Informing Progress - Shaping the Future

Response to the CJC's Review of Litigation Funding Consultation.

February 2025

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You must fill in the following and submit this sheet with your response:

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The response was drafted following consultation with the membership.

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Response to the CJC's Review of Litigation Funding Consultation.

Questions concerning '*Whether and how', and if required by whom, third party funding should be regulated*' and the relationship between third party funding and litigation costs.

1. **To what extent, if any, does third party funding currently secure effective access to justice?**
2. **To what extent does third party funding promote equality of arms between parties to litigation?**
3. **Are there other benefits of third party funding? If so, what are they?**

The use of third party funding to obtain access to justice was expressly considered by Lord Justice Jackson in his Final Report on 'Review of Civil Litigation Costs'. Having expressed the view in his Provisional Report, that it promoted access to justice, he reported in his Final Report that the majority of contributors to the debate had supported that view. On access to justice His Lordship took the view that it provides an additional means of funding litigation and, for some parties, the only means of funding litigation, and thereby promotes access to justice.

FOIL supports that view. Third party funding does enable some claims to be pursued which would otherwise not be actioned and can therefore be a route to access to justice (and to greater equality of arms – third party funding enabled the claimants in the Post Office litigation to participate in litigation in which the Post Office spent £24m just on disclosure).

It must, however, be noted that the 'justice' that is obtained may be tempered by some of the drawbacks of litigation funding set out in response to some of the questions below. It is also important to note that access to justice should extend to all parties in a dispute, not just those bringing proceedings: one of the reasons Lord Justice Jackson gave for supporting the concept of third party funding was that it did not impose additional financial burdens upon opposing parties. The obtaining of access to justice by one party should not result in an impingement on access to justice by other parties.

The Interim Report notes that the current voluntary Code of Conduct does not make provision concerning the purpose for which funding can be provided: "*It could, by way of illustration, have included a requirement that funding is only to be provided where it can facilitate access to justice/equality of arms, those being the most explicit and, arguably, implicit rationales on which the court have legitimised the use of TPF*."

FOIL does not believe that the introduction of such a requirement would be practicable or appropriate. As the Interim Report notes in following sections (page 53) "*commercial litigation funding is not confined to those who cannot afford other forms of funding. Some estimates suggest that as many as 50% of claimants who now take up*

commercial funding would be able to finance their costs from other sources." It is difficult to see what benefit would arise from prohibiting that choice.

4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding? If not, what improvements could be made?

The path to current regulatory regime is well-known and comprehensively set out in this consultation's Interim Report. Lord Justice Jackson took the view that full regulation was not "*presently required*" and recommended that a "*satisfactory voluntary code, to which all litigation funders subscribe, should be drawn up, to include effective capital adequacy requirements and place appropriate restrictions upon funders' ability to withdraw support for on-going litigation. He proposed that the issue of statutory regulation by the FSA should be re-visited "if and when the third party funding market expands."*

The current regime has significant weaknesses:

- Membership of the Association of Litigation Funders of England and Wales (ALF), and therefore adherence to its Code of Conduct, is voluntary. Lord Justice Jackson envisaged an environment in which all litigation funders signed-up to a voluntary code. He emphasised the point in addressing the Association of Litigation Funders in 2011, stating that his recommendation could be considered implemented *"provided that all reputable litigation funders are willing to join the Association of Litigation Funders and sign up to the Code*". Clearly that has not occurred (and, with respect, should be a universal requirement, not limited to reputable funders): as the Interim Report notes, of the estimated 44 funders operating in England and Wales, only 16 are members of the ALF.

- Even if a funder is a member of ALF, there is no mechanism by which adherence to the Code can be established.

- The AFL is not an independent body: its operation is essentially self-regulation, by and of its members.

- Although the ALF has established a complaints process, the Code has few teeth. The sanctions available in the event of a complaint being upheld are unlikely to present an effective deterrent to bad practice, bearing in mind the multi-million-pound nature of the sector. In particular, a maximum fine of £500 provides no financial deterrent. There is no mechanism to award compensation where loss has been suffered. Viewed against the background of other regulatory regimes which govern professionals involved in the litigation process, including by the FCA and the SRA, the ALF's regime is extremely light touch.

