

## Funding arrangements—overview

Litigation costs can be expensive and there are many different ways in which a party can get assistance in funding the costs of a litigation. Examples are:

- litigation funders
- conditional fee arrangements (CFAs)
- damages based agreements (DBAs)
- insurance policies such as before the event or after the event insurance (BTE and ATE insurance)

This area underwent a fundamental change when the Jackson costs reforms came into force on 1 April 2013. The changes impact on the strategy that practitioners may adopt when seeking to fund litigation. It is also important to be aware of the transitional provisions which continue to apply to pre-commencement funding arrangements as defined in CPR 48.2.

## Funders

The information available in Lexis®PSL Dispute Resolution dealing with this area is written in association with Rosemary Ioannou of Vannin Capital, a litigation funder which is a member of the Association of Litigation Funders (ALF).

## An introduction

It is important to have an understanding of what litigation funders are and how they can provide litigation funding for parties. If considering using it you will also need to know when it might be used and what sort of terms a funding agreement would contain to see whether it is something that your client would be prepared to consider. There are an increasing number of litigation funders in the market place and the issue for practitioners is the extent to which these are regulated. Those funders which are a member of the ALF, an independent body, will be subject to regulation.

If considering using litigation funding, the funder will want to assess the claim both in terms of liability and other factors such as the ability to enforce any judgment. The litigation funder will also have clear views as to what level of control it will want to exert over the strategy of the claim which may be inconsistent with the expectations of the practitioner and their client.

For information on the basics of litigation funding, see Practice Note: Litigation funding—an introduction.

## Litigation funding process

There is a standard approach that funders adopt when assessing a case and deciding whether to fund it. It is important to have an understanding of this and the issues which a funder may consider during the process.

For information on the process, see Practice Note: Litigation funding process.

## Factors applied when assessing a claim

There are common factors that all professional funders will consider when assessing whether to fund a claim. These are financials (anticipated costs and quantum), chances of success, enforcement including defendant's domicile and location of the defendant's assets as well as the applicable law for determining the dispute and which courts have jurisdiction. For more detailed information, see: What funders look for—checklist and Key documents and information required by funders—checklist.

## **Regulatory obligations in respect of funding arrangements**

There are different forms of funding arrangements. It is therefore important to discuss with a client what methods of funding are available and which method would be the most appropriate given the client's specific circumstances.

Whether there is an obligation to notify the court and other parties about the funding arrangements in place for a party will depend on when the arrangement was entered into. If on or after 1 April 2013 there is no such requirement unless you are dealing with proceedings which currently fall within the exceptions to the recovery of additional liabilities ie success fees under CFAs or premiums under insurance policies. The exceptions are in relation to insolvency-related proceedings until April 2016), publication or privacy proceedings and mesothelioma claims.

If the funding arrangement was entered into prior to 1 April 2013 and falls within the definition of a pre-commencement funding arrangement as set out in CPR 48.2 the old CPR provisions will continue to apply notwithstanding the fact they have been repealed. It is therefore important to ensure that the necessary notification was made as a failure to do so could result in an inability to recover the additional liability for the period before the notification. The information that needs to be provided in that notification will depend on the type of funding arrangement and different rules apply depending on when you are notifying.

There are also obligations on you to do this under the Solicitors regulatory requirements.

For information on these requirements, see Practice Notes: Funding arrangements—Solicitors Regulatory Requirements .

Issues in relation to costs and funding for practitioners also arise out of the Consumer Contracts Regulations 2013. The three different types of contract are distance, off-premises and on-premises. For information on the type of contracts and the issues practitioners should consider in relation to costs and funding, see Practice Note: The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 and its impact on costs and funding.

## **Conditional fee agreements (CFA)**

A conditional fee agreement provides a means of funding litigation. However, it only applies if there is an enforceable CFA and so it is important to make sure that the CFA complies with the requirements set out in section 58 of the Courts and Legal Services Act 1990. Specific requirements apply when the CFA includes a success fee, which is currently the most common type of CFA.

