of the *Code of Conduct*, then that external party provides the ALF with a certificate of compliance;
- the terms of the new applicant's proposed terms of funding (its LFA) is reviewed by an independent barrister, and again, either suggestions for modification of the LFA are made to the new applicant directly by that barrister, or a notation of compliance with the terms of the Code is provided to the ALF by the barrister.

Notably, some non-ALF funders ensure that they publicise the fact that they agree to voluntarily abide by the ALF's *Code of Conduct* in relation to capital adequacy for the duration of the funded claim.[162]

(b) Suggestions for reform from within the industry

For the purposes of this Project, funders were asked to what extent they considered that the present capital adequacy and cash fluidity requirements (presently, £5 million, and 36 of aggregate funding liabilities) were sufficient, inadequate, or too onerous. This question was posed, particularly if more formal regulation were to be forthcoming, so as to give an honest assessment from funders themselves of the current framework. The responses were quite varied:

[160] Rules of Association (2014), cl 3.15.6.
[161] Funder #0153, by interview dated 26 Mar 2024.
[162] As declared by Softwhale Holdings Ltd in respect of the website established for the collective proceedings relating to Bitcoin: *BSV Claims Ltd v Bittylicious Ltd Case number* (CAT, 1523/7/7/22).

Empirical feedback – capital adequacy levels:

Funder #6239 – the present requirements are sufficient;

Funder #2613 – the period of aggregate funding liabilities (36 months) is fine; but the minimum capital adequacy could usefully be increased to perhaps c. £20 million, given the quantum of claims that are being funded nowadays (especially in light of the collective proceedings regime in the CAT)

Funder #3418 – the annual auditing requirements that apply to funders at the time of annual subscription, by which both capital adequacy and cash fluidity must be scrutinized, may provide more comfort than the stipulated levels themselves;

Funder #8421 – the present requirements seem a bit low, and would be comfortable with higher in both capital adequacy and aggregate funding period;

Funder #1938 – the £5 million seems a bit low; and the 36 months of funding liabilities 'is simple and conservative but possibly too simplistic for formal regulation and where the industry is now'.

Whilst some funders considered the capital adequacy requirements to be somewhat low in the current climate of collective actions, their benchmarks were said to enhance competition within the litigation funding market, insofar as the ALF' badge of honour' is concerned:

Empirical feedback – capital adequacy and facilitating competition:

Funder #2613 – raising the minimum capital adequacy requirement from its present level of £5 million was perceived by some in the ALF to be being anti-competitive, so as to indirectly rule out smaller funders from becoming members of the ALF (albeit that the view of that particular funder was that £5 million is a very reasonable level, and given the amounts at stake, is hardly anti-competitive);

Funder #1938 – whilst the £5 million 'is low, it allows new entrants into the industry' and that one of the benefits of the self-regulation model 'has been to achieve the benefits of regulation whilst allowing flexibility in business models and funding structures to facilitate competition'.

For the purposes of this Project, law firms were also asked as to whether or not they considered the capital adequacy requirements contained within the ALF's *Code of Conduct* to be sufficient:

Empirical feedback – capital adequacy – law firm views:

- It isn't worth much if that £5M is spread across a number of the funder's funded cases, it only really provides comfort if the threshold is 'per case' (which funding by an associated entity which has been formed by the funder precisely for that case can achieve);
- Sometimes when we ask about whether the £5M is available for 'our case', the funders do not give specific answer, replying that 'we have exposure over a number of cases' – hence, sometimes we have to wonder how much the requirement is worth in reality, if we have no clear understanding of what the funder's overall litigation exposure is, and over what time period;
- Transparency should work both ways – whilst the funder has to know all the strengths and weaknesses of our client's case, sometimes it is difficult to ascertain whether the funder is ring-fencing its funding around our particular case, or whether the funding available to it is being used across a number of cases, with the hope that a success fee or two from other cases will fund our case.

(c) Inapplicable backstops

What if a funder were to fail, and leave a funded client's own-side or the defendant's adverse costs unmet? Presently, the realities are that:

- there is no indemnity fund established by the government or by the industry from which to meet such contingencies;

- the State-funded Financial Services Compensation Scheme will not compensate a funded client if the funder is unable to pay liabilities which are incurred under an LFA, for that scheme only covers business conducted by firms which are authorised by the FCA and the PRA to conduct 'regulated financial services';

- the PRA authorizes 'regulated activities' which includes the promoting, arranging, and providing of insurance, and the FCA has the two statutory objectives of "promot[ing] the safety and soundness of these firms and, specifically for insurers, and contribut[ing] to the securing of an appropriate degree of protection for policyholders.' However, funders do not provide insurance products or services as part of their funding businesses, and hence do not fall within the PRA's or FCA's remits;

- professional indemnity insurance would not customarily be held by those who are engaged by funders as principals or as employees, given that they do not engage in the provision of advice. In that regard, funders are different from claims management companies, whose principals *do* engage in advice regarding the commencement, conduct, and settlement of litigation (and hence, those who provide regulated claims management services may be required to take out a policy of professional indemnity insurance in respect of those services.[163]

[163] Per: the Compensation (Claims Management Services) Regulations 2006 (SI 2006/3322), Reg 21.

10. REVIEW AND COMPLAINTS

The main points:

- **Two aspects of self-regulation are critical to its effective functioning of litigation funding: reviewing its own process, and facilitating a process for any complaint that a funded client may have against its funder.**
- **Both are provided for under the self-regulation model employed in England.**

(a) Reviewing the *Code of Conduct*

The ALF has undertaken a review of the *Code of Conduct* on three occasions since the Code's inception: in 2012, 2014 and 2018. The most recent incarnation of the Code was published in January 2018. The review process was previously done with the assistance of the CJC, but is currently undertaken internally:

Empirical feedback – review process – as explained by Susan Dunn, Chair of the ALF:

'We review the Code when matters arise that suggest that we should be doing things in a different or better way, or where the Code requires perhaps greater detail. We tend to do that internally, as we feel best placed to understand the issues and prepare the drafting. But when, for example, we decided that we needed greater detail in our complaints procedure, we consulted an external QC to ensure that we had considered all the angles.'

As an example of how change can be prompted (and as discussed later in the Report),[164] early in the life of the ALF's regime of self-regulation, an amendment to the Code was required because a complaint was made against an entity which was associated with an ALF-funder member, but where the entity itself was not an ALF member. As a result, the complaint could not be addressed under the Code's complaints procedure. In order to remedy that for the future, the Code was amended so as to introduce Funders' Subsidiaries and Associated Entities as being governed by the *Code of Conduct*'s obligations and by the complaints procedure.

[164] See: Section 11, 'Corporate structure'.

(b) The complaints procedure

The *Code of Conduct* requires that the ALF 'shall maintain a complaints procedure', and all funders, funders' subsidiaries and funders' associated entities 'consents to the complaints procedure as it may be varied from time to time in respect of any relevant act or omission' by any party.[165]

The complaints procedure is a lengthy document,[166] which sets out the detailed process from the initial complaint, to its referral to an 'investigating counsel', and if the complaint is not dismissed at that stage, to the 'response stage'; with subsequent investigation and report to the Board of the ALF; and thereafter a determination of the complaint by independent legal counsel. A right of appeal to a new independent counsel is also embedded in the process.

The complaints procedure sets out the possible sanctions arising from breach of the *Code of Conduct*:[167]

> *The following sanctions may be imposed against a Member:*
>
> *(1) a private warning (including where appropriate recommendations as to future practice);*
>
> *(2) a public warning (including where appropriate recommendations as to future practice);*
>
> *(3) publication of the Opinion (subject to any redactions which Independent Legal Counsel shall identify in order to ensure that no matter confidential to the parties is disclosed);*
>
> *(4) suspension of membership of the ALF for any identified period of time;*
>
> *(5) expulsion from membership of the ALF;*
>
> *(6) the imposition of a fine payable by the Member to the ALF, up to a limit of £500;*
>
> *(7) the payment of all or any of the costs of determining the Complaint*

For the purposes of this Project, the ALF was asked to comment on the extent to which the complaints process has been invoked since 2011, and about its role in that process:

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[165] Version 2018, cl 15.

[166] Available at: https://associationoflitigationfunders.com/wp-content/uploads/2018/03/ALF-Complaints-Procedure-October-2017.pdf.

[167] Ibid, cl 25.

Empirical feedback – the complaints process – as explained by Susan Dunn, Chair of the ALF:

- All complaints are sent for initial scrutiny of investigating counsel as whether or not they are suitable for further investigation; and if they are, then the complaint itself is referred to an external independent counsel to determine, as the ALF does not feel that it is appropriate that such complaints should be determined internally – that external counsel then advises the Board of the ALF as to what sanction would be appropriate, if the complaint is proven;

- Since 2011, the complaints process has been invoked **four** times: (1) was about a non-ALF member [please see later section to explain those circumstances[168]] and could not be addressed; (2) did not name the funder member about whom the complaint was made, so that the complaint was not possible to assess; (3) was about a complaint that the funder member had wrongfully terminated the LFA, but the complainant admitted that it had forged evidence which it had supplied to the funder member; and (4) concerned another complaint about termination (that the funder member had not followed its own process for terminating funding), which complaint was dismissed.

(c) Disputes about settlement or termination

Where a funded client has a dispute with the funder, funder's subsidiary or associated entity about settlement or about termination of the LFA, then it is necessary that a KC shall provide a binding opinion about the matter.[169] To reiterate, these disputes are <u>not</u> administered by the ALF. They are governed by the Code's process, but that process is internal as between funded client, funder, and KC. As a result, the ALF has no information as to how often that internal procedure has been invoked since 2011.

[168] As per the discussion in: Section 11, 'Corporate structure'.
[169] Version 2018, cl 13.2.

PART IV

FUNDING STRUCTURE AND SOURCES

11. CORPORATE STRUCTURE:
'ASSOCIATED ENTITIES' AND 'FUNDERS' SUBSIDIARIES'

This Section has implications for some of the LSB's regulatory objectives, viz: protecting and promoting the interests of consumers; encouraging a strong and effective legal profession; and improving access to justice.

<u>The main points:</u>

- **In 2014, the ALF's *Code of Conduct* was amended to demarcate as between a funder, that funder's subsidiary, and its associated entity – introduced in response to an incident surrounding an ALF member whose closely-connected entity was the subject of a complaint, but where that entity was not governed by the Code. By ensuring that each of the funder, the funder's associated entity and its subsidiary, is subject to the ALF's complaints procedure (and to the ramifications arising therefrom), consumers' interests are protected, and their ability to proceed with the funded claim enhanced by the measures to which the funder's associated entity or funder's subsidiary are potentially subject;**
- **The capital adequacy and cash fluidity requirements of the ALF's Code and of its Rules of Association are also designed to ensure that the funded client is able to pursue its claim;**
- **Funders' practices are divided on this point – some set up different companies/entities to fund different funded cases, whilst others do not embrace that demarcated structure;**
- **Where the LFA is entered into between the funded client and a funder's associated entity, there are potential consequences for any non-party costs orders sought by the defendant. In particular, a non-party costs order is obtainable against, say, an associated entity directly; and it is always in the interests of the funder to cover such costs (to the extent that the associated entity cannot), for otherwise it amounts to a breach of the Code, and could yield reputational damage too. In support of the assuredness that a defendant can recover its adverse costs from a funded client, the funder is increasingly subject to joint and several liability (with the funded client) in respect of adverse costs. This 'primary liability' on the part of a litigation funder helps to assure a strong, resilient and effective legal profession (commercial resilience being just as important a gauge of 'effectiveness' as 'competence' in the context of this Project).**

(a) The demarcation of funder, the funder's associated entity, and the funder's subsidiary

In the original version of the ALF's *Code of Conduct*, a funder could be either an entity which 'has access to funds immediately within its control', or it could be an entity which 'acts as the exclusive investment advisor to an investment fund which has access to funds immediately within its control'.[170]

The 2014 Code amended this definition by separating out the funder from its 'corporate subsidiaries'. A corporate subsidiary of a funder which has access to funds within its immediate control is called a 'Funder's Subsidiary',[171] whilst a corporate subsidiary of a funder which acted as the exclusive investment advisor to an entity having access to funds immediately within its control was called an 'Associated Entity'.[172] That re-designation continues to the present day under the 2018 *Code of Conduct*.[173] These Funder Subsidiaries and Associated Entities will **not**, themselves, be members of the ALF; only the actual funder is the member. However, the funder:

- accepts responsibility to the ALF for these entities' non-compliance with the Code;[174]

- must inform the funded client prior to the execution of the LFA whether the LFA is being entered into by the funder itself or by one of those subsidiaries or entities;[175]

- must ensure that if the subsidiary has entered into the LFA, then the subsidiary *maintains access to* the minimum capital adequacy requirement of £5 million, and *maintains the capacity to cover* aggregate funding liabilities for a minimum of 36 months. It is important to note, on this point, that the Code does not require that the subsidiary or associated entity *itself* has £5M in capital. Rather, it must have *access to* that amount of capital. This is an important point of distinction. Certainly, the overarching funder itself must have a minimum of £5M in capital (or such other amount as is stipulated by the ALF) – the ALF's Rules of Association decree this.[176] But under the Code, the funder's associated entity or funder's subsidiary must *maintain access to* that amount of capital,[177]

[170] Version 2011, cl 1.
[171] Version 2014, cl 2.1.
[172] Ibid, cl 2.2.
[173] Version 2018, cl 2.1 and 2.2.
[174] Ibid, cl 4.
[175] Ibid, cl 5.2.
[176] Rules of Association (2014), cl 3.15.1.
[177] Version 2018, cl 9.4.2.

and must have *the capacity to cover* aggregate funding liabilities for 36 months.[178] It is an important point for some funding corporate structures where, say, the funding party who has entered into the LFA with the funded client is an associated entity and subsidiary of a very well-capitalised funder. That parent company may easily have assets in excess of the £5M, but the associated entity may only have sufficient capital at any one time to meet the funding obligations on its cases, it may not itself always have £5M in its bank account. In that scenario, the Code would be fully complied with, for the associated entity *would have access to* a minimum amount of £5M (via access to resources from the main fund of the overarching funder) and could prove that it maintains *the capacity to cover* aggregate financial liabilities for a period of 36 months – but it is not necessary that the entity actually maintains, itself, a capital amount of £5M.[179] This reflects the concept, as embodied in the Code, that it is the funder member who takes responsibility for any entities which are associated with it.

By corollary, where the LFA is entered into by the funded client with the funder's subsidiary or associated entity, then it is the subsidiary or entity which is entitled to receive a share of the proceeds of the judgment or settlement if the funded client's claim is successful. Moreover, the complaints procedure stipulated in the Code fully applies to each of the funder, the funder's subsidiary and the associated entity, as may be relevant.[180]

(b) Reasons for the demarcation in the *Code of Conduct*

The reason for the acknowledgement of the new corporate structure in the 2014 Code was because of events surrounding the funder Argentum Capital Ltd in early 2014. That funder was a member of the ALF, but voluntarily withdrew from the ALF due to the fundraising practices of an entity/investor, Buttonwood, which was closely associated with Argentum, and whose practices were alleged to be allied to a Ponzi scheme.[181] Argentum was the ALF member, but a complaint was made against Buttonwood, the shell company which was actually providing the funding to the case. It was against Buttonwood that the

[178] Ibid, cl 9.4.1.2.

[179] The author was grateful to explore this point further with one of the participant funders by way of interview and follow-up correspondence.

[180] Ibid, cl 15.

[181] See e.g. D. Marchant, "CISE Suspends Argentum Capital after Offshore Alert Exposes Ponzi Scheme" (*Offshore Alert*, 22 Feb 2014); and "Funding Fail: Argentum Exits Association of Litigation Funders" (*The Lawyer*, 30 April 2014). For the ALF's close involvement in the enquiries, see the announcement at <http://associationoflitigationfunders.com>.

complaint by the funded client was made – and at the time, the ALF had no jurisdiction to adjudicate over that body, as the Code only provided for jurisdiction over the funder itself (and Argentum was not funding the relevant dispute, Buttonwood was). Hence, shortly after this incident, the Code was amended to ensure that any complaint made by the funded client is covered by the Code's complaints procedure, whether the alleged complaint relates to an act or omission of the funder, the funder's subsidiary or the associated entity.[182]

As a result of this amendment to the corporate structure of funders, it was considered that the operation of funding would become more transparent, that the funded client would know precisely which entity holds the necessary capital in respect of its funded case, and that funders would not be able to use a convoluted corporate structure to avoid their responsibilities under the Code.[183]

(c) Adoption of the demarcation in modern funding

For the purposes of this Project, funders were asked to confirm to what extent their corporate structures followed the 'Associated Entity' and 'Funders' Subsidiary' structure which is set out in the ALF's *Code of Conduct* ('the corporate structure'), and what they perceived to be the purposes and advantages of that corporate structure.

[182] Ultimately, Argentum left the ALF in 2014 and dissolved the following year. The episode has been noted as showing that 'ALF members have not been immune to scandal in the past': Megan Mayers, *Litigation Funding – The UK Rankings* (*The Legal 500*, 2023), available at: https://www.legal500.com/practice-areas/litigation-funding/.

[183] Confirmed with Susan Dunn, current Chairperson of the ALF, by oral feedback, 14 Feb 2024.

Empirical feedback – corporate structure:

Funder #6239 – this funder does not follow that corporate structure; and considered that the only purpose of the structure is to ensure that the investment for each funded case is managed by an entity separate to the funder;

Funder #3418 and Funder #8421 – these funders adhere to the corporate structure, so as to set up different companies (entities or subsidiaries) for each funded case; but it is only the funders which have been admitted to the ALF as funder members;

Funder #1938 – this funder adopts the Associated Entities model, in that the funder is the manager, or investment advisor, to the entity who is actually funding the case which is being brought by the funded client. This funder considers the advantages of this model to be considerable:

- It allows for flexibility, for the manager/investment advisor to be the ALF member and to be responsible for its associated entities rather than for the individual fund vehicles per case to be ALF members;
- The model also reflects the reality that the relationship is between the funded client and the law firm on the one hand, and the funder on the other – the relationship is not with the associated entity, and hence, it is only right that it is the funder who is the ALF member;
- This model allows the funder to raise capital into a variety of different funding entities which can be tailored to the structural preferences of the investors – a more flexible solution than the funder 'investing only through *their* balance sheets and raising capital through debt/equity'.

(d) Non-party costs orders

Where the LFA is between the funder's associated entity and the funded client, then any non-party costs order has a number of nuanced ramifications:[184]

- The associated entity is liable for that non-party costs order in the first instance, because the court will make the order on the face of the LFA;

[184] The author is grateful to one of the participant funders for explaining the realities of modern-day adverse costs orders as against associated entities, as perceived within the litigation funding industry.

- Because of ALF Code's capital adequacy requirements, it means that the ALF member has to procure payment for those adverse costs, or otherwise the associated entity is insolvent, and the ALF member breaches its obligations under the Code;[185]

- Furthermore, the ALF funder member is heavily incentivised to deal with an adverse costs order and not leave it unpaid, because otherwise, the defendant is likely to apply for disclosure of the investors who stand behind the associated entity; and so, to avoid that, the ALF member will ensure that the corporate structure is such that it gives the associated entity immediate access to resources (the main fund, e.g.) in order to meet any liabilities for adverse costs;

- Moreover, in modern judgments regarding litigation funding, it may be that the court will not make the funded client primarily liable for costs and then make the funder secondarily liable. Rather, the court may join the funder and the funded client so as to make the adverse costs order a matter of *joint* liability. In that event, the defendant is entitled to look to the funder as the primary target for meeting that adverse costs order (as illustrated by the order made in *Sharp v Blank*[186]). As commentators have since noted, 'litigation funders may face very substantial adverse costs liabilities (in this case, on a joint and several basis) if a funded claim is unsuccessful.'[187]

[185] Per: Version 2018, cl 14.
[186] [2020] EWHC 1870 (Ch).
[187] e.g.,'Funder liable to pay substantial adverse costs in group litigation' (*CMS Law-Now*, 20 Jul 2020), available at: https://cms-lawnow.com/en/ealerts/2020/07/funder-liable-to-pay-substantial-adverse-costs-in-group-litigation.

12. HOW FUNDERS ARE FUNDED

The main points:

- **Funders may derive their finance via capital investment or via debt facility, both are practised sources of litigation funding in England;**
- **For those funders who raise finance via capital investment, a number of sources, from US university endowment and pension funds to high-net-worth family offices, are used;**
- **Being a non-correlated asset class, investment in litigation appeals to investors in accordance with basic portfolio investment theory;**
- **However, litigation funding is not immune from the economic pressures caused by higher interest rates, and raising capital investment (or borrowing) is more difficult now than it has been in recent years.**

(a) Sources of finance – investment versus loans

Where *do* funders get their money from? For the purposes of this Project, the participating funders were asked this very question. For funders such as Burford Capital Ltd, a publicly-listed company, the company's audited statements set out the shareholdings and sources of income.[188] Many funders, however, are not public companies, and so, for those funders, a number of potential sources of funding were posed as options in the relevant Questionnaire:

- individual high-net-worth or corporate investors who are domiciled in the UK;
- individual high-net-worth or corporate investors who are internationally-domiciled;
- philanthropic sources (e.g., from Universities or from charities) which are seeking an investment opportunity for their funds;
- managed trusts;
- pension funds;
- hedge funds (whether in the UK or elsewhere); OR
- other.

[188] See: *Annual Report 2022*, available at: https://s201.q4cdn.com/169052615/files/doc_financials/2022/q4/bur-Current-Folio-20F-Taxonomy-2022.pdf

A sample of funding sources is shown in the table below.

Empirical feedback – sources of finance:
Funder #6239 – hedge funding; *Funder #3613* – philanthropic sources (US Ivy League University endowments and bequests made available for investment) and US pension funds; *Funder #1938* – all options applied, except for managed trusts and pension funds; and in addition, credit funds and other alternative assets have provided funding; *Funder #3418* – predominantly individual high-net-worth or corporate investors who are internationally-domiciled; *Funder #2288* – institutional investors from the UK, US, Europe and Australia, such as endowment funds, managed trusts and alternative funds.

All of the above use 'permanent funding', i.e., the capital which is being used for funded cases is via funds which are not via a debt facility, but where the capital is made available from the aforementioned sources for investment in funded cases.

However, some funders fund on a 'debt basis', which means that they arrange an overdraft facility by which to fund cases. This is seen as more precarious, for the debt facility can be withdrawn by the lender if circumstances change, thereby plunging the funded cases (and the relevant law firms and funded clients) into uncertainty.

Media reporting on Affiniti Finance Ltd: N Rose, 'Leading litigation loan provider owes backer £43M, administrators reveal':[189]
'Affiniti Finance – which lent money to thousands of law firm clients – went into administration late last year after a breakdown in the relationship with its ultimate backer, which is now owed £43m, it has emerged. The newly published report of the administrators, Quantuma, said it was not possible for Affiniti to continue as a going concern, leaving an "orderly run-off process" the best option for creditors. Affiniti, based in Chester, lent money to clients via Consumer Credit Act agreements to fund their disbursements in personal injury and financial mis-selling claims. …

[189] (*Legal Futures*, 12 Jan 2022).

> The business was doing well … [but] Quantuma explained that "a series of events occurred, over an extended period, which resulted in the company defaulting on its obligations under a loan agreement with its secured creditor and provider of finance, Fortress Capital". Affiniti was dependent on this funding and as a result of the breakdown in the relationship, Fortress decided not to advance any further funds for new lending and instead demanded repayment of the £43m it had lent. …'

One ALF member[190] suggested that this is one reason why some funders choose not to join the ALF, for their capital position would require disclosure, and whilst the capital adequacy requirement of £5 million could certainly be met via a debt facility, a funder may be reluctant to admit that a debt facility is the *sole* basis upon which they are funding cases.

(b) The realities of the economic environment

Under the terms of litigation funding, litigation is an investment, an 'asset class'. It is also considered to be a non-correlated asset class, in that the price movement in shares, bonds, term deposits, gold and other valuable metals, etc, has no impact on the pricing of risk in litigation. According to modern portfolio theory, it is suggested that investors can reduce overall risk and potentially enhance returns by investing in assets with low or no correlation. This, in part, explains why investment in litigation is perceived to be desirable by many investors. Furthermore, as some who participated in this Project were keen to stress, financing English litigation has been viewed a providing a worthwhile and reasonable return on monies invested, in spite of its relatively high costs. Whether the funder raises money via invested capital or borrowings via a debt facility, there is 'money to be made' in funding another's litigation.

