Burness Paull

Litigation funding in England & Wales:

What is it and should clients consider deploying it?

In conversation with some of London's leading funders:

Vannin Capital, Bench Walk Advisors and Balance Legal Capital

England & Wales embraced disputes funding at an early stage. However, it is really in the last five to ten years that disputes funding has gained prominence - to the extent that there are now more specialist litigation funding firms in England than in any other jurisdiction[1]. But what is it exactly, and when should clients consider deploying it?

We caught up with contacts at three leading funders based in London to discuss.

VANNIN CAPITAL

BENCH WALK ADVISORS

BALANCE LEGAL CAPITAL

[1]Matthew Amey, *Third party litigation funding in England and Wales: an overview*, Practical Law UK

But first, the basics...

A third party funder is an independent party that pays some or all of the legal costs and expenses of one of the parties to dispute proceedings (usually, but not always, the claimant). In return, the funder will be paid out of the proceeds should the claim succeed, often as a percentage of the amount recovered or a multiple of the amount it invested. If the claim fails, the funder will not be entitled to payment.

A third party funder can be any independent third party to the claim, but it most commonly now refers to entities or funds which were set up specifically to invest in disputes such as Vannin, Balance Legal Capital and Bench Walk Advisors.

The way funding normally works is that, assuming a funder accepts a claim, the funder (not the client) would pay the client's legal fees and other expenses as the claim progresses. Sometimes that package can also cover adverse costs risks along the way (for example, if the court were to order a client immediately to pay its adversary the costs associated with a defeat at an interlocutory/interim hearing), or at the end of a trial (the normal rule in England is that costs follow success, so if a client were to lose at trial it may still be ordered to pay its adversary's legal fees even if the case has been funded).

There are also insurance policies that can be combined with funding to cover this potential costs risk. The result is that the burden of the upfront cost is removed from the client, with the funder covering those and taking its reward from the spoils of the dispute at a later stage.

Clearly, therefore, funding will not suit every dispute - it sits most naturally with commercial dispute resolution (litigation or international arbitration). Each funder will have their own specific requirements, but as a minimum a funder is going to want to see:

- **Good prospects of success on the legal arguments:** Making that judgement in significant claims (with myriad factors, parties, claims and counterclaims) can be complex. Funders each have their own ways of assessing prospects of success, which methods are increasingly sophisticated. Anecdotally, it has been said that the prospects of success should be measured at 60% or above. Obviously the aim of the funder is to back cases which are a good bit more likely than not to win.

- **Larger claims and good proportionality between legal fees and expected return:** Funders will each have a minimum level (as regards claim value) under which it will be difficult for them to make a decent return on any investment – certain funders are set up only to target higher or (comparatively) lower value claims. However, at the very least, they will all generally want to make sure that the prospective damages are large enough such that they can recover their outlays and fee, and still leave enough for their client.

- **Recoverability:** Again, it goes without saying that in addition to succeeding on the legal argument, a funder will want to know that any judgment can actually be enforced. That will involve an upfront analysis on the opponent's assets: volume, location (i.e. in which jurisdiction) and the ability to enforce against those assets.

Each funder adopts their own approach to assess these factors. The most common approach is a two stage process[2]: (i) an initial evaluation of the factors above (among others) leading – if satisfied – to an initial offer which is often subject to a second more detailed review with a locked in period of exclusivity in the meantime; and (ii) a more detailed analysis, often involving outside counsel. Ultimately any decision to invest often has to be blessed by a funder's investment committee. The overall process can take weeks or even months.

Third party funding was previously forbidden under the rules on "champerty", which sought to exclude parties with no legitimate concern in a litigation from exerting an influence over that litigation.

However, changes in law and policy have seen litigation funding become a legal and viable funding form, and its use has increased significantly in recent years. In particular, the so-called "Jackson reforms" from 2010, which aimed to increase access to civil justice and tackle the rising costs of litigation, have led to an upsurge in the use of litigation funding.

[2] See International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration (2018)*, page 31.

Initially, litigation funding was primarily seen as the answer for the impecunious litigant which had a valid claim but lacked the funds to progress it. This was (and remains) a particularly stark issue in England & Wales, where the cost of litigating (and arbitrating) is comparatively high.

However, litigation funding no longer caters solely to those without their own funds: "much of the focus of the litigation finance market today is on the growing corporate utilization of funding by large, well-resourced entities. These entities may be looking for ways to manage risk, to reduce legal budgets, take the cost of pursuing arbitration off-balance sheet, or to pursue other business priorities instead of allocating resources to financing an arbitration matter. Put simply, funding is not only for those that are impecunious. 'The use of funding offers the client the ability to minimize risk, does not have any negative effect on their cash flow, and ensures payment of lawyers.'"[3]

[3] ICCA Report, page 20

In conversation with the experts...