- Although the provisions on capital adequacy were addressed to some extent in the finalising of the ALF Code of Conduct, with the Code requiring the maintenance of £5m in capital, with further provisions on the ability to pay debts as they fall due and cover funding liabilities for 36 months, the capital sum is modest in view of the increasingly high value claims and costs involved in funded cases, and the provisions have not been sufficient to quell concerns that, in the event of a large costs award against a funder, the sums awarded would not be forthcoming.

As Lord Justice Jackson recognised, a voluntary approach to regulation may be appropriate in providing some checks and balances in a nascent market, allowing providers to become established. However, it is the case that third party funding has come under scrutiny over recent years as the market has expanded and serious concerns have been raised at the way the market operates. High profile cases such as the *Bates v The Post Office* litigation, concerns around the collapse of the SSB Group; and the adverse consequences to its former clients; and the headlines around the settlement in the *Merrick v Mastercard* litigation have driven concerns that the current regime does not protect those receiving funding, particularly individuals, SMEs and other unsophisticated litigants. Against that background, and with governance in other jurisdictions also under scrutiny, it is unsurprising that calls for stronger, statutory regulation have grown, including from within the EU and from the US Chamber of Commerce's Legal Reform Committee.

A balance is required in considering future regulation. Whilst there is potential for a more rigorous statutory regime to deliver greater consumer protection, an overly prescriptive and demanding regime may disproportionately affect the market and funders' ability and willingness to provide funding, thereby damaging the main benefit of litigation funding in delivering greater access to justice. It may also encourage forum shopping, potentially impacting negatively on the England and Wales civil justice system as the forum of choice for major litigation. A careful approach is needed.

As part of the international consideration of the future of litigation funding, a number of bodies have reported and put forward recommendations, including the European Law Institute, an independent organisation within which Sir Geoffrey Vos serves as Second Vice-President. Its report on 'Principles Governing the Third Party Funding of Litigation' was published in December 2024[1]

The ELI reports calls for regulation by those concerned at the growth and impact of the third party funding market. However, noting the danger that "*regulation which affects the risk/reward balance for funders may well simply lead to funders ceasing to offer funding in the regulated territory"*, leading to "*serious access to justice issues*", the ELI "*broadly endorses the view that such regulation is only appropriate where there is an identifiable problem or market failure".*

[1] https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf

It also notes that "*aspirational nature*" of many models of regulatory control, for example in assuming that supervisory authorities have sufficient resource and funding to be able to deliver effective regulation. It should be noted that in presenting the draft voluntary Code which eventually became the ALP Code of Conduct, the CJC reported that, whilst arguably some providers came under FCA/SRA regulation, no established regulator wished to extend their remit to take on the emerging third party funding market and nor was it anticipated that the government at the time would be prepared to fund the establishment of a new regular. It is unclear whether that position has changed subsequently.

Thirdly, the ELI highlights the practical consequences of increased regulation: "*increased regulation will mean increased costs of capital and, hence increased costs of funding. TPLF [Third Party Funding] is commercial; it has to offer a return to funders, or it will not be offered*."

Whilst it seems clear that there are sufficient identifiable problems within the current regime to meet the ELI's criteria for greater regulation, in short, the ELI report highlights the dilemma: whilst the current voluntary code provides insufficient control, regulation can also create problems. The ELI's solution is the adoption of a set of Principles setting out best practice, with a view to retaining access to justice, providing an outline of potential safeguards, and assisting legislators, regulator and courts in their decision making. The Principles range over a number of issues including the information to be provided in promotional materials, transparency of the agreement, the avoidance and management of conflicts of interest, capital adequacy, fees, case management and control, and the termination of agreements. FOIL believes the proposals contain much useful guidance on the development of an effective funding regime which can square the circle: sufficient protection to prevent abuse and ensure fair treatment for those receiving funding, without adversely affecting the market and discouraging the funding which is often the only way for those funded to have access to justice.