However, that is not to say that the wider economic environment is immaterial to funders. Indirectly, the climate of rising interest rates has had a real impact on funding in 2023–24, as both brokers and funders noted during the course of research undertaken for the purposes of this Project:[191]

[190] This observation was made anonymously, and no identifier number will be used.

[191] These observations were forthcoming primarily from interviews with funders and from observations made by panellists at the Brown Rudnick conference, *Third Party Litigation Funding* (14 Mar 2024).

Empirical feedback – what is the litigation funding climate like in 2024?:

- The relative yield of litigation funding, compared to other more mainstream (and presently more productive) asset classes such as share and bond investments, has come under pressure in the changing economic environment;
- There is less liquidity in the funding market at present, which is particularly impacting large-cost cases (i.e., cases where the funding budget would exceed £15M) – funding for those is difficult to find at present;
- Re the duration of cases, funders are being more attracted to smaller-cost and shorter cases (i.e., budgets less than £15M). This is because, in a high interest rate environment, investors are more sensitive to duration, because cases don't generate interim cash flow in the usual course, and so the net present value of a cash receipt in, say, 5 years' time is lower, in a high interest rate environment, than in a low one. Hence, investors prefer shorter cases at times like this;
- Some funders have faced challenges raising capital in this environment, whether via investment (because other investments may appeal more to investors) or borrowings (because it is costing more to borrow);
- The *Paccar* issue happened to coincide with the increased interest rates, so the increased pricing charged by funders presently is difficult to attribute clearly to either problem – but the cost of funding has increased;
- *Paccar* has also impacted on funders' willingness to fund collective proceedings at all, given the ongoing uncertainty as to whether or not even multiple-of-costs success fees could be viewed as DBAs – and investors do not like uncertainty!
- With greater capital restraints, more co-funding arrangements are active now, either with other funders, or with law firms, or with other investors altogether – sometimes these arrangements go very well and enable a funder to share the burdens and risks appropriately. However, co-funding with funders who are not ALF members can be problematical ('who knows how long their money will last') – and there can be other problems with co-funding arrangements (whose transaction documents do we use; who is on the investment (advisory) committee; what is the co-funder's input; pricing can be challenging to work out as among the collaborators) – it is a case-by-case assessment, but diversification of business model carries with it greater risks of 'who one is getting into bed with'.

13. MONEY-LAUNDERING CONCERNS

This Section has implications for the LSB's regulatory objective, viz, promoting the prevention and detection of economic crime.

The main points:

- **The risk of litigation funding being sourced via capital derived from unlawful means, so as to give rise to money-laundering economic crime, inevitably arises, particularly where a funder has no clear and transparent reportage of its funding sources or track record in the jurisdiction;**
- **Presently, the Solicitors' Regulation Authority provides no guidance to law firms on the AML or KYC checks that should be done with respect to funders;**
- **ATE insurers are also the subject of AML requirements in circumstances where a litigation funder has contracted to pay the premium in respect of any ATE policy taken out to cover the risk that the funded client may be subject to an adverse costs order;**
- **Nevertheless, law firms are very alive to the risk of breaching anti-money laundering laws, and those who were consulted for the purpose of this Project carried out AML and KYC checks on funders with whom they associated in order to detect any commission of money-laundering economic crime;**
- **However, there has never been any allegation or finding, in respect of any litigation funder practicing in England, that their sources of funding have been sourced to capital derived from unlawful means. Hence, this concern may (presently) be more theoretical than real.**

Suppose that: a hypothetical funder X sets up a 'bank' somewhere offshore and wishes to fund litigation in England; the funds deposited into the bank are sourced from illegal or terrorist activities; and the 'managing director' of the bank is disqualified from serving in any directorial capacity in the United States. Suppose that X approaches law firm Y offering to fund cases on a single case or portfolio basis. How easy would these matters be to detect? Who is, or should be, responsible for ascertaining that?

To reiterate at the outset: for the purposes of this Project, the author asked the question, and received confirmation from the ALF, that there have been **no** allegations of this type since self-regulation

commenced in 2011, nor has there been any evidence of any funding from such sources over that period.[192] Hence, these concerns do need to be kept in proportion.

(a) Law firms' obligations

Law firms in England are required to conduct AML checks upon persons from whom they receive money, in accordance with their legal obligations contained in the Money Laundering, etc, Regulations 2017.[193] These Regulations, which came into force on 26 June 2017, apply to 'the vast majority of solicitors' firms',[194] and requires a law firm to take appropriate steps to identify and assess the risk of money laundering and terrorist financing to which its business is subject.[195] As the Solicitors' Regulation Authority states:

> *Keeping money launderers out of legal services has long been a priority of ours. Firms we regulate often handle significant amounts of money or can help to disguise transactions through their services. This makes them attractive targets for criminals and funders of terrorism who want to launder money.*[196]

However, it is somewhat surprising as to how little attention the topic receives at that source. The SRA's own case studies provide no illustration of litigation funding being an example of the obliged province of AML checks.[197] Nor does the SRA's guidance re the Money Laundering Regulations 2017 mention litigation funding.[198] The Legal Sector Affinity Group Anti-Money Laundering Guidance for the Legal Sector 2023 (which is uploaded on the SRA's website) similarly contains no mention of litigation funding as being an area of concern. Indeed, apart from 'sham litigation', the litigation sector as noted as being of

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[192] Via correspondence between author and Chairperson of the ALF, Susan Dunn, via correspondence dated 28 Mar 2024.

[193] Specifically, Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, as amended by the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 which came into force on 10 Jan 2020. This implemented broad changes to the regulations; and the Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020.

[194] Via a combination of Regs 8 and 12. The topic forms an important part of solicitors' training. See, e.g.: Keir Bamford *et al*, *Legal Foundations* (College of Law Publishing, 2019), ch 15, 'Money laundering and the Proceeds of Crime Act 2002', albeit that this chapter does not explicitly refer to litigation funding either.

[195] Per: Reg 18.

[196] SRA, 'Money Laundering', available at: https://www.sra.org.uk/solicitors/resources/money-laundering/.

[197] Ibid, https://www.sra.org.uk/solicitors/guidance/money-laundering/, where four examples are given.

[198] Ibid, 'The scope of the money laundering regulations', available at: https://www.sra.org.uk/solicitors/resources/money-laundering/guidance-support/scope-money-laundering-regulations/.

'lower AML risk'.[199] However, in its recent 'sectoral risk assessment', the SRA notes that, as an emerging issue, the 'use of crowdfunding can make the source of funds extremely difficult to establish'.[200] By contrast, the Law Society of England and Wales maintains an extensive list of resources and assistance for its members in respect of anti-money laundering.[201]

The research undertaken for the purposes of this Project demonstrates that law firms, and others, are very alive to the risk of money laundering arising from litigation funding (particularly where the funder has no longstanding presence or reputation in the jurisdiction, may present somewhat complicated offshore funding arrangements, and has not been used by the law firm previously). The risk to the law firm of breaching its AML obligations is perceived to arise, regardless of whether the law firm enters into an LFA directly with the funder, or whether the LFA is between the funded client and the funder. The reality is that the litigation funder will be paying the monthly invoices rendered by the law firm, and that 'money trail' requires that checks be done.

Awareness of the risks posed by the source of litigation funds has long been in lawyers' consciousness. In 2019, two senior litigation lawyers were quoted as follows:

> *'the law firm is not absolved from its obligations to satisfy itself as to the source of funds just because the funds are coming from a funder … [t]here are, however, a growing number of new entrants to the market in respect of which the due diligence obligations are going to be more difficult to discharge, [thus requiring funders to provide] appropriate verifiable due diligent information at the point an offer of funding is made'; and: '[a]lthough the funder is not a 'client' of a law firm as such, it is clear a law firm needs to be aware of the AML risks associated with funding they receive nonetheless, and to take appropriate steps including taking into account the Law Society's AML guidance and the risk-based approach.'*[202]

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[199] See, in particular, pp 44 and 183.

[200] *Sectoral Risk Assessment - Anti-money laundering and terrorist financing* (updated 5 Mar 2024), available at: https://www.sra.org.uk/sra/research-publications/aml-risk-assessment.

[201] Available at: https://www.lawsociety.org.uk/topics/anti-money-laundering.

[202] 'Litigation funding and AML obligations' (*Commercial Dispute Resolution News*, 22 Jul 2019), citing, respectively: Luke Harrison, head of litigation and partner of Debenhams Ottaway, and Anthony Maton, managing partner of Hausfelds, London, and available at: https://www.hausfeld.com/media/o1rp0xvw/litigation-funding-and-aml-obligations_article_-1-_-002.pdf.

For the purposes of this Project, various law firms were asked about the practice 'at the coal-face' regarding the requisite AML checks of funders, and about the extent to which principals or directors of the funder may be disqualified from holding that office, whether in the UK or elsewhere. Summarising these:

Empirical feedback – from law firms:

- Dealing with ALF members offers much better security re who one is dealing with and where their money is coming from, and several of these are publicly-listed companies anyway for whom audited financial statements are prepared and readily available;
- But sometimes it is necessary to source funds from a non-ALF member, to ensure that the client's claim can proceed – which is where an AML check will be very important;
- The corporate structures of funders can be very complicated/off-shore/less than transparent – for example, we have dealt with a Delaware-registered funder, for which there is little financial transparency and a complex ownership structure which is difficult (if not impossible) to track re AML checks;
- Re directors' checks, ordinarily funders will give us two directors' details to check – they may be the 'clean' ones and we don't always do checks of the others who were not nominated.

(b) The role of ATE insurers and litigation brokers

Litigation brokers, litigation funding advisers and ATE insurers occupy a key space in the litigation funding market in England. Putting clients/law firms in touch with suitable funders is a broker's business, and research conducted for the purposes of this Project indicates that brokers are fully cognizant of the risks that money laundering pose to the litigation funding market. Furthermore, where an ATE premium is taken out to support the provision of litigation funding, the ATE premium is usually paid for by the litigation funder – meaning that the ATE insurer itself has to ensure that, before issuing the policy, the necessary AML checks of the funder have been completed. Various brokers and ATE insurers were asked about this, and their feedback was very insightful:

Empirical feedback – from funding brokers and ATE insurers:

- Law firms should conduct thorough due diligence checks, including AML and KYC checks on a prospective funder, and any related entities which are providing capital before executing the LFA (and a number of law firms do this diligently, in our experience);
- If we are approached as a broker, we always conduct those checks ourselves by asking the relevant funder a number of questions;
- However, our sense is that, with the parties focusing on securing the necessary funding, AML and KYC checks may not *always* be prioritized to the extent that they could be;
- Further, when negotiating the terms of the LFA, we would always seek to incorporate sensible limits on the funder's right to assign or transfer its rights and obligations to another funder under a co-funding agreement without the consent of the funded client, because every time a new funder comes on board, AML checks are required;
- The experience of ATE insurers varies, in that some carry out their own AML checks on a funder before issuing the ATE policy, whilst others rely upon the law firm's AML checks.

(c) Funders' obligations

For those litigation funders who are authorized by the Financial Conduct Authority in respect of their investment activities (it will be recalled[203] that funders are not required to be so authorized in respect of their funding activities), those funders are required to have AML compliance frameworks in accordance with the *FCA Handbook*.[204] That publication contains AML governance requirements:

> *We expect senior management to take responsibility for the firm's anti-money laundering (AML) measures. This includes knowing about the money laundering risks to which the firm is exposed and ensuring that steps are taken to mitigate those risks effectively*.[205]

This necessitates that those funders have procedures in place regarding AML, which often includes using an external party to carry out AML checks on sources of capital in the funds which those funders manage.[206]

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[203] See: Section 8, 'The self-regulation model'.

[204] *FCA Handbook* (Release 34, Mar 2024), Ch 3, 'Money laundering and terrorist financing', available at: https://www.handbook.fca.org.uk/handbook/FCG/3/2.pdf.

[205] Ibid, para 3.2.1.

[206] The author is grateful to one of the participant funders for drawing this issue to her attention.

PART V

MANAGING, AND PAYING FOR, THE COSTS OF FUNDED CASES

14. PAYING, AND BUDGETING FOR, THE FUNDED CLIENT'S OWN-SIDE COSTS

***This Section has implications for several of the LSB's regulatory objectives, viz: encouraging an independent, strong and effective legal profession; improving access to justice; and promoting competition in the provision of legal services*.**

<u>The main points:</u>

- **The funded client's own-side costs are always covered by the funder, regardless of the success or otherwise of the funded claim; and only exceptionally will the funded client be required to repay any of the sums advanced. By laying off the burden of those considerable costs to another party, consumers' (and others') access to justice is greatly enhanced. Even disbursements such as the court filing fees and expert witness costs could be prohibitive, much less the legal fees incurred by the funded client's legal representatives;**
- **Funders have very mixed views as to the extent to which a funder's participation in the funded claim has a significant role in controlling, or reining in, the funded client's costs, and about the extent to which the lawyers' costs-budgeting is accurately assessed at the outset and thereafter maintained during the course of the claim. A resilient and effective legal profession depends upon costs being fair, proportionate, and not unnecessarily incurred – and the extent to which litigation funders can exercise any control over that process impacts upon that objective;**
- **Contractual terms in the LFA, closer judicial attention to costs management, having the legal team work on a contingency rather than and hourly rate basis, and preventing tactical steps by opponents which have the effect (and perhaps the intention) of increasing costs, were all mentioned by participants in this Project as being potential solutions to the problem of inflated costs budgets;**
- **A litigation funder may exercise some influence over the choice of law firm, particularly where past experience dictates that poor management of costs-budgeting occurred;**
- **At the end of the day, however, events do occur in litigation which can 'blow out' own-side costs (such as an order for third party disclosure or unexpected interlocutory hearings). A funded client is depending upon a litigation funder being able to accommodate unexpected own-side costs, in the interests of tht funded client being able to pursue its claim to finality.**

(a) What funders pay for on behalf of their funded clients

Funders will typically pay the own-side legal fees which the funded client's law firm charges in order to prosecute the claim to an outcome, and will also pay for the own-side disbursements incurred. These own-side costs are the 'bread and butter' of what the LFA will cover.[207] These disbursements typically[208] cover the following:

- Court filing fees;
- Expert witness reports and attendance;
- The cost of an ATE premium taken out to cover adverse costs, if awarded;
- Counsel's fees, whether being paid on a DBA, CFA, fixed fee or hourly retainer basis;
- The legal fees incurred by the law firm who is representing the funded client (again, whether being charged to the client on a CFA, fixed fee or hourly retainer basis);
- Any costs (such as transcript fees or travelling expenses) associated with a trial.

Only exceptionally will a funded client be liable to *repay* to the funder any of the sums advanced by the funder during the course of the claim. Under the ALF's *Code of Conduct*, repayments are required where the LFA is terminated due to a material breach by the funded client.[209]

(b) Costs-budgeting issues

For the purposes of this Project, it was hypothesized that one of the benefits of funding is that law firms should costs-budget with reasonable accuracy. As one funder put it, '*funders allocate capital to cases and need cost certainty as much as possible, and are incentivized to ensure that costs are appropriate and stay within budget'*, but that the attempt by funders to '*introduce discipline over costs [can only apply] to the extent permitted*'.[210] In other words, the funder cannot take improper control of the proceedings, even in the interests of managing own-side costs – English law's strict anti-champerty laws prohibit that, and funders have to be cognizant of that reality.[211]

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[207] Nick Rowles-Davies, *Third Party Litigation Funding* (OUP, 2014) 33.
[208] This was the scenario for all respondent funders who participated in this Project.
[209] Per: cl 13.1.
[210] Per follow-up correspondence with Funder #1938.
[211] Analysed in: Mulheron, *The Modern Doctrines of Champerty and Maintenance* (OUP, 2023), 15 and ch 5.

Funders were asked to what extent they have found that a funded client's own-side costs have been reined in because of the funder's monitoring of costs, or the extent to which costs have exceeded the budges (and, in the latter scenario, why that has typically occurred). Some funders made the point that their level of experience in reviewing and scrutinizing budgets can provide an additional level of costs control; and that some law firms explicitly rely upon that expertise to manage costs.

However, it seems that funders perceive that their entities and the funded clients' law firms are not always on the same page re costs-budgeting! In fact, in no other part of this research project was there such a tension evident between litigation funders and lawyers on any point. None of the funders who responded to the Questionnaire considered that own-side costs were customarily reined in because of the funder's monitoring of costs – quite the reverse:

Empirical feedback – how costs-budgeting works in practice:

Funder #1938 – it can be a real problem:

- On occasion, we have had to bring in third parties to review costs being incurred by the funded client's law firm and to press that legal team to undertake more serious costs-budgeting;
- Just taking cases commenced in the last five years in English courts or arbitrations, budgets have been exceeded in 21% of cases; and for those cases where the budget has been exceeded, the budget increased, on average, by 60%; and overruns of budgets can be 3 times the original budget in some cases;
- Initial budgeting is often poorly done and incomplete; law firms frequently do not stick to budgets and expect to be paid irrespective of any previous budget estimate that may have given; 'we have experienced some egregious examples of law firm behaviour in relation to costs';
- Courts exercise limited if any control and oversight over costs in large cases – albeit that large cases can take unexpected directions which makes accurate budgeting difficult.

Funder #3418 – where the original budget has been inaccurate, there are two clauses commonly contained in the LFA which may rein in own-side costs:

- Any additional investment in the case would be at the funder's discretion in the event of a budget overspend, which discretion may be reasonably withheld; or
- If additional investment is refused, and no other funding is available, then the legal team may be required to defer their fees or work on a contingency basis until the outcome of the case.

Funder #8421 – there is a 'constant tension between funders and lawyers when it comes to costs-budgeting and the incurring of own-side costs':

- Where lawyers are on hourly rates, that is a greater problem because the level of own-side costs is tied to the hours spent on the case; whereas where lawyers are working on a CFA or DBA (contingency basis), there is more alignment of interest between funder and lawyers where own-side costs are concerned;
- In the category of cases in which this funder is typically involved, at least 60% of the cases are conducted by the legal team on an hourly rate basis.

Funder #2613 – law firms see funders as 'a walking wallet', and a blow-out in own-side costs can have serious ramifications for the funder:

- Suppose that, midway through a case, the own-side costs have increased, compared to the claim value, to such an extent that the case is no longer commercially viable – that is a ground upon which ATE policies typically provide that the ATE insurer does not need to cover adverse costs if awarded against the funded client – that will leave the funder 'on the hook' for those adverse costs (via a non-party costs order if necessary);

If the funder itself views the case as one which is no longer commercially viable, then the funder will be 'on the hook' for all funding up to the point of termination, which means that if the funder is inclined to terminate, it needs to do so early before the case becomes very costly and with no prospect of recovery.

The funder's views of the court's role in managing costs were not entirely favourable either:

Empirical feedback – the courts' role in managing costs:

Funder #1938 – courts exercise limited if any control and oversight over costs in large cases – albeit that large cases can take unexpected directions which makes accurate budgeting difficult;

Funder #6239 – court's extensive case-management of a case (particularly for collective proceedings in the CAT) has led to significantly increased own-side costs (and the potential for higher adverse costs, should the claim fail).

Clearly, although law firms depend upon the litigation funder paying their WIP and disbursements, the disparity between law firms and funders re how own-side costs are managed is a real source of tension. This was a common theme across all funders who participated in this Project. However, as one funder noted,[212] there can be many reasons that own-side costs can 'blow out' for reasons entirely beyond the funder's or the law firm's control – third party disclosure, interlocutory hearings that were not anticipated at the outset, or problems with the expert evidence – and the workability of the litigation funding regime depends upon a funder's flexibility with accommodating these extra, possibly unforeseeable, own-side costs.

[212] Per: interview and follow-up correspondence with Funder #2288.

15. THE FUNDED CLIENT'S POTENTIAL FINANCIAL LIABILITIES TO THE DEFENDANT

This Section has implications for several of the LSB's regulatory objectives, viz: protecting and promoting the interests of consumers; encouraging an independent, strong and effective legal profession; improving access to justice (for both the funded client <u>and</u> for the defendant); and protecting competition in the provision of legal services.

<u>The main points:</u>

- **Funders vary as to whether, and to what extent, they will cover adverse costs, security for costs, ATE premia, or other financial liabilities which the funded client may incur. There is no standard customary practice across the industry that all are covered for every case. Some funders cover the risk of adverse costs themselves, whereas other funders make it a condition of their funding that an ATE policy must be taken out in order to cover adverse costs and other costs awards that may be awarded against the funded client;**
- **However, in all circumstances in which the litigation fudner contractually agrees with the funded client (via the LFA) to cover adverse costs, security for costs and other costs awards, or to lay off that risk to an ATE insurer and to pay the premiums of the ATE policy, the interests of the defendant (and of its legal representatives) are significantly protected. Payment of adverse costs protects both sides to the litigation; and is the hallmark of a well-functioning costs-shifting jurisdiction. It also supports a financially-resilient and effective legal profession, where legal costs are covered by the losing opponent;**
- **Some funders insist that the funded client takes out an ATE insurance policy for adverse costs, whereas others permit the funded client to take on the risk of adverse costs themselves. The most important aspect, from the defendant's point of view, is that its reasonable legal costs are payable by the funded client's litigation funder or ATE insurer, should the funded claim lose. This is a significant hallmark of the access to justice to which a defendant, too, is entitled;**
- **Modern ATE policies typically contain wording that covers not only adverse costs, but also any security for costs orders made (a change in practice over recent years which precludes sums of money being paid into court to meet security awards).**

Starkly put, any order for adverse costs or security for costs is the *claimant's* liability. It is the litigant's responsibility to bear those under a costs-shifting regime.[213] The only two circumstances in which the litigant (claimant) can avoid this outcome are that:

(1) the litigant enters into a contractual relationship with another party for the payment of those costs in its stead, or

(2) a third party associated with the litigation is the subject of a non-party costs order.

Where a claim is supported by litigation funding, the funder is potentially crucial to **both** of those scenarios. In doing so, the funder offers the funded client – whether that be a class representative in a consumer-based collective proceeding or a corporation which is bringing a piece of commercial litigation – considerable protection. The funded client's ability to lay off to the funder (or other third party) any potential financial liabilities which may be incurred in favour of the defendant is a key aspect of the funder's facilitation of the claim being brought *at all*. It is also a key pillar for the provision of access to justice to a winning defendant, because under a well-functioning costs-shifting regime, it is unfair and undesirable that this party should have to bear its own costs. This section deals with the first scenario, and the subject of non-party costs orders is dealt with in the following section.

(a) Extent of coverage by litigation funders

Funders have a contractual freedom as to which potential financial liabilities they will fund, in return for the success fee set.[214] ALF funder members must state in their LFA whether, and to what extent, the funder is liable to the funded client to pay:

- ***adverse costs*** to which the funded client may be exposed in the event that the claim fails,
- any ***ATE premium*** taken out in order to purchase insurance against those adverse costs,
- any ***security for costs*** ordered, or
- any other ***financial liability*** to which the funded client may become subject.[215]

[213] S Middleton and J Rowley, *Cook on Costs 2021* (LexisNexis, 2020) 21.
[214] Nick Rowles-Davies, *Third Party Litigation Funding* (OUP, 2014), 121 and App 1.
[215] *Code of Conduct for Litigation Funders* (2018), cl 10.

During the course of this Project, funders were asked to what extent they customarily cover the four abovementioned items.

Empirical feedback – financial liabilities – what is covered:
Funder #6239 – all four items are customarily covered in the LFA; *Funder #3418* – customarily does not cover all of the abovementioned items, but requires, as a condition of funding, that the funded client has an ATE policy in place to meet any adverse costs order – and the funder may pay the ATE premium for that adverse costs cover if the funded client does not have the means to pay it; *Funder #8421* – assesses which of the four items to cover on a case-by-case basis. For example, for CAT-related collective proceedings and group actions, all four items are generally covered. However, in commercial matters, the funded client may prefer not to have all four items covered (in order to reduce the success fee to which the funder would otherwise be entitled); *Funder #2613* – adverse costs and security for costs are usually covered, unless the funded client (especially a large corporate) elects to run the adverse costs risk itself to reduce the success fee.

It is now frequently the case in modern funding practice that an ATE policy (the premium of which is paid for by the funder) contains wording to enable the ATE insurer to meet any security for costs orders[216] via the incorporation of an anti-avoidance clause in that policy. It is no longer a case of paying such monies into court (although 'cash is king' to some defendants still), but rather, of showing the defendant the terms of a non-cancellable ATE policy taken out by the funded client which covers any security for costs order that may be awarded, and which prevents the ATE insurer from voiding the policy for any reason.[217] It all depends upon the precise wording used; several cases have concerned ATE policies which have not provided adequate security for costs or 'sufficient protection' to the defendant.[218]

[216] Pursuant to CPR 25.12.
[217] Nick Ellor, 'Security for costs and ATE insurance: threats and co-operation' (*Legal Futures*, 9 Dec 2022).
[218] Usefully summarised in: Rupert Cohen, 'Security for costs and ATE insurance' (*Landmark Chambers*, 18 Jul 2023).

