

# LITIGATION FUNDING

A GUIDE TO LITIGATION FUNDING  
FOR COMMERCIAL LITIGATION AND ARBITRATION

## ABOUT COLLYER BRISTOW

Collyer Bristow LLP is a long-established central London law firm. We provide high quality, individually tailored legal advice, often with a cross-border aspect, to a portfolio of international and domestic clients including businesses, ambitious entrepreneurs and wealthy individuals and families. We specialise in Business; Dispute resolution; Private wealth; and Real estate services.

Our clients choose Collyer Bristow because they, like us, appreciate individuality, creativity and collaboration. They recognise that their needs may be unique and complex, or that in progressing with their legal issues they value a more engaged and personalised service from their lawyers. They recognise that the Collyer Bristow approach is one of building understanding, trust and relationships with clients. We take time to build relationships so as to understand the commercial objectives behind every transaction or dispute. We find this allows us to operate more strategically on our clients' behalf and to best support the achievement of the outcomes they desire.

The firm is well known for its high standards of client service. We combine a long history of high-quality legal work and professionalism with a dynamic, commercially astute team of lawyers. The firm and individuals are ranked in the leading legal directories including Chambers & Partners and the Legal 500.

## OUR DISPUTE RESOLUTION SERVICES

### Resolving disputes swiftly and effectively

Conflicts are an unfortunate yet inevitable part of commercial life which must be dealt with swiftly and effectively. We work with clients across a vast range of industries supporting them through the full range of disputes. We provide dynamic and tailored strategies to get them back on track and focused on the day-to-day activities required for success.

With an in depth understanding of our clients' businesses and the key industries they operate in, our creative strategists provide innovative solutions to even the most complex of claims.

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- Competition and antitrust
- Construction
- Corporate recovery, restructuring and insolvency
- Corporate reputation management
- Employment law
- Fraud
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- Investor claims
- Litigation funding disputes
- Real estate
- Shareholder disputes
- Tax disputes and investigations

We are a conflict of interest free firm and a major source of our work is referrals made by other law firms – be they in the UK, USA or elsewhere – in particular large English and US law firms. We see the confidence placed in us by so many other law firms as a reflection of our reputation for high quality legal work and straight-dealing with clients.

## "TENACIOUS IN ACHIEVING THE BEST RESULTS FOR CLIENTS"

Legal 500, legal directory

## "TECHNICALLY EXCELLENT AND GOOD VALUE FOR MONEY"

Legal 500, legal directory

## LITIGATION FUNDING

Large and increasing amounts of capital are available to finance complex litigation in England. In return for a share of the damages payable to the funder, it enables a claimant to pursue a claim without having to pay its lawyers legal costs and involves no cost to the claimant if the claim is unsuccessful.

This is a basic guide to the funding available to claimants for complex commercial litigation (and arbitration). It may be helpful also for foreign lawyers who may not have detailed knowledge of litigation funding or who may operate in a jurisdiction where it is prohibited or unpopular.

The position in England is the reverse of that. Here, the litigation funding industry has flourished and at the current time the number of funders is increasing, as is the amount of finance available. Funding has also widened to become attractive to claimants who are able to afford legal costs but choose not to incur them for cash flow reasons or because they do not want to run the risk of the legal proceedings themselves. An additional advantage is that the respondent's awareness that the claimant is backed by a well-resourced funder can be a factor that can encourage an acceptable settlement. The importance of third-party funding in facilitating access to justice is widely accepted in many jurisdictions.

There are currently many litigation funders and they compete for the best cases; they have a large appetite but a cautious one. Funders do not charge a fee to review cases but obtaining funding is not easy and claimants need to understand the commercial realities of the market.

Funders take it into account that every case has risks for them and involves their making a significant capital investment. In general, funding of complex litigation is an expensive, risky and lengthy process for a funder. A claim may take years to be resolved, not only to achieve a successful end but also to obtain payment of the damages.

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Broadly speaking, all litigation funders seek some similar features:

- A strong case.
  - A large claim - for many millions of pounds.
  - A "reasonable" costs budget from the claimant's lawyers, compared with the amount of damages likely to be recovered.
  - A financially strong respondent against whom a judgement is readily enforceable.
  - The availability to the funder of insurance cover for the legal costs ("adverse costs") that it will have to pay to the respondent if the case is unsuccessful.
  - Damages high enough to leave the claimant with a minimum of 50% of the damages after all deductions.
  - A claimant who is likely to take a realistic approach to reasonable settlement proposals from the respondent.
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Much is open to negotiation but as a rough indication of one funding scenario, the funder will want its share of the damages (the "funder's fee") to be what it has spent on the case plus about 2.5 times that amount. So, if it expects to spend £1 million, it wants to recover that amount from the damages plus £3 million. Based on these figures the funder would want to be funding a case where it expected that the damages recovered by the claimant from the respondent would at the very least be £9 million so that the claimant can receive a minimum of 50% of the damages. In practice, the funder would require an expectation of some millions of pounds more so that it could have more confidence that there would be sufficient amount available after all deductions.