Since April 2013 amendments to the CLSA 1990, s 58 have taken effect and it is important for practitioners to be aware of the impact these amendments and whether the new regime applies or whether transitional arrangements are applicable.

## **Requirements for a valid CFA**

When entering into a CFA you will need to comply with a number of requirements and these are set out in CLSA 1990, s 58, ss 4A. For an explanation of what a CFA is together with the requirements for a valid CFA including the need to undertake a risk assessment, see Practice Note: Conditional fee agreements—definition, requirements and limitations.

## **Success fees**

An understanding is required of what is meant by the term 'success fee' and whether such fees are recoverable. Success fees are determined by means of a percentage and an ability to determine the appropriate percentage for a success fee is needed. For information on this area, see Practice Note: Conditional Fee Agreements—success fees.

## Types of CFAs

There are a number of different types of CFAs and different considerations arise in relation to each type. For an understanding of the current position as well as that prior to April 2013, see Practice Note: Types of conditional fee agreements.

## Assigning a CFA

The key principles for assignment were set out by the Court of Appeal in *Davies v Jones*. A CFA is a personal contract which it involves personal skill and as such is incapable of assignment. However, a limited exception was set out in *Jenkins v Young Brothers Transport* which has in the main been applied by subsequent courts. For information on this area, see Practice Note: Assigning a CFA.

## Questions and answers

We provide a number of question and answer documents on the topic of CFAs.

## Damages based agreements (DBAs)

The Damages Based Regulations 2013, SI 2013/609 introduced DBAs into civil litigation, having previously been limited to employment matters. However, the regulations have been the subject of much criticism and there has been a distinct lack of use by legal practitioners.

As a consequence the regulations have been reviewed by a working group of the Civil Justice Council and a report with recommendations has been published. For information on this, see News Analysis: Reform of Damages Based Agreements—CJC recommendations are published.

The recommendations and the proposed reform of the 2013 DBA Regulations set out in the CJC report will now be considered by the government—there is no timetable in place for what happens next. While the report makes reference to the redrafted regulations as being the 2015 Damages Based Agreement Regulations, we are now in 2016 and no information has been further coming as to whether, and if so when, new regulations will published. The report does note that phase I, which dealt with the drafting issues, was completed in March 2015 and so that aspect of the report may have been with the government prior to the publication of the full report.

An understanding of the provisions in the current regulation and the requirements for a valid DBA is essential if considering using a DBA as a means of funding. The regulations result in conflicting positions for legal representatives and clients depending on whether a matter is likely to settle early on in the proceedings or whether it is clear it will be a drawn out dispute. There is therefore a very real concern as to how legal representatives can deal with the potential conflicts without leaving themselves open to a professional negligence challenge later down the line.

For information on DBAs, see Practice Notes: Damages based agreements (DBAs) and Simple worked examples of DBAs.

## Costs insurance

There are two main types of costs insurance, being before the event (BTE insurance) and after the event insurance (ATE insurance). It is important to be aware of the difference between the two and the information that you need to provide to your client, opponent and the court. The issue of what costs can be recovered under the policies will also be key as well as an understanding of what action needs to be taken if there is a change in circumstances. The biggest change under the April 2013 reforms was that ATE insurance premiums are now only recoverable in very limited circumstances.

For information, see Practice Note: Costs insurance.

## Jackson reforms on funding

### The reforms

Changes to funding arrangements were brought into force on 1 April 2013, with some transitional arrangements in place. For an overview of the changes, see Practice Notes: Funding arrangements—Jackson Reforms and Civil litigation funding—consultation and reform proposals.

### Jackson funding reforms—one year on

April 2013 saw reforms to many aspects of litigation funding but what has this meant in practice? The implemented changes involve the sharing of risk through a number of different entities such as solicitors' firms, clients, litigation funders or insurers. The key aspect is how these different entities work together to provide parties with the ability to fund claims they wish to bring. It is important to have an understanding of the funding methods available and the impact of the changes, especially in light of their introduction at the same time as cuts to legal aid; this simultaneous cut in legal aid had not been envisaged by Lord Jackson when producing his Final Costs Report.

For more information, see Practice Note: Jackson reforms on funding—one year on.



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