To focus on just one issue, the Appendix to the Principles, setting out the minimum content of third party funding agreements, would require the funders' fees to be set out, including the basis on which the fees are to be calculated. This is a particular area of weakness in third party funding at present. Whilst the success fee in CFAs is required to be risk-based and set out in the agreement, there are no similar requirements that the return for third party funders should be linked to the risks to which they are exposed. A requirement to justify the fees to be paid would be a move towards addressing concerns that the financial rewards for funders can be excessive.

5. Please state the major risks or harms that you consider may arise or have arisen with third party funding, and in relation to each state:

a) The nature and seriousness of the risk and harm that occurs or might occur;

b) The extent to which identified risks and harms are addressed or mitigated by the current self-regulatory framework and how such risks or harms might be prevented, controlled or rectified;

c) For each of the possible mechanisms you have identified at b) above, what are the advantages and disadvantages compared to other regulatory

options/tools that might be applied? In answering this question, please consider how each of the possible mechanisms might affect the third party funding market.

FOIL takes the view that the most serious disadvantage of the current regime is its entirely voluntary nature: that it is possible to operate as a third party funder without being subject to any regulatory requirements. One struggles to identify any other area of similar financial engagement, with parties exposed to considerable risk of financial loss and disadvantage, which is not subject to some form of independent regulation.

At present, it is possible for a funding company to enter the market without any regulatory requirements in contrast, for example, to companies providing consumer credit who are required to be regulated by the FCA and meet minimum standards. The requirement for a licence would similarly require funders to prove their suitability to enter the market and meet minimum standards. A licencing regime would enable oversight provisions to be put into place, including, for example, a requirement to have in place anti-money laundering provisions.

Some of the risks and harms have become evident through high profile examples. The Post Office claim has highlighted the potential for funding agreements to be very costly to claimants, eating into their damages awards; the SSB Group issues have highlighted the potential for ordinary claimants to find themselves unexpectedly faced with adverse costs orders. Press reports on *Merrick v Mastercard* have highlighted the issue of control: of who steers the litigation and has the right to settle.

Even if the ALF Code of Conduct applies to a funding agreement, the discipline it imposes on the terms of the agreement is very light touch. It still allows for the possibility of an exploitive, one-sided agreement which the funded party may not fully understand.

FOIL believes that a requirement for a comprehensive funding agreement, with transparency and certainty on the issues likely to lead to disadvantage or dispute, is the primary requirement. This would enable the parties to understand fully the agreement they are entering into; have a clear understanding of the terms to which they are agreeing; focus minds and require a funder to justify to a greater extent the terms being sought; and more easily enable an objective assessment of whether the terms were fair and reasonable and whether they have been adhered to. Such an approach would potentially make it more realistic for the courts to play a greater role in regulation of funding arrangements, with judges well used to applying principles of proportionality and reasonableness, with more detailed agreements given them the information required to make such judgment calls.

By way of example, FOIL has raised above the problem of a lack of a risk-based approach to fee-setting. The ELI Principles set out a number of factors which are likely to feed into the level of a funder's fee including:

- Is the fee based in whole or in part on a binding precedent?

- Does the case require a novel interpretation of the law which is likely to require: (i) significant finding of relevant facts and/or (ii) appeals?
- On a scale of 1-10 how difficult is the case to build? Is this due to the nature of the facts or the parties involved?
- Does the dispute involve a high risk of loss?
- What is the down-risk for the funder?
- What is the expected timeline for a clear outcome?
- Are there relevant changes in the law in the lifetime of the funded dispute which can affect the prospects of success?
- Is the funded party: (i) an individual of limited means; and/or (ii) lacking experience in litigation?
- Are there procedural hurdles and consequent costs?
- Are there issues as to enforceability?
- Other funder costs issues such as:
  - cost of capital
  - cost of insurance
  - comparison of risks and returns offered by funding to those offered by other investments
  - duration risk

At present, with no regulatory requirements on the calculation of the fees, those receiving funding can be seriously disadvantaged, with agreements giving funders disproportionate returns. More stringent requirements requiring fees to be transparent and objectively justified would reduce the risk of market abuse.

