

# LITIGATION FUNDING – TRANSPARENCY IS CRITICAL TO THE INDUSTRY’S SUCCESS

*UK law firms are increasingly seeing the benefits of working with litigation funders. But a trust deficit remains among the uninitiated around costs and process. Funders must work to resolve this*

Recently, *The Lawyer* surveyed more than 200 solicitors in the UK to ask about their views on litigation funding. The results were clear – lawyers who had prior experience of working with funders were overwhelmingly positive. But feedback from those without prior contact was far less supportive, indicating mistrust and uncertainty over how funders work, and the pros and the cons of financing.

It is time that the funding industry as a whole recognises that to succeed in our collective mission to enable access to justice, we must adapt to improve transparency in everything that we do.

## Key role

The market believes litigation funding has an important and growing role to play in UK cases. The overwhelming majority of *The Lawyer*'s survey respondents – 69 per cent – said that they expect funding to become available across a wider selection of cases in future.

Key benefits of funding were cited as offering alternative fee arrangements to clients and enabling solicitors to win work they otherwise might have turned down. Other positives identified by users of funding were the “extra pair of eyes” that well-managed funders can bring to a case through their diligence processes.

But this positivity, based on the experience of funding on cases, was lower among the uninitiated, who questioned whether a lack of clarity on pricing could lead to unexpected costs and a loss of control.

While these concerns are only held by a minority of those who had worked with funders before, the presence of these views among those without first-hand contact is worrying for the funding industry.

It shows that we must all address both how we manage our pricing and process, and how we communicate what these will be, something not all of us have excelled in, as we have raced to meet growing demand.

## More transparency and diligence needed

This need to improve transparency across the industry is all the more important today, given the recent judgment in *Davey v Money & Anor*.

The judgment focused on the often-named ‘Arkin cap’, what was considered an established precedent which capped a funder’s potential exposure to adverse costs at the quantum of their actual investment in a case and thus prevented uncapped liability for costs. In the

Davey case, the Arkin cap was set aside, exposing the funder to costs of more than five times their original investment. This will rightly cause those considering funding speculative cases to reflect on the appropriateness of their investments. And it demonstrates the need for extra diligence in case selection and transparency around that decision making.

## Honesty is the best policy

Funders have a duty to their clients and their investors to ensure that each of the processes, case selection and terms of potential funding arrangements are not only responsible but also seen as such on legal, financial and commercial grounds.

The route to this worthwhile outcome is transparency in approach and in negotiations.

We must be up-front on all the steps and costs at every stage of a funding application. And we should encourage the lawyers we are working with to ensure their clients fully understand not just the benefits of funding, which are typically clear, but how and when funding is appropriate, and whether funders will progress a case, and what costs they will take from recoveries.

## Room for improvement

With the UK legal market valued at £35bn in 2018, and with growth forecast at 5 per cent in the coming years, there is increasing scope for litigation funding.

Those lawyers and claimants who have already touched funding are clear on the benefits, so others can be assured that funding offers a good opportunity for lawyers to support meritorious claims and for claimants who otherwise might not have had a route to justice, now to be able to pursue their claim.

But funders need to up their game in communication in order to build trust among the potential beneficiaries of what we have to offer, many of whom are yet to engage with funding.



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