

THE ESSENTIAL GUIDE TO FINANCE AND COSTS

# LITIGATION | FUNDING

## CLEARING THE ROAD

CJC CHARTS COURSE FOR  
THIRD-PARTY FUNDING

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# Clearing the road

The latest CJC forum has given third-party funders direction, says **Neil Rose**



Road to success: The CJC provided a clear directive for TPF

Photograph: Alamy

**I**t is a happy coincidence for the Civil Justice Council (CJC) that one of its most effective forums came shortly after the Ministry of Justice announced a review of the CJC's operation. There is nothing terribly sinister in the move – the CJC has been up and running for ten years now – but helping the smooth development of third-party funding (TPF) in England and Wales should certainly go some way to proving the value of the CJC.

The CJC forum – or 'big tent', as these events have become known – was held to debate whether, and what, regulation is required to protect claimants, defendant, lawyers and funders. As usual, *Litigation Funding* was invited on a Chatham House basis, meaning we can report what was said, but not who said it.

## FREE-FOR-NOTHING

Participants were told that in principle TPF is to be encouraged so long as it is kept under reasonable control. The concern was what would happen in the event of a free-for-all, meaning some form of regulation was probably desirable. At the same time, regulation must not trigger a fresh round of satellite litigation.

As a starting point, it was important to know what is already happening. Delegates heard from one German-based funder with experience of the German, Austrian and Swiss markets, where the concepts of champerty and maintenance are unknown. TPF raises no public policy issues in Germany, he explained, and the only debate has been over the cut taken by the funder – it started at 50% but

competition quickly brought it down to 20-30%. 'The market easily accommodates five reputable funders,' he said, who between them have 90% of the market. There have been no court disputes to speak of, no defence argument that TPF is an abuse of process; only a couple of instances of claimants trying to walk away from the funder in anticipation of a lucrative settlement or favourable judgment. Both failed. The authorities have seen little need to regulate funders.

The model this funder uses in Germany does not include automatic disclosure of the funding to the other side. He says eight out of ten cases settle, but a big difference is that the legal costs for a €100,000 case will be €10-15,000, five or ten times less than they would be in England. The funder can withdraw when there is a material change, but they leave behind the money to pay both sides' costs up to that point, meaning they are reluctant to walk away unless there is very good reason.

A funder with domestic experience then took the floor to question who needs protecting and whether there are other ways of doing it than regulation, which could just lead to satellite litigation. The client can have separate advice on the funding agreement, their solicitor can ask for money on account if they are worried about their bills not being paid, while security for costs could protect the defendant. The funder said they always disclosed the funding anyway, as it showed the other side that an objective person believed in the merits of the case. Another domestic funder, though highlighting transparency and security of funding as critical, put the case for letting the market decide rather

than regulation. ‘You stand and you’re good for your money,’ he said. ‘Regulation just provides lots more jobs for government employees.’

### SECURE APPROACH

It was at this point that the idea emerged of using a reformed security-for-costs mechanism, along with disclosure of the existence of funding, as a way to protect the defendant. Unfair contract terms legislation could also be beefed up to assist further. The security would be in the form of cash, or a bank guarantee, or in the case of a reputable company, just a promise. The representative of a major insurer said he would be content with this so long as there was no recoverability, the cause of so many problems with conditional fee agreements (CFAs). ‘If it’s not going to get passed on to the defendant, there’s a very low chance of a challenge,’ he predicted.

A review of the Australian experience of TPF found the repeated efforts to stay funded proceedings on the grounds of abuse of process have failed, except for a couple of cases which have been stayed while the terms of the funding were modified to the court’s satisfaction. However, the courts have also recognised that they have yet to explore all the ramifications of TPF and that their procedures were not designed for it either. This suggested various circumstances in which a stay possibly should be ordered, such as the claimant showing no interest in suing on its own initiative, the funder not being prepared to meet any adverse costs orders or the funding agreement being manifestly unfair from the defendant’s perspective.

Alongside court control is a move to regulate litigation funders in Australia. The Standing Committee of Attorneys-General is in the process of drafting laws to achieve this, while it has also emerged recently that the Council of Chief Justices of Australia and New Zealand is looking to act amid growing concerns about the proliferation of shareholder class actions and the lack of disclosure about the terms of funding agreements. Options being considered include, not exactly by coincidence, providing the court with a copy of the agreement and ordering security for costs.

It was suggested by one delegate that the Australian TPF model is different from England’s, meaning that the case for regulation is different too, and it was agreed that security for costs and disclosure should provide sufficient protection between claimant and defendant, leaving ‘no real possibility for abuse’. Any issue between the claimant and the funder should not be a matter for the defendant – although it was pointed out that this principle did not stop insurers from attacking CFAs.

However, the discussions had focused on TPF backing larger commercial cases where the parties are well able to look after themselves. What about group actions involving individuals? Such people potentially require a greater degree of protection and though in theory they should be protected by their solicitor, the profession’s general lack of understanding of funding was seen as a major weakness. There was agreement that this should be addressed separately as part of the CJC’s work on reform of collective redress.

The delegates broke into four groups to consider the issues, and they came back supporting the approach of security for costs and disclosure. However, there was a mood against self-regulation – the experience of claims farmers hardly inspired confidence, said one group, and

generally it was seen to be toothless. Another group suggested there was no need for regulation of any kind because all the parties will have access to high-quality advice.

### THE REGULATOR’S VIEW

So what of formal regulation? The day had begun with an overview of the principles surrounding regulation and the economic starting point that you do not regulate – you let the market sort it out. But there may be reasons to regulate, such as a monopoly, windfall profits or anti-competitive behaviour. ‘One of the most important is inadequate information,’ it was said. There are non-economic reasons as well, such as consumer protection and political popularity. Regulation can be risky, however. It can lead to market failure, create barriers to entry or not be cost efficient. However, the conclusion was that TPF does enable the litigation process and some form of regulation may be desirable.

Later in the day the regulators had their say, pointing out that TPF may be riskier than people realise – ‘we may not have said claims management companies (CMCs) needed regulating before they started,’ said one, pointing out that there is the same scope for abuse by funders as there was with CMCs. The key issue for him was keeping a grip on conflicts between the competing interests at play here. There was some discussion that responsibility could effectively rest with solicitors, in the same way that policing the CFA regime was moved from the courts to the Solicitors Regulation Authority, but there were considerable reservations about this.

Instead, if regulation is required, the regime for CMCs may conveniently

Consensus moved from questioning the need for regulation to seeing the CMC scheme as an acceptable model

be the one best suited for the task. The Compensation Act 2006 describes claims management services as ‘advice or other services in relation to the making of a claim’, a broad definition that allows regulation to be adapted relatively easily to respond to changing markets. The scope of the scheme can be changed by secondary legislation.

Having heard how the CMC scheme was worked to clean up the sector, at least one major funder was prepared to reconsider their view that regulation was unnecessary. ‘It doesn’t take many bad eggs to give us all a bad name,’ they said. ‘If it does have that positive an impact, then it’s not such a big deal.’ Within a short period of time, consensus had moved from questioning the need for regulation to seeing the CMC scheme as an acceptable form of regulation.

This was undoubtedly one of the more consensual CJC forums that *Litigation Funding* has attended. The solutions put forward seemed sensible and proportionate, and raised no serious objections from anyone in the room. There is still much work to do, not least convincing others of the merits of the approach, and in particular the Rule Committee, which will be charged with amending the security-for-costs regime.

The goal here is to avoid a repeat of the costs war – a battle which, ironically, was the very reason the CJC’s big tents first came into being.