6. **Should the same regulatory mechanism apply to: (i) all types of litigation; and English-seated arbitration?**
   a) **If not, why not?**
   b) **If so, which types of dispute and/or form of proceedings should be subject to different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?**
   c) **Are different approaches required where cases (i) involve different types of funding relationship between the third party funder and the funded party, and if so, to what extent ; and (ii) involve different types of funded party, e.g, individual litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?**

The range of claims in which third party funding is used is daunting for any organisation charged with developing an appropriate regulatory regime. As the consultation paper notes, they can encompass individual claims; group litigation; collective proceedings in the CAT; representative actions, personal injury claims, consumer claims, financial services claims and commercial claims. FOIL would also add family matters, where third party funding is sometimes used to fund the financial proceedings in high value divorce claims.

It would be difficult to shape a single regulatory regime that provided for such a wide range of claims and at the same time did not unnecessarily impinge on the market. FOIL believes that the adopting of principles and a focus on transparency of agreement, coupled with licencing requirements and oversight by a regulator and/or the courts, might provide a framework which would deliver protection with flexibility.

Focusing upon the point made by the ELI, that regulation is only appropriate where there is an identifiable problem or market failure, FOIL does not believe that third party funding for arbitration is as problematic as that used for litigation. It does not believe there is a need to treat litigation and arbitration funding in the same way. Third party funding is an established feature of arbitration, particularly international arbitration, where parties are using a dispute resolution method to which they have agreed. It is frequently used by experienced, commercial entities, assisting those who are unable to fund arbitration without external support, and those who wish to avoid committing funds to dispute resolution or ease cashflow. The market appears to work well. The rules governing third funding in arbitration already differ from those applicable to litigation and there appears no reason to automatically align them.

With concerns around consumer protection, a distinction is often drawn between sophisticated and unsophisticated litigants – between large commercial entities who are presumed to be able to look to their own interests, and individuals and SMEs who may be less able to do so. Whilst the general principle of balancing regulation against the benefits of funding should be borne in mind, the problems that have arisen point to a need for greater regulation for agreements involving more inexperienced parties, with a greater emphasis on fairness of outcome, in particular with regard to the final outcome of a claim and how much the funded party can expect to receive if the litigation is successful.

7. What do you consider to be best practices or principles that should underpin regulation, including self-regulation?

FOIL would highlight again the comprehensive work undertaken by the ELI in developing Principles to govern all aspects of a litigation funding agreement. The report 'Principles Governing the Third Party Funding of Litigation', provides a detailed, comprehensive assessment of the principles required to deliver protection without overregulation.

8. What is the relationship, if any, between third party funding and litigation costs? Further in this context:

- **a) What impact, if any, have the level of litigation costs had on the development of third party funding?**
- **b) What impact, if any, does third party funding have on the level of litigation costs?**
- **c) To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?**
- **d) How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?**

e) Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?

(i) If so, why?

(ii) If not, why not?

FOIL believes the effect of third party funding on litigation costs is a mixed picture. In principle, the financial rigour which arises from having a professional, experienced, financially astute funder involved should result in a greater focus on costs and budgeting, an effect also likely to impact on the defendant's budget, to the benefit of all parties.

In evaluating the impact of his reforms in a speech to the Cambridge Law Faculty in 2018, Lord Justice Jackson took the following view: "*RJ's proposals to promote TPF and introduce a code for funders have been successful. These reforms enable parties to pursue claims (and sometimes defences) when they could not otherwise afford to do so. Funders are highly experienced litigators and they exercise effective control over costs. They often insist upon having court-approved budgets. Self-evidently, these reforms promote access to justice and tend to control costs."*

At the same time, FOIL believes that some litigation funders have concerns over their ability to control costs. Once tied into litigation by way of a funding agreement, a request for additional funding can be difficult to resist. Perhaps it is fair to say that whilst having a litigation funder in place may not increase costs, there is also no guarantee that they will be able to keep costs in check.