(b) Whether the funder itself voluntarily covers adverse costs

For the purposes of this Project, a better understanding was sought as to whether, and to what extent, funders were prepared to cover adverse costs themselves, rather than to offload those to an ATE insurer (albeit that the funder will usually pay the premium for the ATE insurance policy, to the extent that the premium is not deferred).

The responses were quite mixed, as to whether the funders themselves were voluntarily prepared to fund adverse costs:

Empirical feedback – funders covering adverse costs themselves:
Funder #1938 – always requires the funded client to take out an ATE policy in order to meet an adverse costs risk, and never uses its own capital to cover adverse costs – 'that is inefficient, as our funding terms are driven by the extent of the capital that we have to commit to the case'; *Funder #3418 and Funder #2288* – always lay off adverse costs to an ATE insurer, and never cover those themselves; *Funder #6239* – decides whether to cover the risk of adverse costs itself on a case-by-case basis. The decision depends upon the availability of ATE insurance (not always a given) and the funder's own risks assessment of whether or not adverse costs are likely (i.e., based upon an assessment of the merits of the claim); *Funder #2613* – does not typically cover adverse costs itself; but pays the ATE premium upfront. That ATE policy covers potential adverse costs exposure *and* may also cover part of the funded client's own-side legal costs (the funding available from the ATE insurer depends upon the cover that can be afforded).

16. COSTS ORDERS AGAINST THE FUNDER

This Section has implications for several of the LSB's regulatory objectives, viz: protecting and promoting the interests of consumers; encouraging an independent, strong and effective legal profession; and improving access to justice (for both the funded client and for the defendant).

The main points:

- **In modern funding, the litigation funder is viewed as 'the insurer of last resort', should the ATE insurance cover be insufficient to cover D's adverse costs. This has significant impact upon the assurance to a defendant of access to adverse costs cover (which is the hallmark of any effectively-functioning costs-shifting regime), and upon the protection afforded to the funded client (whether consumer or other);**
- **The *Arkin* cap continues to feature in modern funding, not necessarily in order to cap a funder's liability for adverse costs – it can operate more nuancedly in respect of setting a reasonable level of adverse costs. The provision of some precedential authority that a winning defendant is entitled to some measure of adverse costs can be helpful to the defendant, albeit that circumstances that entitle the defendant to the removal of the *Arkin* cap are all-important;**
- **Essentially, a litigation funder's adverse costs liability hugely protects the funded client from potential economic ruin.**

(a) Court orders to pay adverse costs to 'meet the gap'

As mentioned in the previous section, most funders seek to lay off the risk of adverse costs to an ATE insurer. But what if that ATE insurance is insufficient to pay D's adverse costs, should the funded claim fail? That policy could be 'insufficient' for many reasons:

- The ATE insurer has become insolvent;
- The ATE insurer refuses to pay out under the ATE policy for some reason (e.g., non-disclosure of a material fact);
- The funded client's law firm has under-insured the adverse costs risk such that the funded client does not carry sufficient adverse costs insurance with the ATE insurer; or

- The funded client has insisted on a low level of ATE insurance to 'save money' in ATE premiums – knowing that, even though that client is the party 'on the hook' for those costs, the client does not bear those costs in the real world, as either someone else will be found to pay or D will have to 'wear that gap' itself.

To what extent have funders had to be the backstop, to fill the gap in the event of a shortfall of adverse costs cover with the ATE insurer?

Empirical feedback – filling the 'gap':
Law firm feedback – it is common to see court orders against the funder to fill the gap, in the event that there is insufficient adverse costs cover with the ATE insurer; *Funder #1938* – our experience is that a funder can expect to be ordered by the court to pay the gap in adverse costs if there is a shortfall, irrespective of what efforts it has made to lay off the adverse costs risks with an ATE insurer; in such cases, funders are treated as 'insurer of last resort', just by virtue of being the funder in the case.

(b) The ongoing application of the *Arkin* cap

The '*Arkin* cap' (named after the landmark case of *Arkin v Borchard Lines Ltd*[219]) is a 'cap' on the funder's liability to pay the defendant's adverse costs. It states that the cap is set by the extent of funding which the funder has agreed to provide to that funded party (hence, in *Arkin* itself, the funder provided £1.3 million of costs to finance the provision of experts' reports in a competition law action; and the funder's liability to the successful defendant under a non-party costs order was limited to a ceiling of £1.3 million, despite the fact that the defendant's legal costs amounted to almost £6 million). The equation is colloquially described in the funding industry as 'invest one but take two of risk'.

In his review of civil litigation costs, Sir Rupert Jackson opined that the cap should be statutorily abolished altogether:

[219] [2005] EWCA Civ 655.

> *In my view, it is wrong in principle that a litigation funder, which stands to recover a share of damages in the event of success, should be able to escape part of the liability for costs in the event of defeat. This is unjust not only to the opposing party (who may be left with unrecovered costs) but also to the client (who may be exposed to costs liabilities which it cannot meet).*[220]

That abolition has not occurred to date. However, there is no doubt that post-*Arkin* jurisprudence has become rather messy. To explain:[221]

- There was no question of the LFA in *Arkin* being champertous. In fact, it explicitly was not; and that was the precise circumstance in which the cap was developed, in principle.

- On the other hand, where the funder has acted champertously, courts have considered that the cap should be disapplied altogether. In *Excalibur Ventures LLC v Texas Keystone Inc (Rev 2)*[222] (and foreshadowed in *Arkin* itself[223]), the Court of Appeal stated that, 'if a funder had behaved dishonestly or improperly or … if the funder has taken complete control over the litigation [then] …it may be that there should be no cap at all';

- But the awkward question has arisen, post-*Arkin*, as to whether a funding arrangement really must be champertous to disapply the *Arkin* cap, or whether something 'lesser' would do. This uncertainty stemmed from the statement in *Arkin* that the approach underpinning the cap 'is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and *which is not otherwise objectionable*.'[224] Some aspect of a funding arrangement may be 'objectionable', but not 'champertous', leaving open the possibility of the cap not being applied, said Foskett J in *Bailey v Glaxosmithkline UK Ltd*.[225] That court would not speculate as to what those 'objectionable' circumstances would be.

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220 *Review of Civil Litigation Funding: Final Report* (Dec 2009), ch 11, [4.5].
221 Drawn from: Mulheron, *The Modern Doctrines of Champerty and Maintenance* (OUP, 2023) 86–88.
222 [2014] EWHC 3436 (Comm) [72] (Clarke J), and not commented upon adversely on appeal: ibid.
223 [2005] EWCA Civ 655, [40]. See too: *Paccar Inc v Road Haulage Assn* [2021] EWCA Civ 299, [72] (*Arkin* 'established the important principle that *a non-champertous* third-party professional litigation funder could be held liable for a third-party costs order') (emphasis added).
224 Ibid, [40].
225 [2017] EWHC 3195 (QB) [59].

Given this somewhat uncertain landscape, and for the purposes of this Project, funders were asked for their views as to whether the *Arkin* cap serves any purpose in modern funding, or whether its impact is reasonably negligible now because full adverse costs cover is offered as standard in many LFAs. The responses were quite mixed:

Empirical feedback – is the Arkin cap still useful?

Funder #1938 – the *Arkin* cap remains useful in cases where the funder provides only a small proportion of the funding – otherwise, the open-ended liability to pay adverse costs that the funder has not agreed or budgeted to pay, and is not being compensated to pay, significantly increases the risk of funding, and is off-putting for investors who typically wish to know their financial exposure to a risk when investing. Hence, the cap still serves a very useful purpose;

Funder #6239 – we have no experience of Arkin, as we offer full adverse costs cover under our LFAs;

Funder #3418 – we typically cover full adverse costs in our LFAs via a suitable ATE policy, so have not had experience of Arkin; but anecdotally, we think that the market pays little attention to the *Arkin* cap, either because the funder has arranged (or will pay itself) adverse costs, or because there is an assumption that it will not be judicially ordered because it is unfair to the defendant;

Funder #2288 – the *Arkin* cap can be useful where a funder has come into the case late, or chooses to fund only a small part of the claim – *Arkin* hopefully prevents full costs exposure there;

Funder #8421 – we feel that one of the biggest problems with the *Arkin* cap now is that it is unclear *when* it will be applied. Also, if the *Arkin* cap is removed, and we have not arranged cover for adverse costs, then the risk of higher costs exposure under *Arkin* will still have to be built into our pricing, so it is likely that removing the cap would increase the costs of funding. If no adverse costs cover has been arranged, then we think that it still should be assumed that the funder will have no greater adverse costs exposure than the *Arkin* cap, always provided that the funder has behaved reasonably;

Funder #2613 – the *Arkin* cap is still useful, because where a funder agrees to pay 'reasonable adverse costs' under the LFA, then the *Arkin* cap may be brought to bear on what amounts to 'reasonable'.

PART VI

MATTERS TO DO WITH THE SUCCESS FEE

17. THE MEASURE OF 'SUCCESS' FOR A FUNDER

This Section has implications for several of the LSB's regulatory objectives, viz: protecting and promoting the interests of consumers; improving access to justice; protecting the public interest; and increasing public understanding of the citizen's legal rights.

The main points:

- **Whether a funded case is 'successful' for a funder is to be measured by a dual measuring stick: outwardly-facing success; and inwardly-facing success;**
- **Outwardly-facing success occurs where the funder recovers a success fee because there has been a financial benefit recovered by the funded client, whether via a judgment, settlement or arbitral award, and to which, contractually, the funder is entitled to a share;**
- **Inwardly-facing success occurs where the funder recovers more than the amount spent to pursue the case to outward success;**
- **The difference between these two measures does not seem to be well-understood in either the public or the media domains, and a better understanding of the difference between a litigation funder's capital investment and return-on-investment is crucial, if there is to be proper understanding of how funders promote access to justice, and the risks that are taken to further that objective;**
- **When considering the objective of protecting consumer interests in funded litigation, it is apparent that the multiples approach is often more detrimental to the amount which the funded client will recover from the financial benefit recovered than a percentage-of-recovery might yield. This has been particularly pertinent in the post-*Paccar* period.**

For the purposes of this Project, funders were asked about the success rate which they had achieved via their funded cases over the past five years (2019–the present), if 'success' is measured by any case in which a success fee was obtained (whether from a damages award, a settlement sum, or an arbitral award).

It immediately became apparent that 'success to a funder' is evaluated according to **two** different measuring sticks:

- First, if a success fee was obtained (whether as a percentage-of-some-financial-benefit obtained, or as a multiple of costs incurred), so that the funder did indeed obtain some recovery from what was a 'successful case' via trial, arbitration or settlement – this might be termed, for the sake of convenience, 'outward-looking success';[226] and

- Secondly, whether the funder's costs were covered by the amount of that success fee. As one funder succinctly put it, '*success to a funder is earning a penny more than one spent*'[227] – and for convenience, this may be termed 'inward-looking success'.

Dealing with each in turn:

(a) Outward-looking success

Of the funders surveyed, those who responded to this question considered that they recover a success fee in more funded cases than not. The figures cited were as follows:[228]

Empirical feedback – rate of success:
Funder #2613 – success was achieved in **76%** of cases over the past five years; *Funder #1938* – success was achieved, across all jurisdictions and case types (i.e., not restricted to the immediate past 5-year period), in **55%** of funded cases from an inward-looking success fee (i.e., we made some level of profit in these cases) – our outward-facing success rate is higher, in that there are other cases where some financial benefit was recovered, but our success fee was less than our capital invested, so we made a net loss on those other cases; *Funder #2288* – success in E&W cases over that period is **65%** of resolved cases.

[226] This counts as 'success', even where the financial benefit recovered is not necessarily at the levels anticipated when the claim was funded. As noted later in this Section, one funder's experience is that the eventual claim value is typically only 30% of the amount for which the claim was pleaded: interview dated 22 Feb 2023.

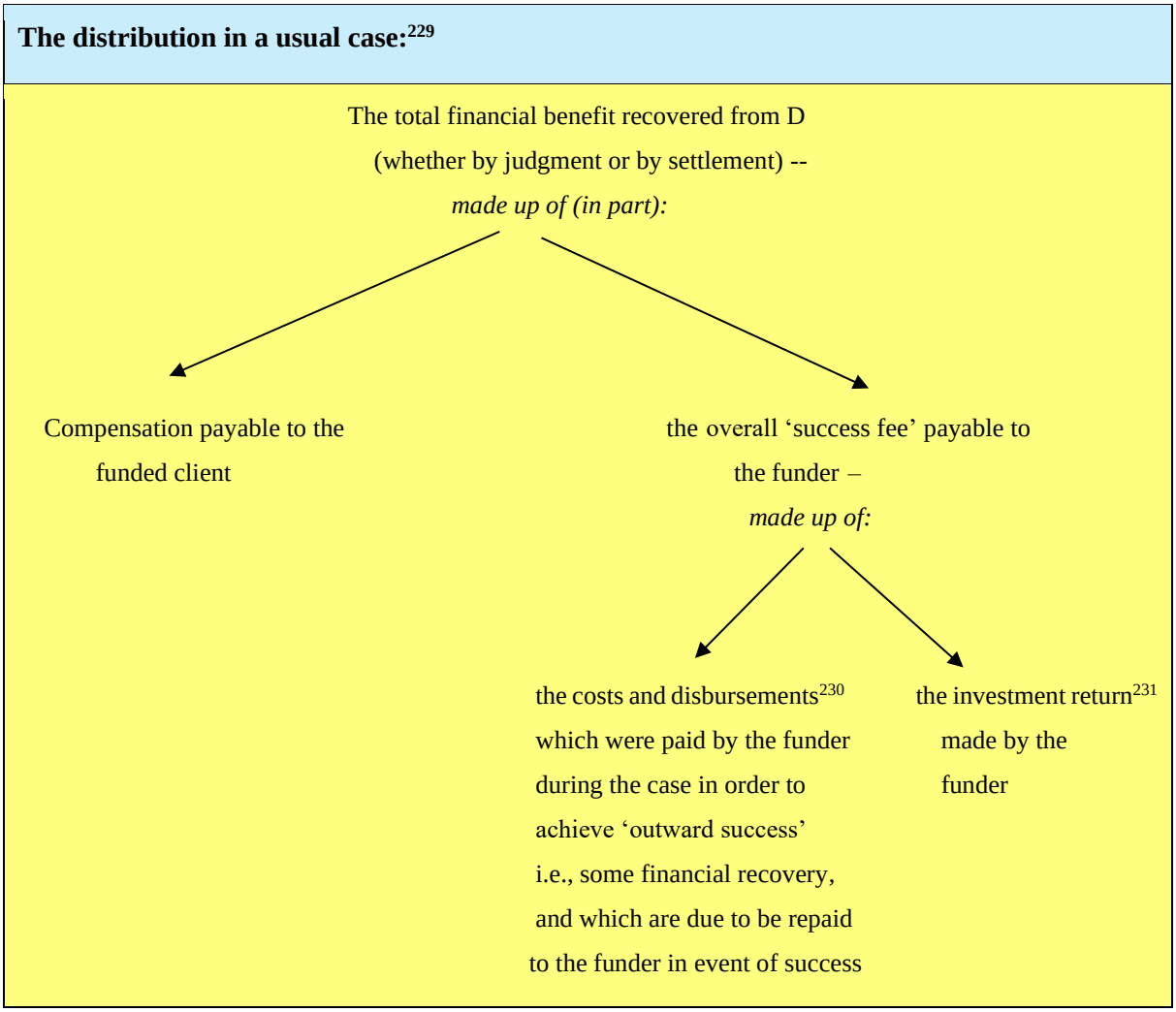
[227] Via interview with Funder #2613 dated 22 Feb 2023.

[228] Note that more than half of the respondent funders did not answer this question, either because it was impossible to determine this for E&W cases alone, or that it was commercially sensitive information.

This better-than-evens success rate was attributed to several factors, such as extensive due diligence, expert screening provided by advisory boards and investment committees, and increasing experience in ascertaining the merits and prospects of cases in some key case types.

(b) Inward-looking success

To be clear, the distribution of the financial benefit recovered under litigation funding can be described diagrammatically in this way:



[229] Note that this diagram does not purport to show the waterfall distribution which is customarily followed where a financial benefit is recovered: see relevant clause in the template LFA in: Nick Rowles-Davies, *Third Party Funding Litigation* (OUP, 2014) 243–44.

[230] Typically called 'the capital invested', 'the spend', or 'the principal'.

[231] Typically called 'the success fee', 'the contingency fee', or 'the return on investment'.

Cases which may appear successful on their face can be 'disasters' for funders, because the success fee is 'consumed' by costs. There may be no profit made at all. This may particularly occur if:

(i) the claim value is significantly less than what was envisaged (according to one funder, its statistics show that, 'on average, the amount of financial benefit recovered in our funded cases was only 30% of the original claim value projected by the law firm, which shows that law firms do not assess the value of their client's claim very well';[232]

(ii) the case had a much longer duration than anticipated;

(iii) there are changes to the substantive law underpinning the case that requires further legal opinion, expert evidence, or revisiting of factual evidence; or

(iv) there is a procedural hiccup (such as the *Paccar* saga) which necessitates interlocutory hearings about preliminary issues which were not anticipated when the success fee was contractually negotiated.

The fact that cases which outwardly look successful may end up being 'losing cases' for a funder is precisely because the success fee for a funder typically[233] includes the own-side costs, expenses and disbursements incurred in pursuing the case on the funded client's behalf. This is in contrast to DBA funding, where the DBA success fee[234] covers counsel's fees, but does not cover items such as court filing fees, expert witness fees, any ATE premium that must be paid, transcript fees, etc – under the DBA regime, the client must pay those types of 'expenses' in addition to the DBA success fee.[235] This contrast is an important one to draw, when explaining why, inwardly, funders' success fees may be 'consumed' by costs to a much greater degree than a lawyer's DBA fee would ever be.

When it was permitted to be used by funders prior to *Paccar*, the percentage-of-recovery formula could be – ironically, given the concerns expressed in, and since, *Paccar* – somewhat kinder to a funded client than the multiple-of-costs formula may be. Take the following examples – suppose that, in both

[232] According to Funder #2613, that firm's statistics over the past five years show that the eventual claim value is, on average, 30% of the amount for which the claim was pleaded: interview dated 22 Feb 2023.

[233] This was the scenario for all respondent funders who participated in this Project.

[234] Or 'payment', as it is termed under Reg 4(1)(a) of the DBA Regulations 2013 and s 58AA(3)(b) of the CLSA 1990.

[235] This situation is explained and critiqued in: Civil Justice Council, *The Damages-Based Agreements Reform Project: Drafting and Policy Issues* (2015), Sections 1 and 2.

examples, the value of the pleaded claim is £100M – outwardly, both cases are successful, in that £30M was recovered, but inwardly, they are very different stories:

Example 1:	**Example 2:**
The success fee under the LFA is: 30%[236] The value of the claim as settled: £30M The costs incurred to fund the claim: £12M The success fee for the funder: £9M **Result: the funder is £3M out-of-pocket in this example; no profit is made on the funded case at all.**	The success fee under the LFA is: 3x costs incurred The value of the claim as settled: £30M The costs incurred to fund the claim: £12M The success fee for the funder (which is necessarily *capped* by the financial benefit recovered): £30M **Result: the funder is not out of pocket, having made £18M profit in this example; but the funder has not achieved its full pre-negotiated success fee.**

This example immediately sheds light on the differential risks posed to a funded client, depending upon the way in which the success fee is calculated. Under the percentage method, the client in Example 1 is able to retain £21M of the claim value as settled. Even though the value of the claim was nothing like what was pleaded, the client retains *something* of the claim's value. Under the multiple method, however, the claim value can be entirely consumed by the multiple of costs. In Example 2, the funder may be dissatisfied, not having obtained its full success fee – but the client is in the unenviable position of having recovered nothing at all from the claim. It also sheds light on what if the claim **had** been worth £100M. In that event, the funder's success under Example 1 (the percentage formula) would have been £30M (30% of £100M); whereas under Example 2, the funder's success fee would have been £36M (3x £12M) – this bearing out the post-*Paccar* sentiment that multiples can be more detrimental to the funded client, and that the percentage 'beats' the multiple, insofar as the funder is concerned, in a minority of cases.[237]

This is why it has been said by many commentators, since the *Paccar* UKSC decision, that the multiple method (to which LFAs have pivoted since the decision that a funder's percentage-of-recovery success fee is a DBA, itself with potential risk[238]) is not necessarily any better for the funded client. In fact, that client may be significantly worse off under that method; and one of the unintended consequences of

[236] In this example, the success fee is 30% of the gross (i.e., the full financial benefit recovered); whereas in some cases, the success fee will be 30% of the net (which is measured by the financial benefit recovered, less the capital spend, i.e., 30% of £18M in the example given).

[237] Indeed, 10% of cases is mentioned in the empirical feedback presented later in this Section.

[238] Jim Diamond, 'Why PACCAR is a catastrophic decision' (*LSG*, 6 Oct 2023), available at: https://www.lawgazette.co.uk/practice-points/why-paccar-is-a-catastrophic-decision/5117468.article).

Paccar is that the client is certainly more vulnerable to recovering nothing at all under the multiple method if the claim value turns out to be relatively low compared with the costs incurred to pursue it.[239] Indeed, it may not be that the client receives nothing, but that it receives an inadequate component of the damages to redress what the litigation was actually instituted for:

Empirical feedback – a law firm's take on it:

This anonymous law firm has instituted cases concerning fire safety cladding replacement on residential apartment blocks. Disputes about the type and the cost of the replacement cladding, and whether the building's warranty covers any of the replacement costs, means that disputes have arisen.

- these cases are expensive to run. Expert costs alone are 'astronomical', and a funder's payment of those disbursements, and our legal costs along the way, are essential to enable these cases to be brought. So, a multiple-of-costs as the success fee can be a large amount!
- conversion to the multiple-of-costs approach has made funding more expensive, in our experience, and has meant that the funded client ends up with less of the damages in the end;
- if the costs of the litigation increase (and we have found that often to be attributable to unnecessary steps being taken by defendants), and the client is on a multiple-of-costs success fee with its funder, then it gets to a 'tipping point' where, even if the client succeeds (via settlement or judgment), there may not be enough left of the financial recovery sum to actually fix the cladding. This leads to dilemmas such as: whether to settle earlier than we would like; and whether the clients can afford to pay any of the disbursements themselves, to reduce the effect of the multiple;
- the multiple approach means that it can be hugely disadvantageous for the client to go to trial; for a 2–3 week trial, with KC and junior, the costs of counsel can be in the region of £400,000. Rarely will counsel work on a CFA or DBA basis on these types of cases. Hence, going to trial and incurring those costs, which will the increase the base figure for the multiplier for the funder's success fee, has to be kept in mind.

[239] Rachel Rothwell, 'Time to end the post-PACCAR chaos' (*LSG*, 8 Dec 2023), available at: https://www.lawgazette.co.uk/commentary-and-opinion/time-to-end-the-post-paccar-chaos/5118125.article).

Funders and brokers agree that, quite apart from the chaos that *Paccar* caused to funders' LFAs, *Paccar* has not necessarily meant a good outcome for clients either:

Empirical feedback – funders' views of the multiple approach since Paccar:

Funder's quote at the Brown Rudnick conference, 14 Mar 2024 – under the multiple-of-costs approach, funded clients are very vulnerable to defendant's antics which push up the costs incurred by the funded client – so not only may the client obtain less in their own pockets, but the market effect is that the cost of funding to the client has gone up since *Paccar*;

Another funder's quote at the Brown Rudnick conference – the general returns to a funder arising from the multiple-of-costs approach are not necessarily that great (especially where the multiple is set fairly low, say, by the CAT), it can be lower than the percentage-of-recovery formula. This means that, in the present post-*Paccar* climate, funders are more likely to compete for the strongest cases, again with an impact upon access to justice when strong, but less meritorious, cases are not funded;

Funder #2613 – depending upon how rockily or for how long the case progresses, there is a real risk that the multiple-of-costs success fee will not be met out of the financial benefit recovered, which is disadvantageous to both funder and to client – the funder may not recover their full success fee, and the client may recover very little – and hence, if funders are not prepared to fund cases with that risk in play, fewer cases become fundable, which impacts access to justice. If, on a multiple approach, we think that we will end up taking more than 50% of the financial benefit recovered, then we will not fund the case;

Litigation broker – in data analysis on how often the percentage-of-recovery success fee was > the multiple-of-costs success fee in the same claim, that occurred in only 10% of cases – in other words, 'the percentage beat the multiple only 10% of the time' – which illustrates that the funder tends to make more money out of the multiples approach (and hence, by corollary, the funded client makes less money out of that approach, because the financial benefit recovered as a whole must bear both the funder's return and the client's share … and the latter will be 'squeezed' by the greater return which the multiple affords to the funder).