Andrew Jones
Managing Director,
Vannin

Jack Bradley-Seddon
Associate,
Bench Walk Advisors

Kylie Ansbro
Investment Manager,
Balance Legal Capital

Funding is clearly helpful for claimants who do not have access to the significant funds needed to contest litigation/arbitration proceedings. But, presumably, lots of your clients could technically afford to do so – why do those clients elect to go with funding?

Jack Bradley-Seddon:

Capital Release: Many individuals and businesses try to be efficient with capital: a construction company, for example, may buy new equipment on finance rather than paying cash in order to free up that cash for other purposes e.g. to invest in new projects. If that construction company pays cash for litigation, then that is similar to buying the equipment in cash; procuring litigation finance however is similar to buying new equipment on finance, in the sense that it allows the company to be efficient with capital. In addition to paying for the costs of running the litigation, in appropriate cases, Bench Walk can provide cash upfront to the business against the claim, which may be used elsewhere in the business. All financing is typically on a non-recourse basis and therefore does not gross up the balance sheet.

Focus on Core Business: Even where a corporate could fund the litigation from free cash, generally its shareholders will prefer that the company deploy its capital in its core business where it has expertise rather than on litigation where it

may not be able to assess the risks and returns as well as a professional funder.

Accounting Benefit: Generally legal expenses operate to reduce EBITDA and hence, if a company pays for its litigation costs, that may operate to reduce the corporate's valuation. By using litigation funding EBITDA is no longer reduced, which may, in turn, increase corporate valuations. Conversely, if the litigation is successful the proceeds are generally treated as an exceptional item and therefore fall outside EBITDA. Therefore third party funding may result in higher EBITDA but the payment to the funder on success generally does not operate to reduce EBITDA.

Professional Endorsement: Having a professional third party funder review a case and confirm it is meritorious can be a valuable confirmation that the litigation is appropriate to pursue and may send a strong signal to a defendant that the claim is to be taken seriously.

As well as covering agreed costs of litigation, do you also offer the possibility of covering adverse costs?

Kylie Ansbro: Yes, we can cover adverse cost risks – either by us providing a claimant with an indemnity for any adverse costs risk, or by paying for insurance cover for the claimant from an ATE insurance provider.

Once funding is in place, how involved is a funder day to day in the proceedings? Do funders get involved in settlement discussions?

Andrew Jones: Our level of involvement on a day to day basis very much depends on the case and the legal team. We certainly do not insist on a deep level of involvement – particularly where we know the lawyers well – but in some cases the legal team and client welcome our involvement and input.

In other cases, we may just have a periodic update call or email exchange to make sure that the case is progressing as planned and within budget.

As regards settlement discussions, in the ordinary course it is purely a decision for the claimant as to whether to settle the case and at what level. We almost invariably find that we are part of the conversation and that our views are sought.

What are three key advantages to litigation funding?

Kylie Ansbro: **Offsetting the financial burden and risk of pursuing litigation:** Litigation can unfortunately be very expensive, particularly in England. Using funding takes away the capital drain of having to pay monthly legal bills, and removes the financial risk of paying for a claim that is not successful (as litigation funding is typically non-recourse). This advantage applies to any type of claimant – be it an individual consumer or a large corporate.

Levelling the playing field: Litigation funding can enable a claimant to level the playing field against a better-resourced opponent, by reducing or eliminating resource inequality.

Settlement driver: Letting the defendant know you are funded can also aid settlement as it sends a message to the defendant about the strength of the claim, having passed the funder's investment criteria and with the backing of its highly experienced Investment Committee.

What is the one most commonly misunderstood aspect about funding?

Jack Bradley-Seddon: That funding is only available to assist claimants when, in fact, it is available to assist both claimants and defendants. In broad summary defence funding would work by:

- Bench Walk advances funding for defence costs;
- On a "win" (as defined – broadly, if the defence is successful and the claim is defeated or substantially defeated), then Bench Walk is repaid its investment plus an element of profit; and
- On a "loss" (as defined – broadly, if the defence is not successful and the claim succeeds for substantially its full value), then Bench Walk loses its principal investment.

Is it riskier (in terms of adverse costs risks) being a funder in view of recent decisions from the English Courts?

