

Advice Note

Litigation Funding Options for Business

March 2017

The cost of litigation projects can be substantial. The work is demanding, often complex and when you win, you should recover a proportion of your legal costs from the other side. If you lose, you will normally be required to pay a proportion of your opponent's costs as well as your own.

In the light of this we work hard to make life easier for you by designing budgets and project managing our work to ensure that we deliver the service and results you expect with no surprises. We are flexible as to your funding needs and always ready to discuss your ideas and any alternatives. In that regard, it is important that you know that there are various funding options that may help in your meeting the costs and reducing the litigation risk:

- Risk sharing with lawyers
- Risk sharing with an insurer
- Risk sharing by funding from third parties.

The purpose of this advice note is to let you know about these various options which must be judged in each individual case in accordance with your investment capacity and appetite for risk. We will be pleased to discuss this with you to ensure that funding meets your overall objectives.

Risk Sharing with Lawyers Conditional Fee Agreements

- A Conditional Fee Agreement ("CFA") allows a lawyer to charge a reduced fee or sometimes no fee if the claim is unsuccessful and a "success fee" on top of normal fees if the claim is successful. The lawyer's fee is partially or wholly dependent on achieving defined success criteria agreed when the CFA is entered into
- It may be possible for counsel (barrister) fees to also be subject to a CFA
- CFAs can be entered into before or at any stage of proceedings
- With most CFAs all disbursements and expenses are payable in any event
- Where a CFA has been entered into a proportion of your normal fees may be recoverable subject to the outcome of the litigation. For CFAs entered into after 31 March 2013, save for very limited exceptions, any CFA success fee will not be recoverable from the losing party in litigation.

In addition to a CFA with your lawyer, you may wish to consider purchasing after the event legal expenses insurance (see below), to cover the risk of liability for an opponent's costs, and possibly for some of your own costs, if the claim is unsuccessful.

Damages Based Agreements (Contingency Agreements)

- A Damages Based Agreement ("DBA") allows a lawyer to charge a percentage of the damages recovered from the losing party
- Payment of solicitors' fees, counsel fees and VAT under a DBA is dependent on achieving defined success criteria agreed when the DBA is entered into, and on monies being recovered from the opponent
- The DBA fee payable for solicitors' fees, counsel fees and VAT from monies recovered from the opponent will equate to a sum of up to 25% of general damages and pecuniary loss (other than future pecuniary loss) for a personal injury claim, and up to 50% of the sum recovered for all other matters (excluding employment claims). In respect any appeal proceedings there is no limit on the DBA percentage fee payable
- In employment claims the DBA fee is up to 35% of the sum recovered for solicitors fees and VAT
- All other disbursements (including expert fees) and expenses are payable in addition to the DBA percentage fee
- Where a DBA has been entered into, any recovery of costs from an opponent will not be directly based on the DBA percentage fee. The recovery of costs from an opponent will be based upon time spent at applicable hourly rates and all disbursements, deemed to be reasonably and proportionately incurred, and VAT if applicable. In any event, the receiving party cannot recover greater costs than incurred under the DBA.

As with a CFA, you may wish to consider purchasing after the event legal expenses insurance to cover the risk of liability for an opponent's costs, and possibly for some of your own costs if the claim is unsuccessful.

Risk Sharing with Legal Expense Insurers "Before the event" legal expense insurance ("BTE")

- This insurance is usually ancillary to another form of insurance cover, for example, warranty indemnity insurance, business interruption cover and property or motor insurance. The purpose of BTE cover is to meet any legal costs incurred by the policyholder in respect of future legal disputes
- If you have BTE which you think suits your needs in the event of a legal dispute, then provide a copy to your lawyer as soon as possible so that a claim can be made.

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"After the event" legal expense insurance ("ATE")

- ATE offers the opportunity to protect part or all of your possible liability for costs to your opponent (and possibly some of your own costs) with an insurance policy that is issued after the dispute arises
- We can put you in touch with a broker or insurer who specialises in ATE, or you can approach your own broker or insurer
- The level of premium payable depends on the type and level of cover sought, and the assessment of the risk can typically be 30% to 45% of the sum insured. Some insurers may be willing to offer ATE at a lower premium if you are willing to accept a high insurance excess
- For ATE policies taken out from 1 April 2013 the ATE premium will not, save for very limited exceptions, be recoverable from the losing party in the litigation
- Following the successful conclusion of the claim, whether by way of a negotiated settlement or following judgment, the ATE premium will be payable to the insurer
- An insured party to litigation must keep insurers informed and have regard to their interest in the proceedings.

Risk Sharing with a Third Party Funder

- Litigation funding is 'non-recourse' funding, not a loan. If a case is lost, the funder loses its investment and no sum is repayable by the funded party
- Commercial "third party funders" invest in litigation with ambitions of a profitable return
- A litigation funder's fee will typically be a multiple of cash advanced or a percentage of monies recovered, whichever is the greater. The key issues for any litigation funder are the value of the claim, potential recovery, the claim having good merits, and there being no issue as to the opponent being good for the money or your being unable to enforce payment in the event of success. Funders prefer cases with few issues and that are not too dependent on factual or uncertain expert evidence
- With litigation funding you remain primarily liable for the lawyers' costs and expenses, albeit that the funder enters into an agreement to indemnify such costs
- With litigation funding you and the funder have to consider the potential liability for an opponent's costs in the event of the litigation being unsuccessful.

For further information, contact your usual legal adviser or our Legal Director (Costs Lawyer)



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