At the time of writing, legislation has been introduced into Parliament to reverse the *Paccar* decision.[240]

(c) The public perception of what the funder makes as profit

The issues raised in this Section have important consequences for the public perception of litigation funding. Some statements in legal literature may convey the impression – however unintentionally – that the success fee attributable to the funder was 'all profit'. For example, it has been said of the Horizon case (*Bates v Post Office Ltd*, aka the Post Office Group Litigation[241]) that:

> *The 555 postmasters who exposed the scandal by suing the Post Office received more than £42m plus costs when their claims were settled in 2019. But around £31m of this sum went to litigation funders, leaving the surviving claimants with little compensation for their shattered lives.*[242]

This passage suggests that the funder's profit was almost 75%. Other reports suggested that the funder's profit on this case was almost 80%.[243]

However, funders' coverage of own-side costs and disbursements incurred by the funded client means that that the success fee **cannot** be purely profit; and indeed, depending upon the figures, the success fee may encompass no profit at all in some cases. There is a widespread lack of understanding amongst media reportage as to this feature of litigation funding.

In reality, the figures for the Post Office Group Litigation settlement show a very different picture – as evidence provided to the Business, Energy and Industrial Strategy Select Committee of the House of Commons in February 2022 confirms:[244]

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[240] The Litigation Funding Agreements (Enforceability) Bill (HL) was introduced into Parliament on 19 Mar 2024.

[241] [2019] EWHC 871 (QB).

[242] Joshua Rozenberg, 'Post Office scandal: Lawyers in the frame' (*LSG*, 5 Jan 2024), available at: https://www.lawgazette.co.uk/commentary-and-opinion/post-office-scandal-lawyers-in-the-frame/5118335.article)

[243] US Chamber of Commerce Institute for Legal Reform, 'ITV's Mr Bates v Post Office highlights problematic TPLF practices' (22 Jan 2024), available at: https://instituteforlegalreform.com/blog/itvs-mr-bates-vs-the-post-office-highlights-problematic-tplf-practices/.

[244] By letter dated 13 Feb 2022 (copy on file with the author).

Select Committee evidence and funder information re the Horizon case:

The Select Committee evidence of the settlement details were as follows:

- The entire settlement in the GLO instituted by Bates v Post Office, achieved in December 2019, was **£57.75M;**
- Of that £57.75M, the breakdown was as follows:
  - £42M for damages, litigation funding, insurance costs or other costs – a figure which somewhat obscures what actually went to the funder;
  - £0.75m for a Support Fund which the Claimants would establish and ad-minister to provide financial relief and assistance in hardship cases; and
  - £15M was payable by the defendant Post Office towards the Claimants' legal costs

Via information provided to the Select Committee,[245] and focusing upon the £57.7M:

- £22M was actually spent on legal costs and disbursements incurred to pursue the claim, a high proportion of which was the funder's capital spent to fund Mr Bates' claim – this 'funder's spend' thus exceeded the £15M costs awarded – and to reiterate, that 'spend' came out of the funder's success fee;
- £24M was the profit (or return-on-investment) actually paid to the funder, which represented what was left of the success fee – this represents a return of 41% of the financial benefit recovered;
- When adding up the legal costs (£22M) and the profit made by the funder (£24M), that means that £46M came out of the settlement sum. Most of this was payable to the funder, but some of it was paid to the law firm re their deferred CFA success fees and to the ATE insurer for a deferred ATE premium. Hence, this is how the 80% figure is reached (46/57.75) – but the profit made on the case was nothing like 80%, it was half of that;
- After deducting the £46M from the settlement sum, that meant that £11.7M was available for distribution to the postmasters, which across a class of 555, yields the figure of c. £22,000 per postmaster;
- The funder has made the point, in media, that, in what was high-risk litigation, and where substantial funding was required, a return of 41% profit is well inside the maximum cap that applies to DBA funding for commercial litigation [author's note: recall that, under that regime, several expenses are outside the success fee and not within it, which 'eats into' the financial recovery under the DBA regime, compared with the litigation funding regime where all expenses are within the funder's success fee];
- The funder has also made the point, in media, that such funding enabled recovery by the postmasters of c. £22,000, in circumstances where 'other funders declined to take that risk', thus raising the spectre that the case may not have been instituted at all.

[245] Separately, some of these figures and points are also cited in: Neil Purslow, 'Litigation funding cap can only help defendants with deep pockets' (*The Times*, 14 Mar 2024).

Plus:

The Post Office's legal costs were also the subject of evidence before the Select Committee:

- c.£43 million was incurred by the Post Office for its legal and professional consultancy fees connected with the litigation, and for other costs indirectly related to the litigation;
- This figure was almost twice what the funders spent on funding the GLO litigation;
- Consequently, the Post Office spent £42M in damages, and then an additional £58M in costs (£43M of its own costs, and £15M of that had to be paid to Mr Bates for his costs, which in turn had been paid by the funder).

The case has been used by both opponents of litigation funding ('look how little the postmasters actually received in their hands') and the funders ('the case simply could not have been brought without the support of litigation funding'). For present purposes, however, it is important to recognise that, given that litigation funders must cover disbursements and legal costs *within* their success fee, the funder's return-on-investment (i.e., profit) made on the case can be much lower than the actual success fee. In fact, any return on the funder's investment may be non-existent, a matter which is not widely reported nor recognised in the media or in the public domain.

18. PERCENTAGE-OF-RECOVERY SUCCESS FEES

The main points:

- **Prior to *Paccar*, percentages varied according to numerous matters, from likely duration to the type of case being funded;**
- **Percentage formulae were rarely, if ever, used in isolation; 'the higher of multiple or percentage' was far more usual;**
- **According to respondent funders, a percentage recovery of >50% appeared to be rare-to-non-existent, a matter primarily brought about by competition in the funding market.**

(a) The range and the fixing of the percentages

Accepting that the decision of the UKSC in *Paccar*[246] has precluded the use of percentage-of-recovery success fees being charged by funders since the delivery of its decision on 26 July 2023, the question was put to funders for the purposes of this Project: when funders were employing the percentage method of calculating its success fee, what range of percentages did the funders customarily charge in their funded cases over the course of the last five years (2019–2023-pre-*Paccar*)?

It must be noted, upfront, that where litigation funders used percentage-of-recovery success fees (pre-*Paccar*), the formula has typically been that the funder's fee is '*the greater of*' the percentage or the multiple-of-costs return. Where a financial benefit is recovered, then typically the funder will be entitled to reimbursement of its invested capital as a priority in the 'waterfall distribution' of the financial recovery,[247] and then, the success fee will be the greater of the percentage or the multiple.[248] Rarely, if ever, will a funder employ an approach of where the success fee is *only* to be calculated as a percentage-of-recovery. However, it is the percentage approach which is the specific focus of this Section.[249]

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[246] *R (on the application of Paccar Inc) v Competition Appeal Tribunal* [2023] UKSC 28.

[247] Other payments in priority in the waterfall will be any outstanding or deferred fees payable to the law firm; and any adverse or other costs which the ATE insurer has had to pay out during the course of the proceedings. See the waterfall clause precedent in: Nick Rowles-Davies, *Third Party Litigation Funding* (OUP, 2014) and the 'specimen priorities agreement' reproduced at p 243.

[248] See: the specimen LFA reproduced ibid, particularly the definition of 'contingency fee' at p 223.

[249] The multiples approach is considered, in turn, next in Section 19.

As always, the percentages charged were a nuanced matter. Several funders made the point that percentages were very fact-specific, 'always tailored to the circumstances of the dispute itself'.[250]

Further, several funders stated that the percentage method was typically mixed with multiples, 'the higher of' formula being commonly employed prior to *Paccar*.[251] One funder commented that, even a decade ago, the standard mantra was '*the greater of 3x or 30%*', but that (funding) times had changed, and so had the numbers.[252] Another funder commented that it typically used a combination of percentage and multiple-of-costs for its success fee, 'to protect against the claimant's absolute control over settling the case'.[253]

The percentages charged price for the risk that the case represents, and in that regard, the following insights were obtained from the empirical research:

Empirical feedback: in the last five years, prior to Paccar, percentages would depend upon:

- ***Quantum*** – the larger the value of the claim pleaded, the smaller the percentage – and a sliding scale was typically applied in which the percentage varied, with a higher percentage applied, the lower the financial benefit recovered, and vice versa;
- ***The likely duration of the claim*** – the longer anticipated, the higher the percentage because '*duration drives up risk*';
- ***The competition within the funding market*** – as competition has increased, percentages have dipped, particularly for claims which are perceived to be relatively low-risk with good merits and with a single or relatively few discrete issues;
- ***The pricing of finance*** – funders rely on finance, and to the extent that funders need to borrow money to service the funding of their claims, more expensive finance is inevitably priced into the percentage charged for the success fee;
- ***The type of claim*** – to give an example, and in the words of one funder: 'international treaty arbitrations are very risky, where they are conducted against sovereign states who are well-resourced and against whom enforcement of any judgment can be very difficult. These cases are far riskier than standard commercial litigation or even collective proceedings before the

[250] Per the written response of Funder #3418, dated 6 Mar 2024.
[251] Per interview with Funder #8421, dated 5 Mar 2024.
[252] Ibid.
[253] Written response of Funder #1938, dated 28 Feb 2024.

CAT, and hence, the percentage charged for international treaty arbitrations will reflect that increased risk.'
Empirical feedback – percentage success fees – caps typically applied:[254]
Funder #6239 – **20–40%** *Funder #2613* – **10–50%** *Funder #1938* – **15–35%**

Again, to reiterate, own-side costs and disbursements are included within those caps. The success fee represents the total amount recovered from the financial benefit recovered (by contrast with the DBA regime[255]).

(b) The maximum cap

None of the respondent Funders who participated in this Project had charged more than 50% of the financial benefit recovered (or for any part of it on a sliding scale) during the 5-year period since 2019, where a percentage-of-recovery method of calculating the success fee had been used. However, several points might be made in this respect:

i. It would actually **not** be champertous in English law for a funder to charge greater than 50% of the financial benefit recovered as its success fee. That has been judicially confirmed (55% in *Latreefers* (where the figure was acceptably higher, because the funder had a pre-existing interest in the subject matter of the dispute which it was entitled to seek to recoup);[256] and 75% in *Golden Eye (Intl) Ltd v Telefonica UK Ltd* (described as a 'handsome share of the proceeds')[257] (a point discussed further in academic literature[258]);

[254] Several funders surveyed did not provide the range of percentages charged in their funded cases over the past five years, citing commercially sensitive information. Note that the percentage cap is, in many cases, charged *in addition to* the return of the capital invested by the funder.
[255] See the earlier discussion in Section 17(b) of the Report.
[256] [2000] EWCA Civ 36, [63].
[257] [2012] EWHC 723 (Ch) [99].
[258] Mulheron and Cashman, 'Third Party Funding of Litigation: A Changing Landscape' (2008) 27 *CJQ* 312, 334–40; and Mulheron, 'England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments' (2014) 73 *Cambridge LJ* 570, 582–85.

ii. The point was made by some funders during this Project that competition in the funding market meant that setting percentage-of-recovery success fees of greater than 50% was somewhat unrealistic commercially. For that relatively small batch of cases for which litigation funding is suitable, unrealistic pricing of risk is likely to mean that the case will go to a competitor;

iii. Where a multiple-of-costs method of calculating the success fee is used, then it is perfectly possible that the ultimate success fee via that method may exceed 50% of the financial benefit recovered by the funded client – this is another reason as to why the ultimate result of *Paccar*, which was to ban the use of percentage-of-recovery success fees, has not always been to the client's benefit;

iv. Recently, publicity has been given to recent attempts by Florida law-makers to regulate litigation funding in that state so as to impose a 50% cap, thereby ensuring that the funder cannot 'recover more of the proceeds of a case than the litigant';[259]

v. Some commentators involved in English litigation funding have also advocated for a 50% cap 'to ensure that the primary beneficiary of litigation funding is justice itself, not profit';[260]

vi. By way of analogy, a cap of 50% has applied to commercial matters under the DBA regime, in respect of the payment permitted out of the financial benefit recovered, since 2013;[261]

vii. <u>However</u>, there were strong views expressed by some funders during the course of this Project that, should regulation of litigation funding ensue in the future, a maximum cap should <u>not</u> apply. Rather, the cap should be left to case-by-case negotiation within the market – just as has occurred in Singapore[262] and Hong Kong,[263] both applying principally in respect of arbitration proceedings but

[259] Discussed in: J Hyde, 'Litigation funding: Florida lawmakers back landmark regulation' (*LSG*, 12 Feb 2024).

[260] Gabriel Olearnik, 'Navigable lights: the future of litigation funding (Partner, Head of Special Situations, LitFin Services, speech published 23 Feb 2024), available at: https://www.linkedin.com/pulse/navigable-lights-future-litigation-funding-gabriel-olearnik-vu1ef?utm_source=share&utm_medium=member_ios&utm_campaign=share_via.

[261] Per: DBA Regulations 2013, Reg 4(3).

[262] The Civil Law (Amendment) Act 2017 (No 2 of 2017), in force 1 Mar 2017, was passed to permit litigation funding in international arbitration seated in Singapore and in related court (including enforcement) and mediation proceedings. Discussed in: Mulheron, *The Modern Doctrines of Champerty and Maintenance* (OUP, 2023, 70–71.

[263] Per: the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Act 2017, in force 1 Feb 2019, and discussed ibid, 63–64.

where neither Code[264] nor Guidelines,[265] respectively, stipulate for any cap. The arguments against a cap which were espoused during the Project can be summarized as follows:

Matters relevant to a cap (according to funders interviewed for this Project):

- Any cap will narrow (reduce) the breadth of cases that can be funded and claimants' access to capital; cases that would have been funded within the cap would be unaffected and cases that fall outside the cap would simply not be funded going forwards – as funders have no other levers (such as changing their input costs) in order to price within a cap;

- The cost of funding for a case (whether a multiple or percentage or combination) is determined by a number of factors: the size of the budget, the expected risk of the case, the expected duration and the size of the claim (including the range of outcomes on quantum). A competitive funding market is best placed to assess and price the risk profile of a case. The market is also better placed to determine how that return is structured as between multiple returns, percentage returns or a combination;

- Pricing of cases is not static and determined only at the outset – case budgets frequently upsize and damages expectations also frequently fall during the case – so what could be within a cap at the start of a case could end up exceeding it – which would lead funders to cease funding. Funders would need to be more cautious at the outset to avoid this risk;

- Any cap on returns would apply to pricing on an individual case but, for funders, pricing is affected by both the risk / reward on that case but also their assumptions about risk across a portfolio as well as their costs of providing funding more generally (funder overhead / management fees etc and their cost of capital). Funders need to make up for capital on lost cases from the winning cases and what may look like a high return on an individual case may be reasonable when considering risk and losses across a portfolio and the need to deliver net returns to investors. Caps are unlikely to take this into account.

[264] See: *Code of Practice for Third Party Funding of Arbitration* (published 7 Dec 2018), available at: https://www.gld.gov.hk/egazette/pdf/20182249/egn201822499048.pdf.

[265] *Guidelines for Third Party Funders* (published 18 May 2017), available at: https://siarb.org.sg/images/SIArb-TPF-Guidelines-2017_final18-May-2017.pdf.

One participant funder[266] considered that the only circumstance in which a cap would work would be if the court was permitted a discretion to order that a losing defendant should pay the costs of the funder (a point which is discussed elsewhere in this Report[267]). Otherwise, '*caps mean that a funder cannot go beyond a certain budget of capital spent, but the problem is that plans change as risk changes, and funders must price that risk prospectively, without fully knowing of those risks at the outset*.'

[266] Funder #0153, per interview dated 26 Mar 2024.
[267] See: Section 21.

19. MULTIPLE-OF-COSTS SUCCESS FEES

The main points:

- **The multiples approach has become far more significant post-*Paccar*, albeit that there is residual (and presently litigated) uncertainty as to whether even multiples fall within the definition of a DBA;**
- **As a result of the increased risk in the funding environment, the multiple has increased from the previous norm (c. 3x) to anything up to c. 14x;**
- **The base of the multiples approach is often the 'costs incurred', but there are variations to that base which may increase the success fee for the funder substantially.**

Post-*Paccar*, there has been a widespread re-negotiation of LFAs, to ensure that the funder's success fee is calculated on a multiple-of-costs basis, to seek to avoid the LFA falling into the definition of a DBA under s 58AA(3)(a) of the CLSA 1990. Even this has been challenged by some defendants.[268] On that point, the Competition Appeal Tribunal has ruled that multiples *cannot* be DBAs within the meaning of 'payment' in section 58AA(3)(a)(ii) of the CLSA 1990.[269] Should legislation to reverse *Paccar* be passed, then this point will be rendered moot. At the time of writing, leave to appeal on the point has been granted by the CAT,[270] and a reversal Bill has been introduced to Parliament.[271]

In any event, with a greater focus upon multiples post-*Paccar*, two questions were posed to funders via Questionnaire for the purposes of this Project: what is the base of the multiplier, and what multipliers typically apply under LFAs. These are taken in turn below.

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[268] In other words, it has been argued that a multiple can satisfy this definition, that 'the amount of that payment is to be determined by reference to the amount of the financial benefit obtained'.

[269] *Commercial and Interregional Card Claims I Ltd v Mastercard Inc* [2024] CAT 3; *Kent v Apple Inc* [2024] CAT 5. and *Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd* [2023] CAT 73. This was also the position put by the author in: 'The Funding of the United Kingdom's Class Action at a Cross-Roads' (2023) *King's LJ* (https://doi.org/10.1080/09615768.2022.2161350), and cited in: *Therium Litigation Funding v Bugsby Property LLC* [2023] EWHC 2627 (Comm) [43], [49] (Jacobs J), albeit that the point was not argued nor decided at that hearing.

[270] Noted and discussed, e.g., in: Maura McIntosh *et al*, 'Competition Appeal Tribunal finds funding agreement based on multiple not a DBA, despite express cap by reference to proceeds' (*Herbert Smith Freehills Litigation Notes*, 18 Jan 2024).

[271] Per: the Litigaton Funding Agreements (Enforceability) Bill, introduced to the HL on 19 Mar 2024.

But before that, three points are worth noting re the multiple formula:

- The same factors which drive up the percentage success fee, as outlined in the previous Section, apply to the setting of the multiplier (e.g., duration of the funded case, quantum of the claim, the merits of the claim, etc);

- The multiple applied can vary *within* a funded case, depending upon the duration of the case, the stage of the case at which it is completed, or other circumstances – just as applied with respect to the percentage-of-recovery charged;

- The multiple approach particularly suits high-risk cases where the amount recovered may be much less than the amount claimed – for such cases, the success fee 'is tied to the spend', and hence, the amount of spend is the same, whether the risky claim (on the merits) turned out well or not; whereas the percentage method is often more suited to less risky claims, because the claim value may turn out to be high, closer to the amount claimed – and in that case, the success 'is tied to the recovery'. As one funder put it, '*the multiple approach protects better against the downside of a low recovery in a risky case because it is tied to the spend*'.[272]

(a) A multiple of what?

The definition of 'costs' that the funder uses as the base for the multiple type of success fee differs quite markedly in the marketplace. There are two main options – **EITHER**

- The amount of capital committed to the funded case at the outset – which essentially uses a proactive measure of the base, what is the amount of capital being set aside to fund the case; **OR**

- The costs actually incurred or spent (sometimes called 'capital deployed') in the funding of the case – this is a 'looking back' measure of what it actually cost to fund the case to completion.

There is another option too, noted in the empirical feedback below.

[272] Interview with Funder #8421, dated 5 Mar 2024.

The amount of the success fee can vary quite a lot, depending upon the base used. The capital committed (i.e., the capital made available for the case) may be twice what was actually incurred by way of costs (especially if the funded case settles early in the piece) – and hence, if the base is the capital committed, the success fee for the funder will be much higher than it would have been, had 'costs incurred'[273] been the base used.

Empirical feedback – the 'base' used for the multiple:
Funder #6239 – costs incurred or the funding committed to the case, it varies according to the case; *Funder #2613* – costs incurred; *Funder #3418* – costs incurred; *Funder #8421* – costs incurred; *Funder #2288* – it depends upon the case, and its risk profile, duration and budget; sometimes it is a multiple of capital committed (starting low and increasing as the case progresses), and on other occasions we will use a multiple of capital drawn; *Funder #1938* – we use a staged approach which, in practice, results in close to costs incurred.

The formula can be somewhat more sophisticated than that too. For example, a funder may use a formula whereby the multiple is an aggregate of both the committed capital and the costs incurred (say, the funder's return may be stipulated as '*the aggregate of 0.5x the committed capital and 2.5x the drawn capital*'). Such flexibility may be useful to tailor the funder's return-of-investment to the risk profile of the case (say, the anticipated length of the proceedings), and the way (and the timings at which) that the funding will be drawn down.[274]

(b) The multiple itself

The terms of funding have changed enormously post-*Paccar*. The need to re-negotiate; the uncertainty as to whether historical funding agreements will be challenged; the lack of clarity as to whether multiples themselves fall within the definition of a DBA under s 58AA(3); the uncertainty as to whether, and if so when, the decision may be reversed by statute, have all created an environment of heightened risk. To

[273] Also called the 'capital deployed' or the 'capital drawn'.

[274] This example of the varied possibilities, as practised by some funders, was helpfully explained by one participant funder via follow-up correspondence to previous interview.

reiterate, the multiple has been the go-to 'success fee formula' post-*Paccar*, and it is inevitable that the multiples have risen to reflect that increased risk. Increasing the multiple has also been necessary, post-*Paccar*, in order to compensate for the absence of a percentage-based return that would offer more upside if the case was a very successful one. In light of all of this, the 'old standard of 3x' is no longer the norm.

Empirical feedback – the 'multiple' used:
Funder #6239 – **1–14**, depending upon the case; *Funder #2613* – **2.5–5**, depending upon the case; *Funder #2288* – **0.5–4,** 'it is very much a function of the risk posed'; *Funder #1938* – 'a multiple of 3 would have been typical but … we now have higher multiples where we have dropped the percentage element as a result of *Paccar*'.

20. THE *PACCAR* ISSUE

The main points:

- **The *Paccar* decision held that funders undertake 'claims management services', such that their LFAs are DBAs where the success fee is calculated as a percentage of the financial benefit recovered;**
- **The government declared that it wished to reverse *Paccar* via legislation, and has introduced the Litigation Funding Agreements (Enforceability) Bill 2024 to do so;**
- **The text of the Bill provides that funders' LFAs cannot constitute DBAs, because the LFA is precluded (or carved out from) the wider set of DBAs under s 58AA(3) of the CLSA 1990.**

(a) The problem

In the recent decision in *R (on the application of Paccar Inc) v Competition Appeal Tribunal*,[275] the UKSC held that a litigation funder's LFA entered into with a funded client, and where the success fee paid to the funder is determined by reference to the amount of damages recovered in the funded litigation, is a DBA within the meaning of that term in section 58AA of the CLSA 1990. It did so by concluding, by majority, that funders offer 'claims management services' within the meaning of that term in section 4(2) and (3) of the Compensation Act 2006, now enacted as section 419A of FSMA 2000. The reasoning of that decision has been explored elsewhere,[276] and will not be repeated here.

DBAs have an array of legislatively-prescribed pre-requisites by virtue of section 58AA and its subordinate legislation, the Damages-based Agreement Regulations 2013[277] (collectively, the DBA legislation'). These include caps on the success fee (legislatively called the 'payment'), what must be included within (or netted off against) the success fee, and to what sums the funder may be entitled over and above the success fee. The requirements are onerous and complicated,[278] and of the DBA Regulations,

[275] [2023] UKSC 28.

[276] Mulheron, 'Unpacking *Paccar*: Statutory Interpretation and Litigation Funding' (2024) *Cambridge LJ* [online publication 20 Mar 2024, hard copy to follow], from which some of the text in this Section is drawn.

[277] SI 609/2013, in force 1 Apr 2013.

