

Litigation funding process

Produced in partnership with Rosemary Ioannou of Vannin Capital

This Practice Note sets out the standard approach that funders adopt when assessing a case and deciding whether to fund it. Written by Vannin Capital, it also provides an insight as to issues which this funder considers during the process.

Stage 1—non-disclosure agreement

When a case is first introduced, as a general rule, the funder will enter into a non-disclosure agreement with the client and/or the lawyer as appropriate. This is to ensure that confidentiality of the case and the funding terms that may be agreed between the parties is maintained.

The non-disclosure agreement is also likely to be worded to ensure that, as far as possible, privilege is preserved over the documents that are shared between the parties.

Stage 2—provision of documents

Every funder is likely to ask the claimant or their instructing solicitor (as appropriate) for a detailed suite of documents to enable them to undertake a full analysis of the claim.

Before a funder invests in a claim they need to be comfortable (or as comfortable as they can be) in respect to every aspect of it. Obviously the strength of the underlying claim is fundamental. However, funders will also look in detail at a number of other important factors (see Stage 3), including (inter alia) quantum, costs, governing law, enforcement and domicile and financial strength of the defendant.

This means that, in requesting documents from the claimant or its solicitor, the funder will expect to see all key documents relating to the strength of the claim but also the key documents relating to quantum, costs, enforcement (including domicile and financial strength of the defendant) and governing law and jurisdiction of the dispute.

For the vast majority of cases, to assist their initial review of the case, a funder will also request a merits opinion of the case from the instructing solicitor or counsel addressing the key points in issue: from a liability perspective but also looking at the broader points that may arise in connection with the case.

Stage 3—detailed review

A professional funder will always undertake a detailed review of the case they are being asked to fund.

As a first step, the funder is likely to consider whether the claim fits their organisation's investment criteria. This varies significantly between funders. By way of example, fundamental for Vannin Capital is that the minimum quantum of the claim is £5,000,000 and the budgeted costs of the claim are limited to a maximum of 10% of the claim value (a 1:10 funded costs: quantum ratio), ie if the claim value is £10,000,000, the total budgeted costs of the claim that Vannin would fund is £1,000,000.

If, on an initial review of the claim the funder's key investment criteria are met, they are likely to undertake a detailed review of the claim (either internally, as Vannin does, or by instructing external lawyers). In undertaking this detailed review, each funder will look for different things. However, all funders are likely to look in detail at a number of different factors, including:

- the strength of the claim from a liability perspective
- the strength of the claim from a quantum perspective

- who the defendant is and where they are domiciled: to assess both whether they would have the resources to pay any damages award made against them and whether they are domiciled in a jurisdiction where it is likely such judgement can be enforced
- the jurisdiction and governing law of the dispute and the potential for challenging this, and
- the budget for the case: whether it is realistic and whether, when looking at it in tandem with a realistic quantum assessment of the case, it meets the funders investment criteria

It is likely that, during their detailed review of the claim, the funder will request additional documents as well as, potentially, calls or meetings with the claimant and their instructing solicitor and/or counsel.

Stage 4—terms agreed including period of exclusivity

Assuming the case meets the funder's investment criteria, the next step is likely to be that the funder offers terms to the claimant, in the form of a term sheet. This term sheet will include the terms on which the funder is prepared to fund the claim based on their overall assessment of it, including, perhaps most importantly, the quantum and budgeted costs of the claim. The terms offered are likely to be presented on the basis of either:

- a percentage of the damages return received by the claimant, or
- a multiple of the money invested by the funder (whichever is the greater)

The term sheet will also include a period of exclusivity, during which, once the terms are agreed, the claimant is prohibited from approaching or speaking to any other funders. This exclusivity period will vary depending on the complexity of the case but is likely to be between 28 and 45 days.

Stage 5—full review by QC and other external investigation

During the exclusivity period set out in the term sheet (see, Stage 4), at its own cost, the funder will obtain an external legal opinion (usually from a QC) verifying the funder's own detailed analysis of the claim undertaken at Stage 3.

For Vannin Capital to fund a claim, in the normal course, it is important to note that it requires the external legal opinion obtained to give the claim a minimum 60% chance of success.

If there are particular concerns about other elements of the claim, for example, the likely damages return, it may be that the funder will also instruct an economist or accountant to verify quantum assessment that has been made.

Stage 6—investment committee review and signing of litigation funding agreement

Presuming no unexpected issues are raised during the external review of the claim (see Stage 5), the funder will seek to agree a formal funding agreement with the claimant. Once the detailed terms of this formal agreement are finalised, the funder will present the claim for funding to their investment committee. If all of the steps set out at Stages 1—5 above are satisfied, it is likely that the case will be approved for funding by the investment committee. However, it may be that the investment committee requires certain condition precedent's to be met (these can vary on a case by case basis) before the first draw-down of funds is made available.



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