FOIL would argue strongly that the recovery of third party funding costs should not be permitted. FOIL would agree with the argument set out in the Interim Report that "*shifting the burden of the costs of funding claims on to losing defendants will increase the costs of defending litigation to disproportionate levels, as well as promoting costs litigation…".*

In his Final Report on civil litigation funding, Lord Justice Jackson set out, as one of the reasons why he was supportive of third party funding, the fact that the use of third party funding does not place additional burdens upon opposing parties.

The removal of recoverable success fees from the civil justice regime following the Jackson review, was considered a key recommendation and a success. As Lord Justice Jackson explained in speaking to the Cambridge Law Faculty in 2011:

"This reform [removing recoverable success fees] has been a success. Recoverable success fees distorted incentives and drove up costs massively. The abolition of recoverable success fees was a key recommendation of the Final Report. It has substantially reduced litigation costs. When combined with several counterweight measures (including increased damages, enhanced rewards for claimant part 36 offers, restriction of success fees deductible from PI damages), this package of reforms has controlled costs without inhibiting access to justice. There is no evidence that the reforms have led to a drop off in claims, quite the reverse."

Reintroducing an element of recovery of funding costs would unravel that reform and would significantly increase costs.

9. What impact, if any, does the recoverability of adverse costs and/or security of costs have on access to justice? What impact, if any, do they have on the availability of third party funding and/or other forms of litigation funding?

As the court recognised in *Rowe,* as set out in the Interim Report, "*security for costs is a normal and foreseeable aspect of litigation and therefore of the* [third party funder] *investment, and the funder should be expected to include it in its business model in determining the terms on which funding is provided."*

The rules on the provision of security of costs are provisions in place to deliver access to justice, in this respect to defendants. The position of a defendant facing a claim where recovery of costs is uncertain is in an unenviable position, faced with a choice of seeking to settle early a claim which may be unmeritorious, or running the risk of a pyrrhic victory if the claim is successfully defended at heavy financial cost. The availability of security for costs levels the playing field between claimant and defendant. FOIL would argue against any change which prevented security for costs being sought from a third party funder.

Although in *Rowe*, the Court of Appeal was of the view that funders should be structured and provide their services in a way which enables the court and the parties to have confidence that they could meet an adverse costs order made against them, in practice security is often provided by way of an ATE policy with an Anti-Avoidance Endorsement (AAE).

The courts have approached the issue of ATE with an AAE on a case-by-case basis. In the case of *Asertis Ltd v Lewis Barry Bloch* [2] the High Court ruled that an ATE insurance policy with an AAE did not provide sufficient security for costs due to various termination provisions and conditions within the funding agreement. In contrast, in *Saxon Woods Investment Limited v Francesco Costa and Ors*[3] the court held that an ATE policy with an AAE was sufficient security for costs.

10. Should third party funders remain exposed to paying the costs of proceedings they have funded and, if so, to what extent?

Yes, third party funders should remain exposed to adverse costs orders in full. The issue has been given serious consideration in the courts and as a result the limitations imposed by the 'Arkin cap' have been weakened. As the Interim Report notes "*Following the Court of Appeal's decision in Chapelgate Credit Opportunity Master Fund Limited v Money [2020], it is apparent that the Arkin cap is no longer treated by*

[2] [2024] EWHC 2393 (Ch)
[3] [2023] EWHC 850 (Ch)

the courts as a binding rule". A similar approach was taken in *Laser Trust v CFL Finance Ltd*[4]*.*

In *Chapelgate*, the Court of Appeal upheld the decision of Mr Justice Snowdon at first instance, that the Arkin cap was not a binding rule. For Snowden J, the decision that costs may be awarded in excess of the sums the funder had invested in the claim, was a matter of justice:

"*The Court of Appeal* [in Arkin] *obviously thought that it was unjust if a funder whose involvement was limited to providing funding for the claimant's expert evidence was made liable for all the defendant's costs of the action. However, I consider that there is an obvious risk of injustice in the other direction if a number of defendants are forced to incur significant costs in defending themselves but are limited to recovering only a proportion of those costs because of entirely different funding arrangements over which they have no control between the claimant, his funder and his lawyers."*

FOIL would agree.