[278] The author examined the complexities of this legislation in detail, as chair and principal author of the Civil Justice Council (CJC) Working Party's report: *The Damages-based Agreements Reform Project: Drafting and Policy Issues* (Aug 2015); and subsequently revisited the complexities with a view to reform, as government-appointed reviewer (with Nicholas Bacon KC) of the DBA Regulations 2013, leading to the report and redrafting exercise

it has been judicially said that 'nobody can pretend that [they] represent the draftsman's finest hour'.[279] Most LFAs entered into up and down the country have not complied with the requirements of the DBA legislation, and nor did the LFAs at issue in *Paccar* (that much was acknowledged by the litigants[280]), because funders and their funded clients did not realise that they had to so comply. From Courts of Appeal to law reform bodies, from Members of Parliament to litigants and their funders, stakeholders within the litigation sphere in the United Kingdom had proceeded for years on the basis that LFAs were not DBAs. That position has now changed in the light of *Paccar*. Where LFAs which are based upon a percentage-of-recovery success fee do not comply with the DBA legislative requirements, they are now unenforceable funding agreements.

As a result, litigation funders have necessarily pivoted to multiple-of-costs formulae for success fees. Those are not without their problems either, for even those are being contended to constitute DBAs, as defined by the terms of s 58AA(3) of the CLSA 1990.

(b) Its solution (at the time of writing)

This *Paccar* backdrop is important to the issues which this Report must necessarily canvass. At the time of writing, the government has announced that it wishes to reverse *Paccar* so as to re-establish the pre-*Paccar* landscape for funders. This announcement occurred on 4 March 2024:

Press Release: New law to make justice more accessible for innocent people wronged by powerful companies: by the Rt Hon Alex Chalk KC MP
The Lord Chancellor, Alex Chalk, will introduce a new law to make it easier for members of the public to secure the financial backing of third parties when launching complex claims against moneyed corporations with sizeable legal teams which they could otherwise ill-afford. Today's news will restore the position that existed before the Supreme Court's ruling last year, which made many litigation funding agreements unenforceable. As a result, cases can continue being funded.

published as: *The 2019 DBA Reform Project (Explanatory Memorandum and Draft Legislation)*, available at: https://www.qmul.ac.uk/law/research/research-impact/dbarp/.

279 *Zuberi v Lexlaw Ltd* [2021] EWCA Civ 16, [74] (Coulson LJ).

280 In *Paccar*, the funders' remuneration was calculated in both actions by reference to a share of the damages ultimately recovered in the litigation, and each LFA would be unenforceable if it truly fell within the definition of a DBA in section 58AA(3): *Paccar Inc v Road Haulage Assn Ltd* [2021] EWCA Civ 299, [11], [19], aff'd: [2023] UKSC 28, [29].

The new legislation makes it easier for members of the public to secure funding for their legal fights against powerful corporations – such as those caught up in the Horizon scandal.

This move has been called for by people who have needed third-party litigation funding in the past, including former sub-postmaster Alan Bates, who described his case as a David vs Goliath. The post-masters' claim was only possible due to the backing of a litigation funder.

Lord Chancellor, Alex Chalk, said:
"It's crucial victims can access justice – but it can feel like a David and Goliath battle when they're facing powerful corporations with deep pockets. This important change will mean more victims can secure vital third party funding to level the playing field and support their fight for justice. The sub-postmasters were able to secure third party funding in their legal action against the Post Office. Now others will too."

The government is also considering options for a wider review of the sector and how third-party litigation funding is carried out. This could consider whether there is a need for increased regulation or safeguards for people bringing claims to court, particularly given the growth of the litigation funding sector over the past decade. Further details will be set out in due course.

On 19 March 2024, Litigation Funding Agreements (Enforceability) Bill 2024[281] was introduced to the Lords for its First Reading. Its focus is to remove a funder's LFA from the ambit of DBAs under s 58AA(3)(a). That is, it is accepted that *Paccar* states that a funder offers claims management services; but their funding agreements will not be able to be considered as DBAs. The text of the Bill is reproduced at ***Appendix C***. It is expected that the Bill's Second Reading will occur after the Easter recess.[282]

[281] Introduced to the HL, 19 Mar 2024.
[282] Per correspondence with the MOJ, 20 Mar 2024.

21. RECOVERING THE FUNDER'S COSTS FROM THE DEFENDANT IN A SUCCESSFUL CLAIM

This Section has implications for two of the LSB's regulatory objectives, viz: protecting and promoting the interests of consumers; and improving access to justice.

The main points:

- **A curious discrepancy between English litigation and English-seated arbitrations has arisen, in respect of the recovery of a funder's funding costs – it is barred in the former, but has been permitted in the latter;**
- **It has been suggested that law reformers should reconsider the point, to permit (rather than to compel) recoverability of a funder's funding costs in appropriate cases. To do so would ensure that the litigation funder's costs would be paid by the defendant, and would not be deducted from the funded client's financial recovery;**
- **Such an outcome (which, it is hypothesized, should be within the discretion of the court and not mandated) would both enhance the interests of the funded client (consumer or otherwise), and improve the funded client's willingness to pursue the claim at all.**

During the course of this Project, one point was mentioned frequently: that a 'curious divergence has emerged between English litigation and English-seated arbitrations, because under the former, there is no authority to support the proposition that a funder's funding costs are recoverable, whereas under the latter, those funding costs have been held to fall, potentially, within the ambit of recoverable costs under the Arbitration Act 1996, depending upon the facts and circumstances of the arbitral dispute.

As one advisor in the litigation funding market notes, *'[t]here is no obvious principled reason for this difference. From a claimant's perspective, on this basis alone, arbitration must currently be seen to have a material advantage over litigation in England*.'[283] The dichotomy has drawn practitioners'[284] and

[283] Comment made at the Brown Rudnick conference, *Third Party Litigation Funding* (Langham Hotel, 14 Mar 2024).

[284] E.g., Robin Bandar and Steven Bird, 'The landscape of litigation funding in England and Wales' (*Clyde & Co LLP*, 18 Jan 2024).

researchers'[285] attention too. The question arises as to whether the position should change under English litigation, to permit the funded client to recover the costs incurred by a funder in the pursuit of a successful claim.

(a) In litigation

Prior to the 1st April 2013, a lawyer's success fee under a CFA, and any premium payable for an ATE insurance policy which was taken out to cover adverse costs should the claimant lose, were recoverable from the defendant in the event that the claim succeeded. However, courtesy of the *Jackson Review of Litigation Costs and Funding*, the CFA success fee and any ATE insurance premium ceased to be recoverable in English litigation and arbitration. As a result, the amount of damages or settlement funds which are obtained in the hands of a funded client will be reduced by the amount of the ATE premium and by the amount of any CFA success fee. In his review of civil litigation costs, Sir Rupert Jackson never considered the separate question as to whether or not a funder's success fee should be recoverable from the defendant; and no rule of procedure deals with that type of order either.

(b) In arbitration

(i) Essar's case

In 2016, in *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd*,[286] the defendant in the arbitration, Essar Oilfields Services Limited (Essar) was held liable to pay damages to the claimant in the arbitration, Norscot Rig Management Pvt Limited (Norscot) for repudiatory breach of an operations management agreement. The arbitrator was highly critical of Essar's conduct towards Norscot, both during the currency of the agreement and also for most of the arbitration period, and made an order for indemnity costs. Essar became liable to Norscot for the total sum of around US$12m, which included US$ 4M in respect of the costs order made against Norscot.

The litigation funder, Woodsford Litigation Funding, had agreed to fund Norscot's claim in the arbitration, and advanced about £650,000. The LFA stated that the success fee to which Woodsford was

[285] Intl Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in international Arbitration* (ICC Report No 4, Apr 2018) 156–59.
[286] [2016] EWHC 2361 (Comm). The facts are taken from the judgment.

entitled, if Norscot succeeded in the arbitration, was 3x the amount advanced, or 35% of the amount recovered, whichever was the higher. It was the multiple that applied to calculate the success fee – so the amount payable by Norscot to Woodfood was about $1.94M (3 x $650,000). Having succeeded in the arbitration, Norscot sought against Essar that success fee owed to Woodsford. By the Award, the arbitrator held that Norscot was entitled to that success fee from Essar, as the costs of litigation funding which has been necessary for Norscot to incur in order to bring the arbitration to a successful conclusion. The arbitrator held that he was entitled to make this order within his discretion because litigation funding costs were 'other costs' for the purpose of s 59(1)(c) of the Arbitration Act 1996, which refers to 'legal or other costs of the parties'.

HHJ Waksman QC, sitting as a judge of the High Court, upheld the arbitrator's award which required the defendant Essar to pay the whole success fee (3x the funding provided). The award was based on the unusual facts of the case, in particular, Essar's 'reprehensible conduct going far beyond technical breaches of contract'. Essar had 'set out to cripple Norscot financially', effectively forcing Norscot to resort to third-party funding.[287]

(ii) Tenke's follow-up

The ability for a funder's success fee to be claimed from the defendant to arbitral proceedings was confirmed in 2021 in *Tenke Fungurume Mining SA v Katanga Contracting Services SAS*,[288] where the Commercial Court upheld another ICC award of funding costs, but where there was no finding that either claimant or defendant to the arbitration had behaved improperly.

Instead, what mattered in respect of claimed funding costs is whether they are 'reasonable' in two respects: whether it was reasonable for the claimant to have had recourse to this type of funding, and as to the amount of the success fee. The arbitrator held that (on the first issue) there was no need for the claimant's financial difficulties to be caused exclusively by the defendant, it was enough that it needed litigation funding to pursue the arbitration; and (on the second issue), a return of 1x claimant's costs of US$1.3m plus a variable fee of c.US$214,000 was deemed reasonable.

[287] Citing the arbitrator's reasoning at ibid, [21].
[288] [2021] EWHC 3301 (Comm).

(iii) Arbitral tactics

During the course of this Project, various funders made the point that, in the event that the existing litigation funding arrangement with the claimant is disclosed in arbitral proceedings, three applications by the defendant are 'almost certain to follow': (1) a security for costs application (on the basis that, if the claimant needs funding, then that may be viewed as evidence of impecuniosity on the part of that claimant); (2) an application for disclosure of the full terms of the LFA; and (3) an application for recusal of the arbitrator for conflict of interest (on the basis that that party may have had connections with the funder, the claimant or the claim in the past, particularly when in legal practice). It was said that such applications not only extend the duration of the claim, but add considerably to the costs of the claim.

Empirical feedback – the costs of 'scorched earth' tactics in arbitration:
Funder quoted at the Brown Rudnick conference, 14 Mar 2024 – an application (or multiple applications) for disclosure of the LFA, security for costs, and challenging the arbitrator, can be as high as £1–2M. If such applications are unsuccessful, then these costs incurred in strategic applications designed to derail the arbitration should be recoverable from the defendant.

In arbitrations, some costs orders have been made that reflect a real 'quid pro quo' as between claimant and defendant. For example, it has been reported[289] that one arbitral tribunal had granted security for costs against the claimant (to be provided by an ATE insurer), but on the condition that the defendant would reimburse the claimant for the costs of obtaining that ATE insurance for adverse costs/security for costs – including a multiple of the premium that the funder paid on behalf of the claimant for that insurance – if the case ended up succeeding. In other words, the defendant obtained its wish for security – but there was a sting in the tail, should the case against the defendant succeed.

(c) The suggestion for reform

It was suggested during the course of this Project by various participants – brokers, costs counsel, and funders[290] – that the arbitration position should be reflected in English litigation, such that the funder's

[289] Exton Advisors Roundtable, 'The recoverability of third-party funding costs in arbitration' (London, 27 Apr 2023) 5.

[290] Although this was not one of the questions contained in the Questionnaire, it arose frequently in interviews as being a contentious and topical point for discussion.

success fee should be a recoverable cost from the unsuccessful defendant. A number of caveats were mentioned that would temper such a rule change – that:

- It should be a *discretionary* power of the court when all the facts and circumstances are taken into account, rather than a mandated recovery of the success fee as had applied in respect of CFA success fees and ATE premiums prior to 1 April 2013;

- It was reasonable for the funder's success fee to be recovered in the circumstances approximate to *Essar*, where egregious conduct on the defendant's part was evident;

- early disclosure of an LFA should be a pre-requisite to successful application for an order for recovery of the funder's success fee, on the basis that the defendant has been given advance warning of its potential exposure to a costs order against it, should the claim succeed; and

- factors which may feature in the exercise of the court's discretion could include (but not be limited to): the claimant's financial position; whether that financial position has been impacted directly by the defendant's conduct; and the amount of the funder's success fee.

Implementation of this reform would (it was suggested) provide a counterpoint to the Arkin jurisprudence by which a successful defendant is entitled to seek a non-party costs order against the supportive funder; and it would curb the more egregious behaviour of defendants if it were the case that defendants knew that an '*Essar*-type order' was possible to be made against them. A rule change would also net for the funded client a considerable advantage:

> *The commercial implications of this issue may be obvious but they are also hard to overestimate – if a funded claimant is allowed to recover some or all of the funding fee from its opponent, that will mean it can retain all or more of the damages recovered. Since litigation funding is generally non-recourse, this claimant will have reaped these rewards without having taken any of the downside risk associated with its claim failing. In other words, funding in arbitration [or in litigation, if an Essar-type order was possible] becomes a win/win scenario.*[291]

[291] Exton Advisors Roundtable, 'The recoverability of third-party funding costs in arbitration' (London, 27 Apr 2023) 3.

On the obverse side of the coin, in the absence of such a discretionary rule of recovery, the consequences can be dire for the funded client:[292]

Empirical feedback – the consequences for the client of 'scorched earth' tactics in litigation:

- Under the present litigation funding regime, defendants benefit as the funded client's funding costs escalate, because the overall damages pot available to the funded clients in the event of success is 'squeezed'. This creates two problems;
- The first (in time) is that the case becomes hard to settle because the funded client isn't going to recover enough for himself, and the funder is forced to reduce its return in order to induce the funded client to accept a settlement offer (because the funded client decides whether to settle). Whilst there may still be funding available to take the case to a conclusion, as costs escalate this can have the effect of making a case impossible to settle because the funded client won't get enough on a settlement versus what they hope to get if they win at trial – the funder or law firm may think that the offer on the table is reasonable, but the funded client becomes incentivised to refuse it and swing for the fences (however improbable a better outcome may be) because their own recovery out of the financial benefit recovered is otherwise unpalatable;
- The second effect, as costs further continue to rise, is that the case reaches a stage where there is not enough likely value left in the claim to allow the funder to increase the funding budget, or at least to do so while the claimants would expect to get what they need from the claim. In effect, the marginal benefit to the clients of running the case on to a conclusion will be eaten up in the increased costs and funding costs, or worse the case will not support increased funding at all (so is forced to stop) and, in order to make the best of a bad situation, the claimants are then forced to the table to settle and forced to take a low settlement, knowing that this will be their best outcome and the outcome from fighting on will inevitably be worse;
- Both of these outcomes would be ameliorated if the defendant could be held liable for payment of the success fee, as this undue settlement pressure brought about by scorched earth tactics would cease. The funder's success fee would be on top of the damages, so that the funded client's recovery would be preserved (diminished only by irrecoverable costs). It would mean that the defendant bore the increased funding costs themselves – where the court considered that the increased costs were due to the defendant's improper or egregious conduct.

[292] These funders' views were variously expressed and summarized from either points made by panellists at the Brown Rudnick conference, 14 Mar 2024 or in the course of correspondence with the author.

PART VII

SAFEGUARDS FOR THE FUNDED PARTY

22. INDEPENDENT ADVICE

This Section has implications for some of the LSB's regulatory objectives, viz, protecting the interests of consumers, encouraging an independent, strong and effective legal profession, and promoting and maintaining adherence to professional principles.

The main points:

- **Independent advice to the funded client about the terms of the LFA is a requirement for ALF-member funders;**
- **There is a range of practice, in reality, as to the party who provides this advice to the funded client; and in most (but not all) cases, this is a disbursement which the funder (rather than the client) pays;**
- **A conflict of interest on the part of the instructed law firm or barrister – i.e., a conflict re the duty owed to their client, and to the funder – does not appear to arise in theory or practice, given that the law firm/barrister's duty is to their client, and not to the funder.**

(a) The *Code of Conduct* requirement – how it works

Under the ALF's *Code of Conduct*, a funder must ensure that the Litigant 'received independent advice on the terms of the LFA.[293] Such an obligation was already incorporated in the original Code,[294] but was bolstered by a timing requirement in the 2014 review of the Code – the advice must be received 'prior to the execution' of the LFA. This review and uptick in the requirement was a valuable step in reinforcing the anti-champerty measures which the Code implemented for funders.

The Code further provides that the obligation of ensuring independent advice 'shall be satisfied if the Funded Party confirms in writing to the Funder that the Funded Party has taken advice from the solicitor or barrister instructed in the dispute.'[295]

[293] Version 2018, cl 9.1.
[294] Version 2011, cl 7(a).
[295] Version 2018, cl 9.1.

To understand this anti-champerty factor better, a question was put to the funders who participated in this Project: who customarily provides that independent advice to the funded client; and who pays for it? There are several options from whom the advice may be provided:

- The barrister instructed in the case;
- The law firm who represents the funded client (the 'solicitor on the record');
- An independent costs counsel; or
- An independent law firm.

In reality, who provides and who pays is quite a mixed bag in the funding market:

Empirical feedback – independent advice – who provides and who pays:
Funder #1938 – we have seen this advice provided by the law firm acting on the case; or by a costs barrister; or by another law firm. We have not seen the instructed barrister provide that advice, in our experience. The funder pays; *Funder #8421* – either the instructed barrister or the instructed law firm; or an independent law firm. The funder pays; *Funder #3418* – the law firm who represented the funded client. That funded client pays for that advice; *Funder #2288* – costs counsel may be used for group actions or large commercial matters; otherwise, the law firm instructed in the dispute (and sometimes the litigation funding broker too) advises the client. The funder pays in all cases; *Funder #2613* – the law firm who represented the funded client is the usual course; although on occasion, the client has opted to seek that advice from an independent law firm. The funder pays; *Funder #6239* – an independent costs counsel. The funder pays.

In relation to any suggestion that there is an inherent conflict of interest in that advice being provided by the instructed barrister or law firm, it is suggested that:

- The lawyer's client is the funded client, and never the funder – and the advice must reflect that primary obligation on the part of the lawyer, thereby precluding a conflict of interest (and in the

experience of one funder interviewed for the purposes of this Project, the funded client insisted on changes to some of the contractual provisions of the LFA upon receiving that advice);

- In practice, funded clients may benefit from advice from their own lawyers in respect of the prospective LFA because they are, simultaneously, seeking to assess whether there are any other options for that funding, i.e,. from another funder, or via self-funding, and how the terms of those different funding avenues will compare;

- Finally, some funders commented that their paying for the independent advice was an 'access to justice' issue, and part-and-parcel of the ethos of funding the funded client's disbursements 'from beginning to end'.

(b) Group litigation orders – how does it work there?

As explained previously in this Report,[296] the GLO regime depends upon an opt-in arrangement. Each group member must formally consent to his or her participation in the proceedings. Moreover, in order to establish any entitlement to recovery of a 'success fee', the funder must enter into individual LFAs which each group member; there is no substantive law which supports an aggregate assessment of damage across the group, or the entitlement of the litigation funder to take a 'chunk' of that aggregate assessment. The GLO regime is a world removed from the collective proceedings regime in the CAT, which facilitates both of those things.

Hence, the GLO regime's operation immediately raises the question – how well are those group members advised in respect of their individual LFAs? How does it work in practice? Feedback was sought from a participant funder who has been involved in GLOs, regarding their experience by way of example:

[296] See: Section 4, 'The role of litigation funding in the collective actions space'.

Empirical feedback – independent advice for GLO participants:

- In one GLO case which we funded, as well as preparing the LFAs between us as funder and the group members, the law firm representing the group members prepared explanatory materials with FAQs and worked examples (i.e., various supplementary materials) to advise the group members (the law firm's clients) on what they were signing;
- The law firm had the LFA and the supplementary materials reviewed by specialist KC counsel, who customarily advises on solicitors' regulatory matters, to ensure that the law firm had complied properly with their ethical duties, especially in circumstances where clients are signing up remotely, as is necessary in a large scale group action;
- The law firms will do the signing-up and advising of the group member clients; and in our experience, those law firms advise their clients of the funding options, and of the terms of the LFA, carefully. If proper advice is not being given (and, to reiterate, that is not our experience) then that would a matter for the SRA.

(c) Non-ALF members

In response to a question as to whether or not non-ALF funders ensure that their funded clients obtain independent advice as to the terms of the LFA, some interesting observations were provided:

Empirical feedback – independent advice – from law firms:

- the non-ALF funders with whom we deal usually adhere to this *Code of Conduct* requirement, as it is seen as 'best practice', and is useful to the funded client;
- independent advice is a recognised non-champerty measure, and all funders, whether or not members of the ALF, have an interest in walking on 'the right side of the line'.

(d) Comparison with the DBA framework

Ironically, the requirement under the ALF's *Code of Conduct* for independent advice to the funded client accords precisely with what Sir Rupert Jackson recommended before a client could enter into a DBA with a lawyer (i.e. 'no contingency fee agreement should be valid unless it is countersigned by an independent

solicitor, who certifies that he or she has advised the client about the terms of that agreement'[297]). However, the government of the day ultimately declined to impose that requirement for the DBA regime, considering such a measure to be unnecessary and costly.[298]

In the experience of the litigation funding market, the advice appears to serve a valuable purpose in informing the funded client of the terms of the LFA (and whether better terms are available, particularly via self-funding, where appropriate); and that the cost is rarely imposed upon the funded client. Hence, the government's concerns about imposing the requirement under the DBA regime do not appear to have been borne out in the litigation funding market.

[297] *Review of Civil Costs and Funding: Final Report* (Dec 2009), ch. 12, [4.1], and Recommendation [5.1(ii)].

[298] MOJ, *Reforming Civil Litigation Funding and Costs in England and Wales: Implementation of Lord Justice Jackson's Recommendations: The Government Response* (Cm. 8041, Mar 2011), para 13.

23. A FUNDER'S TERMINATION OF THE FUNDING AGREEMENT

This Section has implications for some of the LSB's regulatory objectives, viz, protecting the interests of consumers, protecting access to justice, and promoting and maintaining adherence to professional principles.

The main points:

- **There are three grounds stipulated for the termination of a litigation funding agreement by virtue of the ALF's *Code of Conduct*, relevant to: merits; viability; or material breach;**
- **Rarely do the LFAs omit any of these grounds at the request of the funded client; and funders are particularly careful not to add any further grounds to their LFA;**
- **Termination is not a favoured option for funders, due to the likely loss of their investment (unless in the case of material breach);**
- **Dispute resolution procedures are mandated in the event that the funder wishes to terminate, which appear to be working well in practice.**

(a) The grounds specified under the *Code of Conduct*

The contractual bases upon which funding can lawfully be withdrawn by the funder are inevitably controversial, for to do so will inevitably hamper (and perhaps even stultify) the funded client's ability to prosecute its claim. It is important that funders cannot cease funding in circumstances which would be contrary to the funded client's interests or on unreasonable grounds, and that '[t]he precise definition of proper grounds for withdrawal will require some careful drafting'.

The ALF's *Code of Conduct* provides for three grounds of termination: that the funder[299]:

- ***Merits***: 'reasonably ceases to be satisfied about the merits of the dispute';
- ***Viability***: 'reasonably believes that the dispute is no longer commercially viable'; or
- ***Material breach***: 'reasonably believes that there has been a material breach of the LFA by the funded party'.

[299] Version 2018, cl 11.2.

There is (deliberately) no discretionary right on the part of a funder to deviate from these grounds of termination in the LFA. The funder must remain liable for all funding obligations accrued to the termination date, unless the ground of material breach applies.[300]

It was crucial that the *Code of Conduct*'s earlier incarnations provided for non-discretionary and finite grounds of termination to address some significant concerns raised during the Jackson review, and that philosophy had continued into the 2018 Code (always allowing for the fact that it is always open to the funder and the funded client to agree, contractually, that one or more of the Code's grounds of termination should not apply to their particular circumstances).

Case law application:

The first ground of termination – re reduced merits – was in dispute in the pre-Code case of *Harcus Sinclair (a firm) v Buttonwood Legal Capital Ltd*.[301] Funder Buttonwood Legal Capital (Buttonwood) was permitted to terminate under the LFA if, 'in the reasonable opinion of the funder, the [litigant's] prospects of success in proceedings are 60% or less'.

