

Spotlight falls on funding

Leslie Perrin delivers a birthday message to solicitors as the Association of Litigation Funders celebrates its first year



Photograph: Alamy

The first birthday of the Association of Litigation Funders of England & Wales, which occurred last month, was keenly celebrated, not least by conference providers. November saw an unprecedented number of conferences at which third-party funding was the principal theme of the discussion; symptomatic surely of a growing perception that the funding industry deserves a closer look.

At the end of its first year, the ALF now has nine funder members. These are indicated in this magazine's table of third-party funders on page 23, and also on the ALF website at www.associationoflitigationfunders.com, under 'membership'. As can be seen from the membership directory, there are also overseas members, broker members, law firm members and academic members.

Funder members have satisfied the association's financial criteria for membership which are twofold; that a funder member should:

- have access to funds immediately within its control; (this is to prevent brokers from pretending to be funders, which was a major problem in the early days of the industry); and
- maintain at all times adequate financial resources to meet its obligations to fund all of the disputes that it has agreed to fund, and in particular will maintain the capacity:
 - to pay all debts when they become due and payable; (this is the conventional P&L solvency test); and
 - to cover aggregate funding liabilities under all of its litigation funding agreements for a minimum period of 36 months; (this is a particularly searching balancesheet test).

Funder members have also had their standard form funding agreements examined by an independent barrister, to confirm compliance with the fairness provisions of the ALF's code of conduct.

Law firms, at least if they are solicitors in England and Wales, are subject to obligations under the SRA Code of Conduct to take their clients through litigation funding options. Solicitors can now tell their clients that, if they contract with a funder member of the ALF, they can reasonably assume that the funder will have access to funds sufficient to last the duration of a case, and that the contractual obligations in the funding agreement will be established on the basis of a fair and balanced exchange of value approved by the Civil Justice Council and, ultimately, by the Ministry of Justice and the judiciary itself. None of these assumptions can safely be made by a law firm if its clients are dealing with a funder that is not a funder member of the ALF. Nobody is saying that funders that have decided not to subject themselves to the process of joining the ALF are necessarily short of money, or are contracting on unfair documents, but there must be some degree of risk in these respects that law firms must assess. ALF membership for funders is now a quality mark of some significance.

The level of knowledge among litigation solicitors is, with an increasing number of most honourable exceptions, inadequate. There are two particular areas of misunderstanding; the non-recourse nature of the funder's investment, and the inescapable fact that funders cannot and do not seek to control the conduct of their cases.

Litigation funding, as it is understood by the members of the ALF, is strictly non-recourse; it is not about lending or structured insurance

products, both of which are regulated elsewhere. In litigation funding, the investor's recourse is solely against the proceeds of the litigation. If there are no (or insufficient) proceeds, and the claimant has complied with its obligations under the funding agreement, the funder simply has to absorb its losses and move on.

SOLICITORS DO NOT CONTROL PROCEEDINGS

Solicitors often worry about the extent to which the funder might wish to control the proceedings. They should have no such concerns. For a start, most funders do not have time to be a nuisance to law firms. They do have a contractual right to be kept informed of developments, so as to be able to spot potential breaches of contract or outbreaks of economically irrational behaviour, but most funders are only too happy to allocate a reasonable budget, and have it utilised by the claimant and its law firm in an optimal pursuit of the claim. In any event, judicial oversight of the public policy aspects of litigation funding will ensure that solicitors' duties to their clients and to the court will remain paramount. Who knows, though, funders might even have some value to add.

'Knowledge among litigation solicitors is inadequate'

LARGE COMMERCIAL CASES ONLY?

A major theme of the ALF's first year has been the reluctance of its members to contract with 'consumers'. Funder members of the ALF find adaptations of FSA definitions useful. Thus, potential commercial counterparties acting in pursuance of the purposes of a trade, business or profession are universally accepted. Private individuals are somewhat more problematic, and ALF funder members will often undertake an assessment of the commercial expertise, experience and knowledge of any private counterparty to obtain reasonable assurance that they are capable of making an informed decision to enter the proposed transaction. A consumer is, for this purpose, a private person litigating outside their trade, business or profession. Many funder members of the ALF feel that consumer litigation funding should be dealt with as a recourse product within the provisions of the Consumer Credit Act. To take an obvious example, litigation funding for personal injury cases appears, for all practical purposes, to be unavailable.

Of course the reluctance to deal with consumers may have its roots in the well-documented preference of funders for large cases of US\$10m or above. Although by no means a universal number, that figure is emerging as a practical minimum for many funder members of the ALF. So the ALF birthday message to solicitors is simple. 'Try it, you might like it.' *Leslie Perrin chairs the Association of Litigation Funders of England & Wales and is chair of Calunius Capital*