This is a straightforward example of how litigation funding operates but these are relatively modest figures. Many funders seek claims of a far higher amount than this so that their outlay (and their risk) represents a far smaller proportion of the uncertainties- the main uncertainty being the amount of damages likely to be recovered and the costs to be incurred. The other uncertainties include if, and when, they may obtain a successful judgement and obtain payment of it. The damages have to be large enough to make it an economically viable investment for the funder in spite of the uncertainties.

To achieve the funder's investment criteria, terms may be structured in a number of ways depending upon the legal costs and other expenses likely to be incurred, the nature and risks involved in the case and the funder. So, a funder might require as its fee a percentage share that fluctuates according to the damages that are obtained or a multiple of the funding to be provided or elements of both. The funders fee may also increase over time to reflect the additional costs and risks being incurred. As a new approach in a competitive market, some funders have said that in lieu of their fee they would even consider taking a share in the claimant company if the company's sole asset is the claim.

As part of the deal proposal, the litigation funder will undertake to the claimant that the funder will pay to the respondent any adverse costs order if the case is unsuccessful. As is well known, an important feature of English litigation is that the losing party is generally ordered to pay the winning party's legal costs (this often equates to about 70% of the actual costs that the winner has paid its lawyers).

The funder will commonly pay a premium to an insurer to take on this adverse costs risk (because this is a policy obtained after the dispute has started this is called After the Event insurance - "ATE"). The cost of this premium will be built into the deal that the funder proposes to the claimant. The ATE policy will also usually include an obligation on the insurer to provide security for the costs of the proceedings if the claimant is ordered to provide security. The availability of ATE insurance and the cost of it fluctuates from time to time depending upon market conditions and the insurer's view of the case. The insurer will itself carefully scrutinise the merits of the case to assess whether it is prepared to take the risk and at what premium.

So, a claimant seeking litigation funding has to achieve the confidence of the insurer as well as that of the funder. It is a competitive market and one where some funders are known to be interested in some types of cases and not others, and other funders are known to be interested in funding only a few very large cases per year. It is generally possible for us to have an informal telephone discussion with a funder to obtain a preliminary indication of whether it might be interested in the case. There are also brokers operating in the market to help identify funders for particular cases and to help negotiate the funding terms.

The funder will have extensive requirements that need to be satisfied before it will enter into a funding agreement. Commonly, the claimant and the funder will enter into a Non-Disclosure Agreement at an early stage. The claimant's lawyers have to provide a very detailed case file consisting of the available relevant documents and evidence and a detailed explanation of the case, the amount sought and information about the expected ability to enforce the judgement. "Counsel's opinion" about the strength of the case is normally required (a detailed written opinion from a barrister). A detailed costs budget also has to be provided by the claimant's lawyers.

Substantial costs are commonly incurred in preparing the claim file, dealing with the enquiries from the funders and negotiating and completing the funding agreement. The funder will not normally pay these legal costs. If, however, the claimant is in a particularly strong negotiating position then some funders offer to contribute, as seed capital, towards these legal costs - in particular the cost of obtaining a detailed written counsel's opinion - but this is generally not a common occurrence.

The funder will consider the case file by its own lawyers and/or by an external panel of lawyers (perhaps including a former judge). Most cases will be rejected at this stage. The reality is that it is only a very small proportion of cases put to funders that reach the conclusion of a funding agreement.

If the case is of interest to the funder then it will ask preliminary questions about it and likely issue a term sheet to indicate the terms on which it may be willing to provide funding after further detailed consideration of the case. The term sheet inevitably requires the claimant to agree that the funder should have a period of exclusivity (of some months) to consider the case and to make a proposal and to negotiate terms. The period of exclusivity prevents the claimant approaching other funders during that period.

The funder's proposal will include its intended arrangements for payment of the claimant's lawyers' fees. Usually this is by a monthly payment of perhaps 70% of the fees and disbursements, with payment within about 21 days of the invoice. If the case is successful then the claimant's lawyers will get the balance of 30% plus a success uplift of say 25%. These figures are just examples as much depends on negotiation and on the strength of the claimant's position in the negotiations.

The funder's proposal will contain detailed clauses about the "waterfall" - this decides with what priorities and how any damages obtained are to be split between the funder, the claimants, their lawyers and any ATE insurer and is particularly important if the damages obtained are smaller than had been anticipated when the terms of the funding agreement were arranged.