Buttonwood had agreed to provide substantial sums to fund the litigation, but subsequently formed the view that the chances of success of the claim did not exceed 60% and gave notice terminating the LFA. The funded client was obliged, under the LFA, to obtain a written advice from its legal representatives that its prospects of success exceeded 60% and, whilst the funded client had provided a QC's opinion to that effect, the opinion was highly qualified (i.e. 'very much a preliminary view'). No further opinion as to prospects was ever provided, but the funded client's solicitors repeatedly stated that the chances of success exceeded 75%. Buttonwood disagreed. The funded client contended that Buttonwood's opinion on the prospects of success was unreasonable, was not based upon all the relevant evidence, was formed just before the date when security for costs had to be provided by the funder, and, in all the circumstances, was unreasonable. However, the opinion was held to be reasonable and, hence, the LFA was effectively terminated.

The decision confirmed that, where the funder has serious doubts about the merits of the funded action and wishes to terminate, its assessment of the prospects of success is 'a purely substantive question, to be answered by an objective assessment of the available evidence' and that 'it matters not by what route or process it was reached; the result is all'.[302] A 'reasonable' assessment did not include any obligation on Buttonwood's part to consult the funded client. Any possible gaps in the evidence considered by the funder or the pressure to form the opinion timeously do not negate that 'reasonableness'. Only the verdict itself mattered.

[300] Version 2018, cl 13.1.
[301] [2013] EWHC 1193 (Ch).
[302] Ibid, [43].

(b) The 'real-life' termination clauses in modern litigation funding agreements

For the purposes of this Project, and given the importance of being able to withdraw from a funded case should the need arise, funders were asked two questions:

(1) whether their LFAs customarily include all three grounds of termination provided for in the Code (and in what form):

The question sought to address whether funded clients have exercised contractual 'clout' to have any of the grounds of termination deleted from the funder's particular LFA (as has occurred previously). The question was also seeking to address any variation in the form of wording in which these three grounds of termination are expressed.

Empirical feedback – grounds of termination:
Most funders – their LFA include all three Code-stipulated grounds as grounds of termination; *Funder #2613* – a material adverse effects (MAE) clause was used by this funder to cover the grounds of termination – such a clause typically permits one party (the funder, in this scenario) who extends a financial facility to another (the funded client, in this scenario), to terminate the facility if there was an adverse change in the funded client's position or circumstances – in this funder's termination clause, the grounds are divided between 'termination for breach', and 'termination for no breach'.

(2) whether, in light of their experience, any ***other*** reasons for termination would be fair and reasonable to include as valid grounds for terminating the funding of a dispute:

Given that there is no discretionary right to terminate under the Code, the question necessarily arises as to whether any other grounds should be stipulated, which are reasonable and relevant to the modern-day funding landscape. In response to this question, it was noted by one funder that the phrase, 'material breach', covers a great deal of conduct on the funded party's part (including, say, ending the proceedings without advice from its lawyers, or cancelling the ATE policy, or committing some sort of misrepresentation in the

funding information).[303] Another funder agreed: '*[t]he three grounds cover most eventualities*'.[304] However, some funders considered that extra grounds for termination would be desirable to reflect practice 'at the coal-face'.

Empirical feedback – any other desirable grounds for termination?
Funder #6239 – a right to terminate should arise in the event that there is **adverse comment by the court at a preliminary stage about merits or about substantial procedural difficulties** (at, say, the certification of collective proceedings, or at a strike-out hearing); *Funder #3418* – the **insolvency** of the funded party should be a reasonable trigger for termination; *Funder #2613* – where the client **stops acting on reasonable advice from the client's lawyer**, or where the client cannot or will not provide instructions to their lawyer (e.g., the client has disappeared), then that could usefully be added to the grounds (to whatever extent that these matters do not already fall within 'material breach').

One funder noted that any extra grounds for termination should be an objectively-determined event, rather than a decision which is solely within the funder's discretionary judgment.

(c) Dispute resolution measures

Two consequences were noted to be of great importance in respect of termination:

(i) The loss of investment

Obviously, if a funder is seeking to terminate the funded case for one of the three Code-stipulated grounds, something has gone very wrong with the case. And pursuant to the Code, the funder must remain liable for all funding obligations accrued to the termination date, 'unless the termination is due to a material breach' of the LFA by the funded client.[305]

[303] Funder #2288, interview dated 18 Mar 2024.
[304] Funder #1938, written response.
[305] Version 2018, cl 13.1.

Hence, one funder[306] made the point that, at that point, a funder will be reluctant to terminate because that was likely to lead to the complete loss of the investment (the funding already provided). Rather, a funder would prefer to negotiate a way in which they can '*protect their investment and get the case to the best outcome possible*.' In that respect, the interests of the funded client and the funder are aligned. However, the real (and realistic) problem in this scenario is that the funder cannot exercise control over the proceedings itself '*where the law firm or the client may no longer be playing their role properly. The courts have said that this [absence of control] can be addressed contractually post-judgment, but we have not seen it done pre-judgment, and the Code would not permit it*.'[307] (Notably, as English common law presently stands, a funder who is concerned about circumstances which could entitle it to terminate the LFA cannot have the funded client's claim assigned to it in order to prosecute that claim to completion.)[308]

(ii) Referral to a KC

Where there is a dispute between funder and funded client as to whether the LFA can be terminated, the ALF's *Code of Conduct* requires[309] a funder's LFA to provide that a binding opinion will be obtained from a pre-agreed KC, instructed jointly or by the Chairperson of the Bar Council – and the internal processes of the funder must adhere to that. This dispute resolution procedure is a safeguard for the client where the funder is seeking to rely upon one of the three Code-stipulated grounds.

For the purposes of this Project, funders were asked whether they had identified any difficulty which had arisen in this aspect of the Code's operation. One funder gave feedback as to their experience of this process:

Empirical feedback – dispute resolution re termination:
Funder #2613 – we have been involved in two disputes re termination in 17 years: ■ In dispute #1, we wished to terminate the LFA; the binding opinion of the QC was that our reliance on a ground of termination was incorrect; therefore, we funded the case to conclusion; and the case lost;

[306] Funder #2613, by interview dated 22 Feb 2024.
[307] As explained by Funder #1938 in written response. For example, an assignment of the bare cause of action is not permitted from funded client to funder as assignee.
[308] As analysed in detail in: Mulheron, *The Modern Doctrines of Champerty and Maintenance* (OUP, 2023), Pt III.
[309] Version 2018, cl 13.2.

- In dispute #2 – we wished to terminate the LFA; the KC's binding opinion confirmed our grounds for termination, and the claim was terminated.

In our experience, if we signify a wish to terminate, most funded clients recognise the need to do so, as they accept that, whether because of substantive law merits or because of what has arisen in the evidence or disclosure, their case is fatally flawed.

24. NOT TAKING OVER CONTROL OF THE PROCEEDINGS

This Section has implications for two of the LSB's regulatory objectives, viz, protecting the interests of consumers, and promoting and maintaining adherence to professional principles.

The main points:

- **It is not control by the funder over aspects of the funded case which is prohibited per se by English case law; it is *improper* control which is champertous, as 'undermining the purity of justice or corrupting public justice';**
- **Accordingly, the ALF's *Code of Conduct* provides that the funded client's legal team must not cede control to the funder, but does not prohibit control *per se*;**
- **The due diligence enquiries customarily conducted by a funder may have significant impact upon the funded case, but do not in any way represent any improper control of the funded case by the funder;**
- **Furthermore, the LFA between funder and funded client typically provides that the funded client must follow the legal advice of its own lawyers at all times, thus reducing or eliminating any risk of the funder assuming control of the proceedings.**

(a) The *Code of Conduct* requirement

It is an important anti-champerty factor in English law that there should be no improper control by the funder of the funded case.[310] At essence, the lawyer's client is, and always remains, the litigant, and the funder must not 'monopolise' the litigation.[311]

The ALF's *Code of Conduct* has embodied this anti-champerty factor, in that the funder must ensure that it will not 'seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder'.[312]

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[310] Discussed in: Mulheron, *The Modern Doctrines of Champerty and Maintenance* (OUP, 2023) 118–20.

[311] See numerous comments to this effect, e.g.: *Davey v Money* [2019] EWHC 997 (Ch) [76], [78]; *Akhmedova v Akhmedov* [2020] EWHC 1526 (Fam) [36]; *Dymocks Franchise Systems (NSW) Ltd v Todd* [2004] 1 WLR 2807 (PC) 2815; *Sibthorpe v Southwark LBC* [2011] 1 WLR 2111 (CA) [35]–[36].

[312] Version 2018, cl 9.3.

(b) The extent of permissible engagement – judicially and contractually

English case law warns against overstating the issue, in that a certain level of 'control' ***is*** permissible, according to leading cases arising in litigation funding:

English case law permitting control:

Giles v Thompson[313] – the fact that the lawyer who conducted the proceeding was chosen by the Funder and not by the Litigant himself does not, of itself, constitute a wrongful assumption of control

Re Valetta Trust[314] – it is permissible that the funder be entitled 'to be informed of the progress of the proceedings', and where the Litigant agreed to conduct the litigation 'in accordance with the reasonable advice of its lawyers'

Arkin v Borchard Lines Ltd[315] – being informed of progress is acceptable, provided that the funder does not 'take decisions as to the conduct of the [funded client's] case'

R (Factortame) v Sec of State for Transport (No 8)[316] – as a 'check and balance' against improper control by a funder, independent advice should be forthcoming from experienced and reputable advisers to the Litigant throughout the litigation, so as to enable him to make properly informed decisions about how the proceedings should be conducted

Akhmedova v Akhmedov (Litigation Funding) (Rev 1)[317] – 'Burford's mere control would not - of itself - suffice to engage the law of champerty. A funder of litigation is not forbidden from having rights of control but is forbidden from having a degree of control which would be likely to undermine or corrupt the process of justice' – albeit that, in this case where the Wife's rights to enforce remedies against the opponent were assigned to Burford, this was accepted to be the position: 'the Wife retains sole control over the litigation unless and until she defaults in paying Burford Capital. The Wife's solicitor with conduct of these proceedings, Mr Riem, has confirmed that the Wife rather than Burford Capital decides what steps to take and gives instructions to the lawyers acting for her. Whilst he concedes that Burford Capital is consulted, given its role as litigation funder, Mr Riem confirmed that, in any discussions with Burford Capital, he did not waive the Wife's right to privilege and that Burford Capital did not control the proceedings: "In my dealings with Burford, they have never sought to exercise control over the litigation but, to the contrary, have always made clear that it is for [the Wife] to decide what steps to take".'

Excalibur Ventures LLC v Texas Keystone Inc[318] – 'What the judge characterised as "rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals" is what is to be expected of a responsible funder … and cannot of itself be champertous. … rather than

[313] [1994] 1 AC 142 (HL).
[314] [2011] JRC 227.
[315] [2005] EWCA Civ 655.
[316] [2003] QB 381 (CA) [27], [87]–[89].
[317] [2020] EWHC 1526 (Fam), [60].
[318] [2016] EWCA Civ 1144, [31].

> interfering with the due administration of justice, if anything such activities promote the due administration of justice. For the avoidance of doubt I should mention that on-going review of the progress of litigation through the medium of lawyers independent of those conducting the litigation … seems to me not just prudent but often essential in order to reduce the risk of orders for indemnity costs being made against the unsuccessful funded party. When conducted responsibly, as by the members of the ALF I am sure it would be, there is no danger of such review being characterised as champertous.'

Moreover, it is worth noting that the typical LFA entered into between funded client and the funder contains an explicit provision that the client will '*take and follow the legal advice of the Solicitors and Counsel at all appropriate junctures [including where an offer to settle is made]*'.[319] Hence, it is a considerable safeguard for the funded client that it is *obliged* to act in accordance with the advice of its lawyers, and not in accordance with the wishes of its funder. As one participant explained, at various points throughout a lengthy case, different relationships in the tripartite diagram – as between funder, funded client, and lawyer – will come under pressure, that is inevitable. But it is the adherence to the Code, to the terms of the LFA, and to the precedent and rulings set by English case law, which serves to guide the parties throughout the case.[320]

(c) Due diligence enquiries

The reality is that a funder will undertake due diligence services – additional to, or in place of, those that a solicitor would otherwise provide to the funded client – and the *Code of Conduct* permits that.[321] These services will consist of several key enquiries about the funded case:

- assessing the merits of the case on the substantive law;
- ascertaining the available witnesses, both expert and factual, who may be called upon to provide evidence in the case;
- assessing likely costs budgeting per stage-of-proceeding;
- considering any procedural issues that may involve preliminary issues or interlocutory applications that could increase the costs of the funded case; and
- assessing the enforceability of any judgment which may be obtained against the proposed defendant.

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[319] See, e.g., the specimen LFA contained in: Nick Rowles-Davies, *Third Party Litigation Funding* (OUP, 2014), p 230.

[320] An observation made by Funder #0513, via interview dated 26 Mar 2024.

[321] Version 2018, cl 18.

These services have tangible benefits to the funded client. As acknowledged by Sir Rupert Jackson, the funder's input 'may on occasions be a positive asset for the client and its legal team'.[322]

English courts have readily accepted that due diligence enquiries by funders are part-and-parcel of funding, that they enable the funder to assess the likely quantum of the claim (of direct interest, given that the success fee is often tied to that recovery), and that the due diligence enquiries are vital to both the feasibility of the funded case and to whether or not the funder is going to be liable for either security for costs or adverse costs.[323]

[322] *Sixth Lecture in the Civil Litigation Costs Review Implementation Programme* (Royal Courts of Justice, 23 Nov 2011), para 3.19.

[323] The case law is extensively examined in: Mulheron, 'England's Unique Approach to the Self-Regulation of Third Party Funding' (2014) 73 *Cambridge LJ* 570.

25. INPUT RE SETTLEMENTS

This Section has implications for some of the LSB's regulatory objectives, viz, protecting the interests of consumers, protecting the public interest, and promoting and maintaining adherence to professional principles.

The main points:

- **Input to settlement discussions is permitted by English law, and is also endorsed by the ALF's *Code of Conduct*;**
- **The extent of that input which funders negotiate via their LFAs tends to be more conservative than the extent of input which English case law appears to have endorsed, *viz*, an outright right of veto of a settlement offer has been endorsed in some case law, but funders' input is generally less interventionist than that in practice;**
- **The dispute resolution process governing disputes about settlement has the added benefit, in practice, of drawing to the funded client's attention the cost-benefit analysis of the settlement from an independent legal expert.**

(a) The provisions of the *Code of Conduct*

As part of the overall requirement not to control or influence the conduct *or the outcome* of the funded case, the ALF's *Code of Conduct* requires that the LFA state whether (and, if so, how) the Funder may provide input to the Litigant's decisions in relation to settlements.[324] Note that there is no absolute bar upon input, but the *extent of that input* must be stated in the LFA.

(b) The extent of permissible engagement

Notably, the extent of permissible involvement in settlement discussions has been set at a fairly interventionist level by English courts – perhaps rather surprisingly so. Some judicial statements have gotten awfully close to supporting a funder's right of *veto* of a settlement offer:

[324] Version 2018, cl 11.1.

English case law permitting settlement input:

Arkin v Borchard Lines Ltd[325] – this agreement did not fall foul of the rules of champerty: that 'The agreement provided that Mr Arkin should have the conduct of the proceedings, but would need the consent of [funder] MPC to any settlement or compromise. In the event of dispute, the decision of leading counsel acting for Mr Arkin was to prevail.'

Excalibur Ventures LLC v Texas Keystone Inc[326]– the LFA provided the funders were 'entitled to require' Excalibur to accept or make any offer of settlement as the Funders deemed appropriate, and this clause was not struck down as being champertous in any way

Akhmedova v Akhmedov (Litigation Funding) (Rev 1)[327] – 'With respect to settlement, … even if the Wife was required to obtain Burford Capital's consent before settling her enforcement action, that would appear to be a perfectly proper protection for Burford Capital as funder and would not tend to corrupt justice. In circumstances where Temur has accepted without reservation that this litigation is being pursued entirely properly and appropriately by the Wife and her legal advisors, it is difficult to see a great deal of substance in this pleaded point.'

(c) The 'real-life' clauses in modern agreements

Given the sensitivity and importance of this point, and for the purposes of this Project, funders were asked to describe the extent to which their LFAs provide that input could be provided re the client's decisions regarding settlement. The responses displayed a very careful and cautious input into settlement discussions, with a heightened cognizance of anti-champerty measures, and none provide a right of veto over a funded client's wish re settlement. All funders were careful to emphasise that settlement decisions rested with the funded client ('*we cannot make the client accept a settlement offer, the client absolutely has to retain the right of control*', as one funder put it[328]), but that certain rights are contained in their LFAs as follows:

Empirical feedback – how funders have achieved input into settlement:

- A right to notification and consultation, where a settlement offer is made (contemplated or formally received) by the opponent to the funded client (*Funder #6239; Funder #3418; Funder #1938; Funder #8421; Funder #2288*);

[325] [2005] EWCA Civ 655, [13].
[326] [2016] EWCA Civ 1144, [31].
[327] [2020] EWHC 1526 (Fam) [60].
[328] Funder #2288, in interview dated 18 Mar 2024.

- A right to receive any legal advice on a settlement offer made by the opponent which is provided to the funded client by its lawyers (*Funder #1938*);

- A right to refer any disagreement between funder and funded client as to the reasonableness of a settlement to a third party (a pre-agreed KC) for a binding adjudication/assessment as to whether or not the settlement is fair and reasonable (*Funder #6239; Funder #1938; Funder #2288*);

- Any failure by the funded client to follow the reasonable advice of their lawyers in respect of a settlement offer will constitute a material breach of the LFA, thereby giving rise to a right to termination (*Funder #3418*).

The control over settlement can also be quite indirect 'at the coal-face'. As one funder said, in response to the questionnaire, '*we take a very conservative approach. We exercise no right of veto, only "information rights". We explicitly exclude settlement control. Pricing incentives is how we try to control settlement offers*'.[329] In other words, by pressing on, the costs incurred by the funded client are likely to be significant, and thus, there is a real risk of the return to the funded client being reduced as a result of refusing the settlement offer.

(d) Safeguards re conflicts of interest

It is widely acknowledged by law reform commissions,[330] by law-makers,[331] and by scholars[332] that settlement provides one of the key tension points between the funder and the funded client, whereby conflicts of interest could well emerge. The funder may wish to settle and take 'the bird in the hand' whilst

[329] Funder #8421, via interview dated 5 Mar 2024.

[330] e.g., Australian LRC, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Final Report* (Rep 134, 2018); New Zealand LRC, *Class Actions and Litigation Funding* (Rep 147, 2022).

[331] European Parliament, *Directive of Representative Actions for the Protection of the Collective Interests of Consumers, Directive* (EU) 2020/1828 of the European Parliament and of the Council, of 25 Nov 2020, OJ L 409/1, Art 10.1 and 10.2(a) and (b).

[332] e.g., A Cordina, 'Is It All That Fishy? A Critical Review of The Concerns Surrounding Third Party Litigation Funding in Europe' [2021] *Erasmus L Rev* 270, Sections 2 and 3; I Tzankova and X Kramer, 'From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands', in *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer, 2021), Section 4 (copy on file with author); X Kramer and I Tillema, 'The Funding of Collective Redress by Entrepreneurial Parties: The EU and Dutch Context' (2020) 21 *Revista Itali-Espanola de Derecho Procesal* 165.

costs have not consumed the success fee largely or entirely, whereas the funded client may wish to press on, hoping for a good outcome regardless of the costs incurred (or irrespective of the risk of adverse costs that may loom large). The funded client may be driven by motivations, such as a wish for vindication or to settle past scores vis-à-vis the defendant, which diverge from the commercial motivations which generally underpin the funder's involvement in the funded claim. The funded client's assessment of the substantive merits of the case, the benefits or damage which has arisen from disclosure, and the cogency of the (particularly) expert witness evidence, may all be markedly more positive than the funder's. The potential for conflict undoubtedly exists; and the salient question is what can be done about it. *Tangible* measures are required – and several have been implemented in English law to date.

First, there is the dispute resolution procedure under the ALF's *Code of Conduct*. Disputes about settlement are to be referred to a KC whose opinion will be binding upon the funder and the funded client.[333] In other words, if the KC considers the settlement to be reasonable and fair, then the funded client has to accept it. It has proven to be a useful 'backstop' in practice, both directly and indirectly:

Empirical feedback – the dispute resolution procedure:
Funder #1938 – 'in practice, we have found that the funded client benefits from assistance from the funder at settlement, in understanding the cost/benefit analysis of settling versus pressing on and increasing costs and budgets. This is an area where funder and funded client are substantially aligned; and where the interests of the lawyers representing the funded client may diverge from those of the funded client' – but we have never needed to exercise the KC clause in practice; *Funder #2613* – 'in over two decades of experience in funding, we have not yet had to resort to the KC clause for dispute resolution re settlement, which tends to suggest a sense of commercial realism on the part of the funded client and their legal representatives'.

Secondly, for any settlement proposed in respect of a collective proceedings action under the CAT regime, judicial approval of that settlement is mandated before it can be rendered binding and enforceable.[334] The CAT must be satisfied that the terms of the proposed settlement are 'just and

[333] Version 2018, cl 13.2.
[334] Per: CA 1998, s 49A(1).

reasonable',[335] pursuant to a so-called 'fairness hearing', for which various criteria are set.[336] This serves as considerable protection, not just for the absent class members, but for the avoidance (or resolution) of any scenario whereby the class representative and the litigation funder may be divergent in their views as to the merits of particular aspects of the proposed settlement.[337]

Thirdly, for the lawyer, their duty is owed to the funded client always – the funder is **not** their client. The role of the funded client's lawyer has *always* been paramount as a common law principle, and breach of which can render the LFA champertous, with all the consequences which that judicial finding entails.[338] This tangible measure requires judicial supervision on an ad hoc basis, but its spectre is nonetheless effective.

The lawyer's role: case law principles

- In the early litigation funding case of *Factortame*,[339] the Court of Appeal emphasised that independent advice should be forthcoming from experienced and reputable advisers to the funded client throughout the litigation, so as to enable that party to make properly informed decisions about how the proceedings should be conducted, and as a 'check and balance' upon the control exercised by the funder (including at settlement);
- More recently, in *Re Valetta Trust*,[340] the Jersey Royal Court considered that there the LFA contained a term that the funded client was contractually obliged 'to conduct the litigation in accordance with the reasonable advice of its lawyers', that necessarily reduced the control which the funder could exercise at settlement or at any other time;
- Even more recently, in *Davey v Money*,[341] it was said where evidence is provided by the lawyer that there was no improper control exercised over the funded client; and that the funded client

[335] CA 1998, s 49A(5) and CAT Rules 2015, r 94(8) and (9).
[336] CAT Rules 2015, r 73(2).
[337] These procedures governing settlement, as an avoidance-measure of conflicts of interest, are explored by the author in: 'A spotlight on the settlement criteria under the United Kingdom's new competition class action' (2016) 35 *Civil Justice Quarterly* 14.
[338] As set out in: *The Modern Doctrines of Champerty and Maintenance* (OUP, 2023), ch 4.
[339] *R (Factortame Ltd) v Sec of State for Transport, Local Govt and the Regions (No 8)* [2003] QB 381 (CA) [27], [87]–[89].
[340] [2011] JRC 227, [30]. In this case, the court was considering an LFA entered into by Harbour Fund II, part of Harbour Litigation Funding.
[341] [2019] EWHC 997 (Ch) [77].

has rejected an offer to settle 'out of hand' without any input from the funder, these would be important indicators in rebutting any suggestion of champerty.

Suggestions have been made elsewhere[342] that the ongoing accreditation of lawyers who conduct class actions should require continuing education and certification in relation to identifying and managing actual or perceived conflicts of interests and duties arising in respect of litigation funding. A similar proposal may be useful to consider in England in the context of litigation funding *across the board*.

[342] Australian LRC, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Final Report* (Rep 134, 2018), recommendation #20 and associated text.