Jack Bradley-Seddon: The key recent decision is *Davey v Money* [4] and others in which the "Arkin" cap was removed – that is, the rule that the total liability of a funder for adverse costs should be limited to the overall maximum funding provided by the funder to the claimant.

However, internally we, and most of the funding industry, had been working for several years on the basis that the Arkin cap would likely be removed and therefore the fact of its formal removal has not in and of itself changed our approach to assessing and pricing risk.

Are there circumstances in which funding can be withdrawn?

Andrew Jones: There are various protections that are built into a litigation funding agreement, including the right to walk away in certain defined circumstances. The most common reason will generally be where the case develops in such a way as to make the merits materially worse than expected – e.g. if damaging evidence emerges from disclosure that was not available at the time the funding decision was made.

[4] [2019] EWHC 997 (Ch)

It is unlikely, however, that a funder would simply walk away even in those circumstances; there should be a discussion with the legal team and the claimant about what to do, and if the continuation of the case (with funding) for a period of time will help to secure a better outcome for both claimant and funder than simply discontinuing the proceedings, then that should be the preferable option.

What is the biggest challenge to the funding market?

Kylie Ansbro: There is inevitably a risk that a legal ruling or change to the regulatory landscape in the jurisdictions in which we operate could negatively impact, or force us to change, the way we do business.

The decision in *Davey* is an example of how decisions and changes in law or regulation could impact the market, but it is also illustrative of how these sorts of risks can be readily managed. The funding market must remain adaptable and flexible, and anticipate change.

Our Managing Partner, Robert Rothkopf, recently became a director of the Association of Litigation Funders , and that organisation, as well as playing a fundamental role in regulating the funding industry in the UK, provides another forum for ensuring we are abreast of potential change and development, and working with other reputable funders to respond to that change.

Is England's developed funding market a good weapon in its arsenal to remain a leading disputes centre post-Brexit?

Kylie Ansbro: First of all, I don't feel too negative about the impact of Brexit on the strength of the English courts as a leading disputes centre. The factors that make the English courts a particularly attractive venue for resolving commercial disputes (for example, the quality of our judiciary, top notch solicitors and barristers, time zone) should outlast and override any negative effects or impressions caused by leaving the EU.

But yes – I think that the developed funding market in the UK, and increasing understanding and experience that the legal market (from courts to practitioners) have of working with funders, is certainly a feature in England's prominence as a leading centre for resolving disputes.

It's not surprising that many of the world's most prominent funders are based in the UK, and the existence of the ALF to regulate funding in the UK is a sign of the sophistication of the market here.

VANNIN CAPITAL

Vannin Capital is a global expert in the provision of funding to support individuals, corporate clients and law firms in the successful resolution of high-value litigation and arbitration claims. More than just capital, we combine global experience with local knowledge to deliver a high standard of service and expertise to our clients around the world. A major player in the legal finance market, we are a member of the Association of Litigation Funders of England and Wales (ALF), conducting our business to a high standard in line with its code of conduct.

BENCH WALK ADVISORS

Bench Walk Advisors are a litigation funder who pride themselves on their ability to provide innovative legal capital solutions to clients worldwide. The team's combined litigation experience, investment banking expertise and industry analysis give its clients a strategic advantage that few funders can match. For more information please visit www.benchwalk.com.

BALANCE LEGAL CAPITAL

Balance Legal Capital provides non-recourse funding for commercial litigation and group actions in the UK and Australia, and commercial arbitration proceedings. The team is made up of litigators with extensive disputes experience from top-tier litigation firms and an Investment Committee including Lord David Gold and Ian Terry, two of the UK's most experienced and distinguished litigators. Balance is a member of the Association of Litigation Funders of England and Wales and a founding member of the Association of Litigation Funders of Australia.

Burness Paull & English Dispute Resolution

Burness Paull has a distinct English law dispute resolution team, and is a leading firm for complex and high-value English law disputes.

The partners in our team hail from some of the world's largest law firms and have been involved in disputes in the English Courts, and international arbitration under English law, with clients from, or issues arising in, myriad jurisdictions within North and Central America, South America, Europe, Asia, the Middle East, and Africa.

The broader team works day-to-day on English and international disputes and are qualified to practise in England & Wales. New markets can often present challenges and can lead to disputes, and we are uniquely placed to manage these by providing a single streamlined service, linking in when appropriate with our top-quality global legal network.

We work with the leading barristers in London (when barristers are needed) and are routinely instructed in place of the largest traditional city firms given our ability to offer City of London quality outside the City and in a more flexible manner.

Should you have any questions or want further information about any of the issues in this brochure, please contact Jody Crockett, head of English Disputes, in the first instance.

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