The waterfall always requires detailed negotiation as obviously all the interested parties would prefer to get their share, or a large part of it, in priority to the others. The claimant's lawyers budget is a crucial feature of the funding agreement and includes careful provisions about the amount by which the lawyers are allowed to exceed the budget and in what circumstances. The funder will examine the budget to understand the extent and timing of the payments required from it and, unless there are provisions for extension of the budget, the claimant's lawyers' firm will take on some responsibility for budget overruns. Often, partly in the interests of developing a good relationship with law firms, the funder takes a reasonable approach to this as it knows that litigation is an uncertain process and that budgets can be unexpectedly exceeded because, for instance, of the activity of an opponent. However, it depends on the circumstances of the case and the flexibility that the claimant's lawyers have been able to negotiate with the funder.

The essence of the relationship between the claimant's lawyer and the funder is one of cooperation and of a mutual understanding of the other's position. Many funders are members of the Association of Litigation Funders whose members are required to maintain adequate financial resources to meet their funding obligations and who also have a Code of Conduct.

During the course of the case the funder requires regular reports from the claimant's lawyers but it is common for the funder to have a light touch approach to this so that it does not breach the regulations that prevent it from having undue control of the case as breach could cause the funding agreement to be unenforceable. Funders leave the claimant and the claimant's lawyers to have control over the decision-making in accordance with the agreement. The funder can put forward a view but cannot have any control of the proceedings. There will, however, commonly be provisions in the funding agreement requiring consultation with the funder in the event of settlement negotiations. The funder may specify that it has the right of approval of a settlement.

The possibility of a settlement is one that is commonly taken into account from the outset of the negotiations with the funder. In England, a very large proportion of cases settle before trial and this feature is commonly recognised in the financing terms offered by the funder. So, for instance, the funder is likely to take as its fee a smaller proportion of the damages if there is a settlement at an early point than if the case goes as far as a trial and a judgement. This reflects the lower costs incurred by the funder and reduced risk exposure if there is an early settlement and also operates as an encouragement to the claimant to try to settle. Litigation funding agreements are commonly structured to incentivise claimants to favour a reasonable settlement. If the claimant and the funder disagree as to whether to accept an offer of settlement then the litigation agreement usually specifies that an independent Queen's Counsel (a senior barrister) is to be appointed to decide the question.

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## ARBITRATION COSTS FUNDING

Many litigation funders will, in principle, provide funding for international arbitration and much of what we have said above about litigation funding applies in a similar way to arbitration. There are various additional features that the funder will take into account, however. One, is the seat of the arbitration as this will decide whether funding is permitted under local law. Another is the place of enforcement because if difficulties are expected this will deter funders. A further consideration is that the fact of funding, in some jurisdictions, can be used to raise public policy arguments to prohibit or delay the enforcement of the arbitrator's award. The approach towards funding in a particular jurisdiction may also decide the extent to which the funder can participate in settlement discussions.

Funders also typically have to be sensitive to conflicts-of-interest that can arise in arbitrations. Because arbitrators are often selected by the parties to the arbitration, these situations can occur where the arbitrator or his or her colleagues or their law firm already have a relationship with the litigation funder involved in the case. Potential conflict situations are the repeat appointment of individual arbitrators in cases involving the same funder or the appointment of an arbitrator by a funded party where the arbitrator already has a relationship with the funder. There is pressure on arbitrators to disclose to the parties their connection with funders and some arbitral bodies require that the involvement of a funder is disclosed by the parties.

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**It will be clear from this guide that there is much to negotiate because of the differing interests of the funder, the claimant and the claimant's lawyers. Much will depend on the strength of the case, the damages claimed and the amount of the funder's investment to determine the outcome of the negotiations and the exact terms of the funding agreement.**

## KEY CONTACTS



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Robin is Head of the Dispute Resolution department. He has wide experience of financial disputes and has developed an expertise in advising clients on complex FX derivative contracts. He is experienced in advising on financial mis-selling claims and also advises clients subject to investigation by the FCA. He also has broad experience of both contentious and non-contentious banking and insolvency matters, with an emphasis on financial markets work and distressed debt.

He has worked for administrators, administrative receivers and fixed charge receivers appointed in respect of numerous companies, involving both business and property sales. With regard to contentious insolvency, Robin's experience includes actions for mortgage fraud and other claims and investigations brought by Insolvency Practitioners against companies and directors.



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Stephen's background is one of very wide commercial litigation and arbitration experience, which continues. He has dealt with many cases of white-collar fraud and asset tracing and is a member of the Fraud Advisory Panel.

Stephen heads our cross-department financial sector group. His work includes dealing with bank and financial market disputes and investor disputes.

Stephen is a member of the Commercial Litigation Association, the Fides Network Group, the Financial Services Lawyers Association, the Fraud Advisory Panel, the International Bar Association and the London Solicitors Litigation Association.



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