PART VIII

CONCLUSIONS

26. THE REGULATORY OBJECTIVES AND LITIGATION FUNDING: KEY THEMES

By reference to the LSB's regulatory objectives, it is plain that litigation funding engages with many of them in a significant manner:

- ***Re s 1(1)(a): protecting and promoting the public interest*** – by virtue of being able to fund litigation which would, otherwise, not be capable of being funded, litigation funding serves a public interest. Legal aid for civil litigation is now largely unprocurable; the capability of law firms and counsel to carry lengthy, expensive and risky litigation via either CFA or DBA funding is realistically unlikely; and BTE insurance traditionally excludes group litigation in all contexts. In that light, the funding 'menu' is limited; and grievances which affect a large number of the population, whether as consumers or otherwise, should be capable of being at least tested, in order to ascertain whether or not the right to compensation is established. Moreover, the protection of consumers' interests is not just about seeking redress, but it is also to test the meaning and application of law, of legislative provisions, and of common law precedent. Without that testing, a legal system does not evolve; and a statutory regime remains a sterile enactment without utilisation. Litigation funding has supported that opportunity for evolution and enforcement of the rule of law;

- ***Re s (1)(1)(c): improving access to justice*** – undoubtedly, litigation funding is not for many cases. The economics of funding, and the screening or filtering mechanisms applied, ensure that. But for those cases which litigation funding does support, it is difficult to perceive of how else that litigation would have been funded. The entirety of the collective proceedings in the CAT, as well as significant collective actions and commercial litigation, bear testament to that. Undoubtedly, the enactment of the CAT collective proceedings regime has provided litigation funding with real opportunity, but with real risk too. This method of funding has proven itself to be attractive where there is alleged to be widespread detriment but relatively low-value claims-per-consumer, and where the class-wide loss is capable of being (and is legally permitted to be) calculated by the court. Yet the 'economics' of the particular case really matter. If the costs of the case are so high that they make considerable inroads into the likely financial benefit obtained, then the amount of compensation actually received by the consumer may be quite small; or the particular remedy to which it is hoped that the compensation can be applied (say, replacement of a building's defective cladding) may become unlikely if the costs of pursuing the action are too high. Hence, whilst litigation funding offers the opportunity for cases to be prosecuted which would likely lie dormant

otherwise (i.e., it provides the funded client with their 'day in court'), the reality is that the ultimate 'economics' of the case may dictate a less-than-favourable outcome for the funded client. The risk of 'scorched earth' tactics on the part of the defendant, which may cause the costs incurred in the pursuit of the claim to increase significantly over budgeted allocations, cannot be ignored in this scenario (as some cases, whether in the litigious or arbitral spheres, have demonstrated);

- ***Re s 1(1)(d): protecting and promoting the interests of consumers*** – the vast majority of the cases instituted thus far under the collective proceedings regime for anti-competitive conduct concerns *consumer* class members. The availability of that regime for consumer redress was always envisaged by the government (via the BIS Department's consultation), but has been borne out in practice since 2015. Significant GLO and representative actions have been instituted on behalf of consumers too – and whether or not these cases are ultimately successful, they could not have been brought, absent litigation funding. However, the 'upward scaleability' of litigation funding, so as to capture a greater tranche of consumer cases, is not presently visible, given the metrics of those cases (e.g., merits, quantum, risk profile) which generally appeal to litigation funders;

- ***Re s 1(1)(e): promoting competition in the provision of legal services*** – notwithstanding that self-regulation entails membership of the ALF, clearly many law firms/funded clients are willing and able to engage with non-ALF funder members. There is no suggestion of a 'closed shop' arrangement existing as between litigation funders and law firms; quite the reverse, in the current funding market. Moreover, there have been suggestions from within the industry that the capital adequacy thresholds – both capital available and cash fluidity – should not be cast too highly, in case that should deter new entrants to the ALF. However, by the same token, it has been suggested that compulsory membership of the ALF, and then requiring law firms to deal only with ALF funder members, could be anti-competitive, given precedent re general insurance. Plainly, litigation funding engages with competition of legal services in important respects;

- ***Re s (1)(1)(f): encouraging a strong and effective legal profession*** – litigation funding ensures that a funded client's own-side costs are covered, and this applies, whether the funder enters into an LFA with the funded client or with the law firm, or whether the funding is provided via single-case or portfolio funding. Those own-side costs, which cover the costs of legal representation, expert witness costs and fees, court filing costs, disclosure costs, and other significant disbursements, enables the funded client to have sufficient monies to fund the claim, and to enable

the law firm to pay its staffing costs, operational costs and other outgoings. But equally importantly, successful defendants who have 'seen off' a funded claim are entitled to their adverse costs. A strong and effective legal profession demands that, where costs-shifting applies, it does so in a meaningful and tangible manner. Litigation funders typically either lay off that risk to an ATE insurer (whilst paying the ATE premium for that cover) or cover the adverse costs (and any security for costs or other costs awards) themselves. By ensuring dual cover, the involvement of a litigation funder means that the law firms representing both sides of the litigation can ensure cash-flow – and that contributes to a resilient legal profession. Effectiveness does not only mean 'competence' of representation; it encompasses 'financial resilience' too;

- ***Re s 1(1)(g): increasing the public understanding of citizens' rights and duties*** – the mere fact that litigation is commenced to a successful conclusion may bring with it mainstream media attention and an enhanced appreciation of rights. The equal pay claims of Uber drivers and of supermarket workers, and the claims of postmasters in the Horizon/Bates v Post Office scandal, have entered into mainstream media and into the public consciousness. Without litigation funding, none of these claims would have been brought;

- ***Re s 1(1)(i): promoting the prevention and detection of economic crime*** – litigation funders finance litigation via either capital investment or debt (borrowing) facilities. Either way, the extent to which some funding may be derived, whether directly or indirectly, from unlawful, illegal or terrorist sources, cannot be ignored. This is particularly so in respect of litigation funders who are not ALF-funder members, who do not have an established (or indeed any) track record in England, and whose provenance arises in other jurisdictions. In such circumstances, the burden upon law firms and litigation brokers to conduct AML and KYC checks is onerous, albeit that both are developing increasingly sophisticated methods of conducting these checks.

APPENDIX A

METHODOLODY

The information contained in this Research Report is derived from a variety of sources:

Questionnaires — for the purposes of the empirical aspects of this Project, a detailed Questionnaire was sent to ALF-funder members (a copy of which is attached at ***Appendix D***). Constituted of 27 questions, the Questionnaire sought to elicit information based upon the funders' experiences in supporting the litigation of other parties, particularly over the past five (5) years. In addition to this lengthy Questionnaire, separate (and shorter) Questionnaires were distributed by email format to various: (1) litigation brokers; (2) non-ALF members; (3) litigation funding advisors; (4) ATE insurers; and (5) law firms.

Confidentiality was a key pillar in preparing this Report. It was not of interest as to which particular funders did what, but rather, what risks, benefits, costs and advantages arise from the use of litigation funding in the modern landscape. Hence, each respondent to the Questionnaires was given a random number known only to the research team, and that number is referred to where responses are noted in the Report. However, where any characteristics of the litigation funders and other parties would serve to identify those funders, or where it might be possible to do so, then even the identifying number is not used in the Report. It was also undertaken, for the purposes of the Project, that extracts of the Report for which any respondent's responses are included could be made available to the respondent for perusal prior to the submission of the Report to the LSB, so that the respondents can verify for themselves that confidentiality had been strictly observed.

The information provided in the Questionnaires was, to some extent, based upon information known only to the respondent funders or other participants, who have provided the information in good faith and with care and caution. Where the participants could not provide an 'accurate-with-certainty' answer to a question, or where a 'round estimate' is all that could feasibly be provided, then the results of the Questionnaire survey in this Report records that response. Quotations attributed to particular individuals throughout this Report have been checked with the authors prior to publication of the Paper.

Following receipt of the completed Questionnaires, the research team followed up with some of the Respondents, either by Teams meetings or by telephone, to clarify some comments or responses contained in the Questionnaires.

Interviews and meetings — Apart from the follow-up meetings referred to above, over the 5-week period of the Project, the research team met a number of funders, legal practitioners, industry representatives,

brokers, ATE insurers and other persons interested in or involved with the litigation funding industry in England and Wales. For example, at two conferences at which the author presented during this time frame (hosted by Bryan Cave Leighton Paisner[343] and Brown Rudnick[344] respectively), this Project was mentioned, and with participation invited, whether at the event itself or by follow-up correspondence or interviews. As a result, a number of conference attendees were kind enough to provide information and insights, which have also been included on an anonymous basis.

Case law references — This Report does not purport to be a doctrinal case law analysis of issues affecting litigation funding. Those studies are available elsewhere.[345] Rather, in several sections of the Report, case law is cited in order to substantiate a point which has arisen during the course of the empirical research, or which buttresses a point relevant to the risks, benefits, costs and advantages of litigation funding.

Case law tables – In order to gain a more comprehensive understanding of the users of litigation funding on the claimant side, and the types of opponents who have been the subject of funded cases, Shrutika Gandhi, Research Assistance for the Project, undertook an extensive check of a number of case law databases in order to assemble a detailed table of cases in which funders have been involved over the period of 2019 to the present. These are contained in ***Appendix B***. Whilst the tables are not necessarily exhaustive of all cases in which litigation funding has been involved, they provide an excellent snapshot of the width and type of cases which have been funded across a range of courts. All references to case law herein have been derived from the research team's perusal of relevant case law (both reported and unreported) on the following databases: Westlaw UK; Lexisnexis Butterworths; Bailii; The National Archives case law database; the Competition Appeal Tribunal; and with a cross-check undertaken against the GLO database.[346]

Secondary literature research — The literature review undertaken as part of this Project has been undertaken across a range of sources, both 'standard' and 'grey'. These resources consisted of the following:

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[343] Class Actions Event (BCLP Offices, 28 Feb 2024).

[344] Litigation Funding Conference (Langham Hotel, 14 Mar 2024).

[345] Nicholas Rowles-Davies, *Third Party Litigation Funding* (OUP, 2014); Gian Marco Solas, *Third Party Funding: Law, Economics and Policy* (CUP, 2019); Mohamed Sweify, *Third Party Funding in International Arbitration* (Edward Elgar, 2023); S Friel, *The Law and Business of Litigation Funding* (Bloomsbury Professional, 2020); Mulheron, *The Modern Doctrines of Champerty and Maintenance* (OUP, 2023), chh 4 and 5.

[346] Maintained at: https://www.gov.uk/government/publications/group-litigation-orders/list-of-group-litigation-orders.

'Standard literature'	**'Grey literature'**	**'Grey literature' (cont'd)**
❖ Academic journal articles which discuss litigation funding / funded cases ❖ Law reform commission reports published elsewhere, which discuss the position of funding in E&W (recent reports include those published in Ontario, New Zealand, Australia, and Victoria) ❖ Reports published by law reform bodies in E&W, including those of the Civil Justice Council (CJC) and the *Jackson Review of Civil Litigation* of 2010 ❖ Legal magazines such as *Litigation Funding* and the *Law Society Gazette* ❖ *Hansard* discussions of litigation funding (e.g. those associated with the passage of the Consumer Rights Bill 2014) ❖ Books relevant to litigation funding, class actions, and champerty and maintenance (all of which can address aspects of litigation funding).	❖ The online materials of litigation funders, including their promotional literature on websites, press releases, blog comments, and self-authored articles in publications such as the *Law Society Gazette* ❖ Documents prepared by funders and put to various Lords as part of the attempts to convince Parliament to overturn *Paccar* (UKSC), and the speeches by those Lords during those Parliamentary readings ❖ The online materials of law firms or barristers' chambers, including blogs, newsletters, and press comments, which discuss funded cases with which the firm or chambers is associated ❖ Handouts and papers presented at conference proceedings concerning litigation funding ❖ Discussion fora under *Law Society Gazette* articles (to the extent that these are locatable and not deleted or unarchived)	❖ The recent study undertaken by the Third Party Litigation Funding Committee for the ELI ❖ Working Reports produced by the PR for the CJC (published to the CJC but not available publicly online or in hard copy) ❖ Email correspondence between the author and other parties relevant to aspects of litigation funding ❖ Blogs authored by costs and funding commentators ❖ Publications produced by the Association of Litigation Funders and available on its website (including the *Code of Conduct for Litigation Funders*) ❖ Research reports authored by University academics and published as part of an academic repository ❖ Websites set up to inform class members and others of collective proceedings cases.

APPENDIX B

CASE TABLES

The tables in this Appendix were prepared by Shrutika Gandhi, doctoral candidate at the Institute of Advanced Legal Studies and Research Assistant for this Project. The case tables primarily reflect litigation instituted or conducted 2019–the present, given that this is the time period the focus of the Project. The cases have been prepared on the basis of publicly-available materials only.

1. COLLECTIVE PROCEEDINGS IN THE COMPETITION APPEAL TRIBUNAL

Case	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
Gutmann v Apple Inc Case number: 1468/7/7/22	Balance Legal Capital	Justin Gutmann as the class representative (Law Firm – Charles Lyndon) https://www.theiphoneclaim.com	A claim about the harm suffered by consumers as a result of Apple's concealment of battery issues	Tech giant and social media platform meta-host
Le Patourel v BT Group plc Case number: 1381/7/7/21	Harbour Litigation Funding	Justin Le Patourel as the class representative (Law Firm – Mischon de Reya LLP) https://www.callclaim.co.uk	An excessive pricing claim against BT in charging unfair prices to some of its landline customers	Utility (tele-comms) provider
Stopford v Alphabet Inc and Google LLC Case number: 1606/7/7/23	Hereford Litigation Finance	Nikki Stopford as the class representative (Law Firm – Hausfeld & Co LLP) https://www.searchclaim.co.uk/	A claim about Google's practices which have secured for it the status of default search provider on practically all mobile devices sold in the UK (and many comparable geographies)	Meta-search engine provider
Roberts v Anglican Water Group Ltd and Northumbrian Water Group Ltd	Bench Walk Advisors	Prof Carolyn Roberts as the class representative (Law Firm – Leigh Day) https://www.mywat	A claim about Ds' abuse of dominant position in providing misleading information to regulatory bodies (Environment Agency and Water Services Regulation Authority Ofwat),	Utility (water) provider

Case	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
Case numbers: 1628/7/7/23 1629/7/7/23 1630/7/7/23 1631/7/7/23		ercase.co.uk/the-claim/	allowing D to charge customers inflated prices for sewerage services	
Doug Taylor Class Representative Ltd v Santander Consumer (UK) plc Case numbers: 1598/7/7/23 1599/7/7/23 1600/7/7/23	Woodsford Litigation	Doug Taylor as class representative (Law Firm – Scott+Scott Uk LLP https://www.carfinancingclaim.com/faq/	Claims by consumers who entered into finance agreements for used cars with Black Horse, Santander or MotoNovo and who suffered financial losses	Banks and car finance companies
Hammond v Amazon.com Inc Case number: 1595/7/7/23	Four World Capital (a US- based litigation funder)	Robert Hammond as class representative (Law Firm - Charles Lyndon, Hagens Berman EMEA) https://www.claimagainstamazon.com	A claim that Amazon manipulated how it presented products through its Buy Box feature, suppressing competition in its marketplace and causing over-charge to its customers	the world's biggest e-commerce marketplace operator
Evans v Barclays Bank plc Case number: 1336/7/7/19	Bench Walk Advisors	Philip Evans as class representative (Law firm – Hausfeld & Co. LLP) https://www.fxclaimuk.com/faq2/	A claim about entities or individuals who entered into FX Spot Transactions and/or FX Outright Forward Transactions involving a pair of G10 currencies with banks or other major financial institutions and who suffered losses as a result of	Banks and financial institutions

Case	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
			the cartels identified by the EU Commission.	
Kent v Apple Inc Case number: 1403/7/7/21	Project Greve PC acting on behalf of Vannin Capital	Rachael Kent as class representative (Law firm – Hausfeld & Co. LLP) https://appstoreclaims.co.uk/Apple	A claim that Apple has, by virtue of operating 'closed system' for iOS devices, obtained a dominant (and monopoly) position in the markets for iOS app distribution and payment processing	Tech giant and social media platform meta-host
Gormsen v Meta Platforms, Inc (Facebook) Case number: 1433/7/7/22	Innsworth Capital	Liza Gormsen as class representative (Law Firm - Quinn Emanuel Urquhart & Sullivan) https://www.facebookclaim.co.uk/faqs/	A claim that, in order to access Facebook, users are required to give Facebook access to their highly valuable personal data, including data relating to their activities on websites or apps other than the Facebook website or app, and that, in return, users only receive "free" access to Facebook's social network, no monetary recompense, whilst Facebook generates billions in revenues from its users' data	Meta-social media platform
Gutmann v Govia Thameslink Railway Ltd Case number: 1425/7/7/21	Woodsford Litigation	Justin Gutmann as the class representative (Law Firm – Charles Lyndon and Hausfeld & Co LLP https://www.boundaryfares.com	A claim about not making 'Boundary Fares' sufficiently available for sale or advertised, so as to enable customers to buy an appropriate fare in order to avoid being charged twice for part of a journey	Railway companies

Case	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
Boyle v Govia Thameslink Railway Ltd Case number: 1404/7/7/21	LCM Litigation Funding https://lcmfinance.com	David Boyle as Class representative (Law Firm – Maitland Walker LLP https://gtrclaim.co.uk/FAQ	A claim about unlawfully inflated fares charged by GTR to travel on more than one brand of its trains on the London-Brighton mainline	Railway companies
Coll v Alphabet Inc and Google LLC Case number: 1408/7/7/21	Vannin Capital	Elizabeth Coll as Class Rep (Law Firm - Hausfeld & Co LLP) https://www.appstoreclaims.co.uk/Google/Faq	A claim that Google charged an unlawfully high level of commission on digital purchases (including purchases of and within apps)	Meta-search engine provider
Spottiswoode v Nexans France SAS Case numbers: 1440/7/7/22	Burford Capital	Clare Spottiswoode as Class rep (Law firm - Scott+Scott UK LLP) https://www.homeenergyaction.co.uk	A claim that consumers paid higher electricity bills as a result of manipulation of the price of the high-voltage cables sold to electricity network operators by Power Cable Manufactures	Upstream manufacturers who sell to high-volume purchasers downstream
Gutmann v London & South Eastern Railway Ltd Case numbers: 1305/7/7/19	Woodsford Litigation	Justin Gutmann as class rep (Law firm – Charles Lyndon and Hausfeld & Co LLP) https://www.boundaryfares.com	Claims that 'boundary zone' fares or 'extension tickets' (which are fares valid for travel to/from the outer boundaries of TfL's fare zones) were not sufficiently available for sale, and customers were not sufficiently aware of these boundary fares	Railway companies

Case	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
Gutmann v Telefonica UK Ltd and Vodafone Ltd Case numbers: 1624/7/7/23 1625/7/7/23 1626/7/7/23 1627/7/7/23	LCM Funding	Justin Gutmann as class rep (Law firm – Charles Lyndon) https://loyaltypenaltyclaim.com	A claim that customers were overcharged for mobile telephone services after the expiry of the customer's contractual minimum term, by continuing to require customers to pay amounts in respect of mobile telephone handsets or devices for which the customers had already paid in full by the end of the minimum term	Mobile network operators
Ennis v Apple Inc Case number: 1601/7/7/23	Harbour	Sean Ennis as class rep (Law Firm – Geradin Partners) https://www.appdeveloperclaim.com/faqs/	A claim about Apple's conduct in the market for the distribution of third-party apps via the App Store, in that Apple charged excessive and unfair commissions on the purchases of apps and in-app purchases	Tech giant and social media platform meta-host
Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd Case number: 1527/7/7/22	Woodsford Litigation	Alex Neill as Class Rep (Law Firm – Milberg London) https://playstationyouoweus.co.uk	A claim that Sony imposed unfair terms on developers/publishers of digital PlayStation games and add-on content which forced consumers to purchase these products from the PlayStation Store where Sony could charge commissions of 30%	Tech giant, and online content developer and supplier
Christine Reifa Class Representative Ltd v Apple Inc	Not named, but the claim website mentions that	Christine Reifa as Class Rep (Law firm – Hausfeld & Co LLP)	A claim that Apple and Amazon colluded to cause almost all independent merchants of Apple and Beats products to disappear from the Amazon	Tech giant and social media platform meta-host; and the world's biggest e-commerce

Case	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
Case number: 1602/7/7/23	the funder is ALF member	https://www.ukappleamazonclaim.co.uk/Home/Faq	marketplace, causing a decrease in the discounts provided to customers by the limited number of independent merchants remaining, and a significant increase in the sales of Apple and Beats products at undiscounted prices	marketplace operator
Ad Tech Collective Action LLP v Alphabet Inc and Google LLC Case numbers: 1572/7/7/22 1582/7/7/23	Fortress Investment Group	The partners of Ad Tech are Claudio Pollack, Charles Arthur and Kate Wellington (Law Firm – Hausfeld & Co LLP, Geradin Partners and Humphries Kerstetter LLP) https://www.adtechclaim.co.uk/faqs/	A claim about Google's conduct in the market for online advertising and display advertising on websites and mobile apps, re 'ad tech services'	Meta-search engine provider
Sciallis v Casio Electronics Co Ltd and Yamaha Music Europe Case numbers: 1437/7/7/22 1529/7/7/22 1530/7/7/22 1531/7/7/22 1592/7/7/23	Not named	Elisabetta Sciallis as Class rep (Law Firm – Pogust Goodhead also known as PGMBM) https://myinstrumentclaim.com	A claim alleging that music instrument companies manipulated and dictated resale prices of musical instruments and accompanying gear to customers	Music companies

Case	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
BSV Claims Ltd v Bittylicious Ltd Case number: 1523/7/7/22	Softwhale Holdings Ltd	Lord Currie of Marylebone – Director of BSV Claims Ltd (Law Firm – Velitor Law) https://www.bsvclaims.com/faq/	Claims against the cryptocurrency exchanges Binance, Kraken, Bittylicious and ShapeShift, on behalf of UK consumers who held the cryptocurrency Bitcoin Satoshi Vision (BSV), for the financial consequences to those consumers for delisting BSV in April 2019	Cryptocurrency companies
Commercial and Interregional Card Claims I Ltd (CICC I) and Claims II Ltd (CICC II) v Mastercard Inc and Visa Inc Case numbers: 1441/7/7/22 1442/7/7/22 1443/7/7/22 1444/7/7/22	Bench Walk Advisers	Stephen Allen as Class Rep – Director of CICC I & II (Law firm – Harcus Parker) https://commercialcardclaim.co.uk/faqs/	Claims that merchants had paid an unlawful merchant service charge in respect of inter-regional and commercial card transactions	Credit card companies
Consumers' Association (Which?) v Qualcomm Inc Case number: 1382/7/7/21	Augusta Ventures	Which? - consumer advocacy assn as the class rep (Law Firm – Hausfeld & Co LLP) https://www.smartphoneclaim.co.uk/faq	A claim that Qualcomm, as manufacturer of chipsets, inflated fees charged to smartphone manufacturers such as Apple and Samsung, to allow them to use its technology, which increased costs for those smartphone manufacturers and increased prices for consumers when purchasing smartphones	Upstream manufacturers who sell to high-volume purchasers downstream

Case	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
Road Haulage Assn Ltd v Man SE Case number: 1289/7/7/18 Related - UK Trucks Claim Ltd v Stellantis NV (formerly Fiat Chrysler Automobiles)	Therium	Road Haulage Assn Ltd as class rep (Law Firm – Backhouse Jones Solicitors and Addleshaw Goddard LLP)	A claim against European truck manufacturers who had been found by the European Commission to have been involved in a 14-year price-fixing cartel across Europe	Truck manufacturers (various)
Mark McLaren Class Representative Ltd v MOL (Europe Africa) Ltd Case number: 1339/7/7/20	Woodsford	Mark McLaren as Class Rep (Law Firm - Scott+Scott UK LLP) https://www.cardeliverycharges.com/about-us/	A claim against five major shipping companies for unlawful conduct which affected the price of sea carriage of new motor vehicles so that car manufacturers paid too much to transport new vehicles from their factories around the world to the UK and Europe, and so customers also paid too much for the delivery charges of those vehicles	Shipping companies
Merricks v Mastercard Inc Case number: 1266/7/7/16	Innsworth Capital	Walter Merricks as Class Rep (Law Firm – Quinn Emanuel Urquhart & Sullivan UK LLP and Willkie Farr & Gallagher (UK) LLP)	A claim that Mastercard imposed unlawful fees on transactions processed through its network, so that UK businesses which accepted Mastercard cards paid these unlawful fees and passed them onto consumers via higher retail prices	Credit card company

Case	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
		https://mastercardconsumerclaim.co.uk/Home/Faq		
Gibson v Pride Mobility Products Ltd Case number: 1257/7/7/16	Burford Capital	Dorothy Gibson as class rep (Law firm – Leigh Day)	A claim that several mobility scooter retailers had engaged in resale price maintenance so as to prevent a selling price of certain models of scooters below Pride's recommended retail prices	Mobility scooter retailers

