

Calunius

Capital

Show Me The Money!

Considering that litigation funding is a relatively young industry, there are a bewildering number of businesses holding themselves out as being in a good position to provide access to it. As it is not entirely straightforward for users, especially first-time users, to cut through the terminology and layers of relationships between market participants, this is an attempt to explain the ground rules.

Research indicates that there are about 20 entities promising easy access to capital to fund commercial disputes. Nothing could be further from the truth. It is an unfortunate fact that not all entities are completely open about their role, and in particular whether they have immediate access to funds directly under their control, or whether they are intermediaries who would themselves in turn have to raise money from third parties (the actual funders) if a case looks promising.

It is our experience that at best a small handful of the entities claiming to be litigation funders actually have direct access to substantial funds. The majority are intermediaries who have to construct one-off funding consortiums for each individual case they take on. While there is nothing wrong with this approach, market participants and the industry itself would certainly benefit from less fuzzy terminology and a more accurate description of the capacity in which these intermediaries disguised as funders are acting.

The advice to claimants and their solicitors could not be simpler. Just ask the person you are talking to a direct question; are you an intermediary or a funder? Do you have immediate access to funds directly under your control or do you need to shop around for money from third parties to fund my case?

There are many reasons why it is important to know with whom one is dealing. Putting together a one off consortium will take a significant amount of time, as every participant will want to conduct their own assessment of the case in question. As time is sometimes of the essence in these situations, it may not be appropriate to run the risk of long delays while an intermediary is trying to raise money.

However, there is a more important reason to ensure the situation is completely clear: if one is dealing with an intermediary, for whom is the intermediary acting? Is he the agent of the claimant, the solicitor or the funder? It is obvious that the answer to the question is important, because one needs to know if the intermediary is acting in one's own best interest, or somebody else's. The intermediary will normally act in the interests of whoever offers to pay him. Surprising as it may sound, the answer to the question of who pays the intermediary is often not clear either, certainly not at the beginning of discussions about funding a case. The question has important implications; if the intermediary is not acting for

Calunius

Capital

me, how do I know that he discloses all information that would be relevant for me? Can I simply rely on representations of a previously unknown third party? The advice to claimants and solicitors is simple: ask the intermediary who is paying them.

The only way to avoid lengthy delays in dealing with brokers, and unhappy surprises about who the agent is acting for, is to go directly to the source and contact a funder, i.e. an entity with immediate access to funds directly under their control. This not only saves precious time, but also enables a direct dialogue between the parties about the terms of funding, and the timeline to get to a funding decision.

It might be argued that only via an intermediary, is it possible to get the 'cheapest' rate of funding. We would argue however that it is much more important to make sure that the money source is secure and reliable. Virtually all commercial disputes go on for two to three years; both the claimant and the solicitor must make sure that the money source will not dry up and leave them exposed and vulnerable when they are preparing for trial. The most important thing is to have a solid funder, with secure funds specifically earmarked for your funding alone, without any fancy financial footwork being required. Again the solution is simple: ask the funder where the funds are coming from, who the investors are and how they can ensure that the agreed sums will be available until the end of the proceedings.

Only a stable and reliable litigation funder can free up the claimant and the solicitors to concentrate on conducting the case and achieving the best possible outcome to the dispute.

Christian Stuerwald and Leslie Perrin
Calunius Capital LLP
9 August 2011