2. REPRESENTATIVE PROCEEDINGS IN THE HIGH COURT

Case	Court	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
Lloyd v Google LLC [2021] UKSC 50	QB	Therium	Richard Lloyd (Law firm – Mishcon de Reya LLP)	A claim that Google breached its duties as a data controller under the Data Protection Act 1998 to over 4M Apple iPhone users by collecting and using their browser-generated information	Meta-search engine provider
Prismall v Google UK Ltd [2023] EWHC 1169 (KB)	KB	LCM Litigation	Andrew Prismall (Law firm – Mishcon de Reya LLP)	A claim for misuse of private information	Meta-search engine provider
Commission Recovery Ltd v Marks & Clerk LLP [2023] EWHC 398 (Comm)	BPC	Not named	Commission Recovery Ltd (Law firm – Signature Litigation LLP)	A claim against Marks & Clerk in relation to commissions allegedly paid secretly by IP manager CPA Global to Marks & Clerk in return for referring clients to CPA	A firm of patent and trademark attorneys

3. GROUP LITIGATION ORDERS IN THE HIGH COURT

Case	Court	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
Cavallari v Mercedes-Benz Group AG [2024] EWHC 190 (KB) Mercedes Group Litigation	KB	Asertis for Slater Gordon claimants; Grammercy for Pogust Goodhead claimants	Aurora Cavallari & others (Law firms - Pogust Goodhead, Leigh Day, Slater & Gordon Hausfeld & Co LLP and Milberg London LLP)	Commonly referred to as 'Diesel-gate' – this was a group of claims by consumers that advertised claims by car manufacturers about nitrogen oxide ('NOx') emissions performance of certain diesel cars were inaccurate, being based on illegal 'defeat devices' used during tests done by regulators	Car manufacturers
Various Claimants v Nissan Motor Co Ltd [2024] EWHC 208 (KB) Nissan/Renault Diesel NOx Emissions Group Litigation	KB	Gramercy Funds Management made a litigation funding deal with Pogust Goodhead for group litigations https://pogustgoodhead.com/largest-litigation-funding-deal-in-history/	Car owners (Law firms - Pogust Goodhead, Leigh Day, Keller Postman UK Limited and Milberg London)	Same as Mercedes group litigation	Car manufacturers
Alsopp v Bayerische Motoren Werke Akteingesellsch-aft [2023] EWHC 2710 (KB) The BMW NOx Diesel	KB	Balance Legal Capital for Leigh Day claimants Gramercy litigation funding deal	Mark Allsopp and others (Law firms – Pogust Goodhead and Leigh Day)	Same as Mercedes group litigation	Car manufacturers

Case	Court	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
Emissions Group Litigation		with Pogust Goodhead			
Jaguar Land Rover NOx Emissions Group Litigation Various Claimants v Jaguar Land Rover Automotive plc [2024] EWHC 208 (KB)	KB	Balance legal capital	Car owners (Law firms – Leigh Day, Milberg, and Pogust Goodhead)	Same as Mercedes group litigation	Car manufacturers
Crossley v Volkswagen Aktiengesellschaft [2021] EWHC 3444 (QB) The VW NOx Emissions Group Litigation (Order made in 2018)	KB	Therium	Car owners (Law firms – Slater Gordon, Leigh Day, Your Lawyers, and PGMBM (now Pogust Goodhead))	Same as Mercedes group litigation	Car manufacturers
Tongue v Bayer Public Ltd Co [2023] EWHC 1792 (KB) Essure Group Litigation	KB	Funder unnamed	Karen Louise Tongue and others (Law firm – Pogust Goodhead)	A claim that the Essure medical device (permanent form of contraception) was defective under the Consumer Protection Act 1987 because of unacceptably high rates of serious complications; and an alternative claim in negligence	Pharma company
Bailey v Glaxosmithkline (UK) Ltd [2019]	CA	Managed Legal Solutions Ltd	Sandra Bailey and others (Law firm - Fortitude Law)	A claim that Seroxat, a prescription-only antidepressant and selective serotonin re-uptake inhibitors	Pharma company

Case	Court	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
EWCA Civ 1924				(SSRI), was defective under the Consumer Protection Act 1987 (claim failed; and judgment in GSK's favour, with partial indemnity costs)	
Sharp v Blank [2020] EWHC 1870 (Ch) Lloyds / HBOS GLO	Ch	Therium	John Sharp and others (Law Firm – Harcus Sinclair UK Ltd)	A claim by c. 5,800 shareholders against Lloyds and five of its former directors in relation to Lloyds' acquisition of Halifax Bank of Scotland (HBOS) in 2008	Banking group
Bates v Post Office Ltd (No 4) [2019] EWHC 871 (QB) The Post Office Group Litigation	KB	Therium	Alan Bates and others (Law Firm – Freeths LLP)	A claim that Horizon, a computerised point of sale system used by Post Offices, contained software coding errors, bugs and defects; and that when financial, accounting and other shortfalls occurred in branch accounts as a result, the Post Office did not investigate these fairly or properly; required postmasters to make good the alleged shortfalls; suspended and/or terminated their appointments; or imposed undue and/or unreasonable pressure or influence upon them to resign their contracts with the Post Office	Post Office
The RBS Rights Issue Litigation [2017] EWHC 1217 (Ch)	Ch	Vannin Capital and Harbour Litigation Funding	'SG' group of claimants – Signature LLP; 'SL' group of claimants – Stewarts Law LLP; 'QE' group of claimants - Quinn	A claim by shareholders who took up rights in RBS's £12bn rights issue in April 2008 and who alleged that the prospectus contained untrue and misleading statements, and wrongful omissions, in relation to the true state of RBS	Banking group

Case	Court	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
			Emanuel Urquhart & Sullivan LLP		

4. LITIGATION CONDUCTED IN THE HIGH COURT AND SPECIALIST COURTS AND TRIBUNALS OF ENGLAND AND WALES

[This table excludes the collective actions considered in earlier tables.]

Case	Division/ court	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
Akhmedova v Akhmedov [2019] EWHC 2561 (Fam)	Family Division	Burford Capital	Tatiana Akhmedova (Law Firm – PCB Litigation LLP)	Re the breakdown of the marriage of Ms Akhmedova (Y) and Mr Akhmedov (X), a court order was made that X pay Y £453,576,152 in settlement of her financial claims in respect of the marriage; enforcement had only been possible of c. $5M; and further enforcement proceedings were required	individual
Rowe v Ingenious Media Holdings plc [2021] EWCA Civ 29	BPC	Harbour (Mischon claimants) and Therium (Stewarts and Peters claimants)	Three groups of claimants represented by Stewarts Law, Peters & Peters LLP and Mischon De Reya	Claims about allegedly tax-efficient schemes (promoted under the name 'Ingenious') through which individual taxpayers could contribute funds to LLPs for investment in films in return for certain tax advantages; but the HMRC challenged the tax treatment of the LLPs, and the claimants alleged misrepresentations and negligence against their advisors	A media advisory and production group
Edengate Homes (Butley Hall) Ltd, Re [2022] EWCA Civ 626	BPC	Manolete Partners Plc	Adele Lock (Law firm – Simon Burn Solicitors)	A claim by a liquidator against a former director of Edengate (in liq); this case concerned the validity of the liquidator's assignment of a cause of action to Manolete, the	Director of insolvent company

Case	Division/ court	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
				funder; assignment upheld as validly made	
Davey v Money [2019] EWHC 997 (Ch)	BPC	ChapelGate Credit Opportunity Master Fund Ltd	Julie Davey (Mischon de Reya LLP)	Angel House Developments Ltd (AHDL) borrowed £16M from Dunbar Assets to fund purchase and redevelopment of Angel House; planning permission failed, AHDL missed repayments to Dunbar, and went into administration; Dunbar sought to enforce Ms Davey's personal guarantee; Ms Davey sued AHDL's administrators alleging that they had favoured Dunbar's interests over AHDL's	Admin-istrators of company
Williams v Williams [2023] EWHC 3098 (Fam)	Family Division	Schneider Financial Solutions	Abigail Williams (Law Firm – Vardags)	Re divorce proceedings and financial remedy proceedings being pursued by the wife against her husband in respect of assets allegedly held in other jurisdictions but undisclosed by the husband	individual
Lott v PSA Automobiles SA [2023] EWHC 2568 (KB)	KB	Balance Legal (for Leigh Day Claimants)	Michael Lott and others (Law firms – Leigh Day and Pogust Goodhead)	Claims against car manufacturers in respect of vehicle emissions (the NOx Emissions Litigation) – see the Mercedes Group Litigation under the GLO table. Group Litigation order hearing to be held in 2024	Car manufacturers

Case	Division/ court	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
CFL Finance Ltd v Laser Trust [2021] EWCA Civ 228	BPC	Colosseum Consulting Ltd	CFL Finance Ltd	A claim about whether a settlement agreement was, by its terms, a 'regulated credit agreement' under the Consumer Credit Act 1974	A creditor of an insolvent company
Bugsby Property LLC v LGIM Commercial Lending Ltd [2022] EWHC 2001 (Comm)	BPC	Therium and Omni Bridgeway	Bugsby Property LLC	A claim re the financing of the sale of Olympia, West London in which Bugsby (who wanted to buy the site) alleged that it had an exclusivity agreement with LGIM so that LGIM would help it to find finance for the purchase, whereas ultimately LGIM arranged finance for another (the successful) bidder	Commercial lender
Kireeva v Bedzhamov [2022] EWCA Civ 35	BPC	A1 LLC – International private equity firm and litigation funder	Ms Lyubov Kireeva (Law firm – DCQ Legal)	Mr Bedzhamov was made bankrupt by a Moscow court; Ms Kireeva was appointed as his receiver; K applied to the BPC for recognition of her appointment and relief in relation to accessing real estate held by Mr Bedzhamov in London	Bankrupt individual
Carton-Kelly v Darty Holdings SAS [2022] EWHC 3234 (Ch); on appeal: [2023] EWCA Civ 1135	BPC	LCM Litigation funding	Geoffrey Carton-Kelly (liquidator for CGL Realisations Ltd) (Law firm – Jones Day)	A dispute about whether, prior to administration of a company Comet, that company had entered into a transaction that amounted to a preference in Darty's favour, thus reducing the amounts that would otherwise have been available for Comet's other creditors	Company in administration

Case	Division/ court	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
ECU Group plc v HSBC Bank plc [2021] EWHC 2875 (Comm)	BPC	Therium	ECU Group (Law firm – Mischon de Reya)	A claim by a specialist multi-currency debt management company, ECU, who provided services to clients who had borrowed under multi-currency loan facilities provided by HSBC private bank, HBPB; ECU alleged that HBPB and its FX traders engaged in widespread and systematic misconduct	Bank
Kazakhstan Kagazy plc v Zhunus [2019] EWHC 1693 (Comm)	QB	Harbour Litigation Funding	Kazakhstan Kagazy Plc (law firm – Allen & Overy LLP)	The claimant group of Kazakhstani companies accused former directors of fraud	Company directors
Raydens Ltd v Cole [2021] EWHC B14 (Costs)	Senior Courts Costs Office	Novitas	Raydens Ltd (Law firm – Keidan Harrison)	A dispute between the former wife in matrimonial proceedings and her law firm, in respect of outstanding fees for legal services rendered 2013–18	Client of the law firm
Whistl UK Ltd v Intl Distributions Services plc and Royal Mail Group Ltd	CAT	Vannin Capital	Whistl UK Ltd (Law firm - Towerhouse LLP)	A follow-on claim by Whistl in respect of an infringement finding against Royal Mail that it had abused its dominant position within the market (fine of £50M).	Postal and mail delivery company
Merchant Interchange Fee Umbrella Proceedings https://www.catribunal.org.uk/	CAT	Therium	Stephenson Harwood, Scott & Scott UK, Hausfeld and Mishcon de Reya on	Thousands of UK businesses (including Primark and M&S) sought compensation from Visa and Mastercard for losses alleged to have been caused by the card	Credit card companies

Case	Division/ court	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
cases/151711722-um-merchant-interchange-fee-umbrella-proceedings			behalf of the Primark and Ocado Claimants; Pinsent Masons on behalf of Allianz Claimants	schemes' anti-competitive interchange fees	

5. ARBITRATON APPEAL PROCEEDINGS IN THE HIGH COURT

[re matters arising from arbitrations and heard by the High Court pursuant to s 68 of the Arbitration Act 1996]

Case	Court	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
Malicorp Ltd v Government of the Arab Republic of Egypt [2015] EWHC 361 (Comm)	Comm Ct	1st Class Legal	Malicorp Ltd (Law firm - Saunders Law Limited)	Malicorp bid for an ITT to design and construct a new airport, and operate the airport for 41 years; bid succeeded; and Malicorp contracted with 'the Government of the Arab Republic of Egypt, represented by the Civil Aviation Authority'. Disputes arose under the contract	Egyptian government
Progas Energy Ltd v Islamic Republic of Pakistan (Rev 1) [2018] EWHC 209 (Comm)	BPC	Burford Capital	Progas Energy Ltd (Law firm - Quinn Emanuel Urquhart & Sullivan UK LLP)	A dispute about the importation of liquid petroleum gas into Pakistan by Progas Energy, where it was alleged that, due to the government's wrongful conduct, Progas defaulted on repayment of various loans	Government of Pakistan
Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm); and related: [2010] EWHC 195 (Comm)	Comm Ct	Woodsford Litigation	Norscot Rig Management Pvt Ltd (Law firm - Davies Johnson & Co)	Norscot and Essar entered into a contract in 2007, but the commercial relationship ended badly, and Norscot sued Essar under an arbitration agreement	A company as the other contracting party
Tenke Fungurume Mining (TFM) SA v Katanga Contracting	BPC	Logos Advet Ltd (funding was provided	Katanga Contracting Services (KCS)	The dispute related to a mine in the Democratic Republic of Congo operated by TFM, and with contractual dispute about	A company as the other contracting party

Case	Court	Funder	Client/s	Subject matter of the litigation	Type of defendant being sued
Services SAS [2021] EWHC 3301		by a related entity)	(Law firm - Charles Fussell & Co LLP)	the construction of tailing storage facilities and removal of scats	
Koshigi Ltd v Donna Union Foundation [2019] EWHC 122	BPC	A1 litigation	Donna Union Foundation (DUF) (Law firm - Bryan Cave Leighton Paisner LLP)	A shareholders' dispute concerning the Maltese company, Ulmart Holdings Ltd, where DUF, a minority shareholder, sought an order that other entities buy out its shares on the basis of their allegedly oppressive and unfairly prejudicial conduct towards DUF	Company

APPENDIX C

THE *PACCAR* REVERSAL BILL

The Litigation Funding Agreements (Enforceability) Bill 2024, introduced to the HL on 19 March 2024, reads as follows:

1 Enforceability of litigation funding agreements

(1) Section 58AA of the Courts and Legal Services Act 1990 (enforceability of damages-based agreements) is amended as follows.

(2) In subsection (3), after paragraph (a) insert ", but
(aa) an agreement is not a damages-based agreement if or to the 5 extent that it is a litigation funding agreement."

(3) After subsection (3) insert—
"(3A) For the purposes of this section a litigation funding agreement is an agreement which provides that—
(a) a person providing claims management services ("the funder") 10 is to fund (in whole or in part)—
(i) the provision of advocacy or litigation services (by someone other than the funder) to the recipient of the claims management services ("the litigant"), or
(ii) the payment of costs that the litigant may be required 15 to pay to another person by virtue of a costs order, and
(b) the litigant is to make a payment to the funder in circumstances specified in the agreement."

(4) The amendments made by this section are treated as always having had effect.

2 Extent, commencement and short title

(1) This Act extends to England and Wales only.

(2) This Act comes into force on the day on which it is passed.

The Bill awaits its Second Reading. [347]

[347] See: Bill Passage at: https://bills.parliament.uk/bills/3702.

APPENDIX D

QUESTIONNAIRE

The Questionnaire in this Appendix (and others like it) were prepared by Prof. Rachael Mulheron KC (Hon), Principal Researcher for the Project.

QUESTIONNAIRE FOR LITIGATION FUNDERS

Prepared by Prof. Rachael Mulheron KC (Hon)

For the purposes of an orientation project being conducted by the Legal Services Board

22 Feb 2024

Foreword to the Questionnaire

1. **Manner of response.** Please note that responses may be provided in whatever fashion you find most convenient:

   - By filling out and returning the Word document to either myself (r.p.mulheron@qmul.ac.uk) or to my Research Assistant, Shrutika Gandhi (s.gandhi@qmul.ac.uk); OR
   - By arranging a phone or Teams appointment to run through the questions; OR
   - By our attending an in-person interview at your office to chat through the questions.

2. **Confidentiality.** All responses will be treated with the utmost confidence. In practical terms, this means that:

   - Each respondent funder will be allocated an identifier number which will be known only to Shrutika and myself;
   - All data/responses will be anonymised so that the respondent funder is not identifiable, unless it is a matter upon which the funder is happy to be quoted or otherwise identified;
   - The extracts of the report for which any respondent funder's responses are included can be made available to the funder for perusal prior to submission of the report to the Legal Services Board, so that the respondent can verify for itself that confidentiality has been strictly observed.

3. **Time period.** If there are any questions where you would (1) prefer not to say, or (2) do not keep that sort of data, please just say. Also, please note that a five-year period (2019–the present) has been chosen for some questions in this survey because it encapsulates a period prior to Covid, after which funding may have been affected by a drop-off in litigation volumes. However, if you find that the last 3-year period is easier to answer, please just say.

Types of cases funded

1. Over the past five years (2019–the present), how many of the following cases have you funded in England and Wales, whether to proceedings, or to a stage short of the issuance of proceedings? Please indicate with an X:

    - Consumer cases (where the gravamen of the grievance was to do with goods or services customarily used by consumers);
    - Employee cases;
    - SME cases;
    - Cases involving individuals, and where the dispute concerned tax, infringement of intellectual property, or some other 'non-consumer' issue;
    - Cases in which the funded claimant was a large corporation, fully able to fund its own legal proceedings, but wishing to lay off the costs of that litigation to a funder;
    - Arbitrations heard in private chamber;
    - Marital/family disputes.

2. Over the past five years, have you funded cases in each of the following categories? Please indicate by X which types of proceedings you have funded:

    - Collective proceedings in the Competition Appeal Tribunal (CAT);
    - GLO litigation;
    - Representative actions under CPR 19.8 (formerly CPR 19.6);
    - Unitary actions (whether commercial or otherwise);
    - Arbitral proceedings;
    - Tribunal or specialist court proceedings other than in the CAT.

3. Have you ever funded a claim in which injunctive or declaratory relief was sought – or do you only fund claims which have the recovery of a financial benefit as the aim of the litigation?

4. If 'success' is measured by any case in which a success fee was obtained (whether from a damages award, a settlement sum, or other), can you give figure of what success rate you have achieved via your funded cases over the past five years?

The costs and merits screening that funding provides

5. It is often said that funding provides an extra layer of scrutiny, of 'due diligence inspection' of the claim. Over the past five years, how many claims would you have declined to fund, but which had been 'pitched' to your funding entity as being meritorious claims? What percentage of claims would that declined cohort represent, of your overall funding portfolio?

6. One of the benefits of funding is that law firms should costs-budget with reasonable accuracy. To what extent have you found that the client's own-side costs have been:

    - Reined in because of the funder's monitoring of costs; or
    - Increased, due to factors outside the funded client's and the funder's control? Are you able to give examples of why that happened in any particular case?

7. Although funders have no control or say in the incursion of defendant's costs, have you any direct experience (i.e., statements of a master in a costs course or before a taxing master) of a defendant's costs being inflated because of the knowledge that your funding entity is liable to pay adverse costs, should the claim fail?

Adverse costs

8. Does your entity customarily cover adverse costs, security for costs awards, and other potential costs awards that may be made against the funded client? Why, or why not? If not, what (if any) reduction in success fee would that reduced risk customarily represent?

9. It has been advocated that the *Arkin* cap be removed. Are you in favour of the abolition of that 'two for the price of one' court award? In other words, has the *Arkin* cap been useful to protect your funding entity from a full adverse costs award that may otherwise have been court-ordered – or do you think that the impact of the *Arkin* cap is reasonably negligible now because adverse costs cover is reasonably common in litigation funding agreements in the modern landscape? Does the application of *Arkin* depend upon the type of case being funded?

10. Has your funding entity been the subject of a non-party costs order under s 51 of the Senior Courts Act 1981, other than under the *Arkin* jurisprudence? If so, why was that ordered?

11. To what extent over the past five years (i.e., in what percentage of cases) has your funding entity:
    - laid off adverse costs to an ATE insurer; or
    - decided to cover those adverse costs yourself (and, in the case of the latter, to what extent has that greater risk being reflected in the success fee, if at all?).

Terms of the litigation funding agreement

12. Accepting that the uncertainty caused by *Paccar* may have brought about changes in this regard, what range of percentage-of-recovery success fees has your funding entity customarily charged over the course of the last five years?

13. To the extent that your funding entity has charged, instead, a multiple-of-costs formula, what is the 'costs' that your funding entity customarily uses:

    - Capital invested;
    - Costs incurred;
    - Some other formulation.

14. Again, accepting that the uncertainty caused by *Paccar* may have brought about changes in this regard, in the case of a multiple-of-costs formula, what range of multiples has your funding entity customarily charged over the past five years?

15. Where independent advice about the terms of the litigation funding agreement is required (i.e,. under clause 9.1 of the Code), who customarily provides that advice to the funded client?

- The barrister instructed in the case;
- The law firm representing the funded client;
- An independent costs counsel;
- Other.

Who pays for that advice, in your experience?

16. Has your funding entity entered into 'hybrid DBAs' during the course of the past five years? [This term has the meaning attributed in Section 9 of the report by the Civil Justice Council, *The Damages-Based Agreements Reform Project: Drafting and Policy Issues* (Aug 2015).] What advantages and disadvantages have you observed in the use of such agreements?

17. The grounds of termination of a litigation funding agreement are restricted under the Code of Conduct to three grounds (a drop in merits; no longer commercially viable; and a material breach by the client). (a) Does your litigation funding agreement customarily include all three? (b) Clause 12 prohibits a 'discretionary right' to terminate. However, in light of your experience, are there any other reasons that you consider would be fair and reasonable to include as valid grounds for terminating the funding of a dispute?

18. The Code states (at clause 11.1) that the LFA shall state the extent to which the funding entity may provide input to the client's decisions regarding settlement. Can you describe the extent to which your funding entity can provide such input, as per your litigation funding agreement?

Assignments

19. Has your funding entity ever sought to have assigned to it a relevant claim in England and Wales? If so, which category would this assignment fall into:

- A transfer of the judgement obtained by the funded claimant;
- A transfer of a property right (e.g., debt, liquidated sum);
- A transfer of a restitutionary cause of action;
- A transfer of a bare cause of action;
- Other.

Your corporate structure

20. To what extent does your corporate structure follow the 'Associated Entity' and 'Funders' Subsidiary' structure which is encompassed in clause 2 of the Code of Conduct for Litigation Funders? What is the purposes and advantages of such a structure, in your view?

21. From which sources is this funding predominantly acquired? Please indicate with a X which apply:

★ individual high-net-worth or corporate investors who are domiciled in the UK;
★ individual high-net-worth or corporate investors who are internationally-domiciled;
★ philanthropic sources (e.g., from Universities or from charities) which are seeking an investment opportunity for their funds;
★ managed trusts;
★ pension funds;
★ other (please could you specify).

Amount of funding

22. As at the current date, what is the amount of funding which your funding entity has committed to active (i.e., currently proceeding) cases in England and Wales?

23. As at the current date, what is the amount of funding which is available for commitment to future cases in England and Wales?

24. Over the last five years (2019–the present), are you able to state what amount of success fees your funding entity has cumulatively obtained by way of success fees, in approximate terms?

Regulation

25. Given your entity's membership of the ALF, what advantages and disadvantages has such membership provided to your entity, in your view?

26. If more formalised regulation were to be enacted by the government, to what extent do you think that the present capital adequacy and cash fluidity requirements (presently, £5 million, and 36 months of aggregate funding liabilities) are sufficient/inadequate/too onerous? Please suggest alternatives if you hold views on this issue.

27. If Third Party Funding legislation were to be enacted pursuant to the Courts and Legal Services Act 1990 (or other enactment), to what extent to you consider that the 50% cap presently applicable to DBAs for commercial matters should be applied, in like fashion, to litigation funding agreements? Much depends upon whether (and, if so, which) disbursements were to lie outside that cap (say, any ATE premiums, counsel's fees, expert witness expenses, arbitration expenses if they were also covered by the legislation). If that were to be the case, would a cap of less than 50% still be the minimum, or could a lower cap work financially? Please give your views on this hypothetical scenario to the extent that you think possible.

Thank you for your responses to this questionnaire!
Please could you respond by Wednesday, 6 March 2024. As mentioned, phone, Teams or in-person interviews at any point prior to that date are also fine if more convenient to you.

Prof. Rachael Mulheron KC (Hon)
Professor of Tort Law and Civil Justice
Queen Mary University of London