Snowden J also saw further benefit arising from exposing a funder to adverse costs outside the cap:

"If the possibility that a funder may not be able to take advantage of the Arkin cap caused funders to keep a closer eye on the costs being incurred, both by the funded party and the opposing side, and if careful consideration is given to employing the mechanisms in the CPR to limit exposure to adverse costs in an appropriate case, I do not see that as contrary to access to justice or other public policy."

FOIL would agree.

The Court of Appeal recognised that there might be cases where the Arkin cap was appropriate, for example, where the funder had "*merely covered the costs incurred by the claimant in instructing expert witnesses".* In other cases, where the funder was more instrumental in funding the entire claim a different approach was likely:

"*A judge could, however, consider the funder's potential return significant. The more a funder had stood to gain, the closer he might be thought to be the "real party" ordinarily ordered to pay the successful party's costs in accordance with the guidance* [in the Dymocks judgment]. *In the case of a funder who has funded the lion's share of a claimant's costs in return for the lion's share of the potential fruits of litigation against multiple parties, it would not be surprising if the judge ordered the funder to bear at least the lion's share of the winner's costs, regardless of whether the funder's outlay on the claimant's costs had been a lesser figure."*

The Dymocks judgment [2004] drew a distinction between a 'pure funder', who does not stand to benefit from the litigation and are not funding as a matter of business, and those who stand to benefit from the litigation. In the latter case, Lord Brown stated,

[4] [2021]EWHC 1404

"*justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs."* In his Final Report on civil litigation costs, Lord Justice Jackson took a similar view, recommending that third party funders should be "*potentially liable for the full amount of adverse costs, subject to the discretion of the judge".*

In many cases the decision by the claimant to obtain litigation funding to bring a claim is through a lack of other resources. In these circumstances the claimant themselves is unlikely to be able to meet a claim for adverse costs and it is important that the funder stands ready to meet the award. FOIL believes that the principles set out in the case law highlighted above with regard to recovery of costs achieves an appropriate balance between funders and receiving parties and should form the basis of the general rule on recovery, with orders against third party funders not considered exceptional.

Questions concerning whether and, if so, to what extent a funder's return on any third party funding agreement should be subject to a cap.

11. **How do the courts and how does the third party funding market currently control the pricing of third party funding arrangements?**
12. **Should a funder's return on any third party funding arrangement be subject to controls, such as a cap?**
    a) **If so, why?**
    b) **If not, why not?**
13. **If a cap should be applied to a funder's return:**
    a) **What level should it be set at and why?**
    b) **Should it be set in legislation? Should the court be given a power to set the cap and, if so, a power to revise the cap during the course f proceedings?**
    c) **At which stage in proceedings should the cap be set?**
    d) **Are there factors which should be taken into account in determining the appropriate level of cap; and if so, what should be the effect of the presence of each factor?**
    e) **Should there be differential caps and, if so, in what context and on what basis?**

FOIL believes that, as part of a regulatory regime, there should be greater transparency around the calculation of funding costs – see the answer to Question 5. Requiring a funder to justify funding costs against objective criteria is likely to bring about more proportionate costs, increasing the sums available to the funded claimant.

As indicated in the answer to Question 6, there is a strong argument that individuals, SMEs and other more vulnerable and inexperienced claimants should have greater protection through regulation. One way to achieve this would be by way of a regulated risk-based fee structure. For example, the funding costs could be made up as follows:

a) A success fee element – to cover the costs of unrecovered cases, based on the amount invested with a percentage uplift to reflect the percentage chance of success, limited to 100% of costs invested.
b) An insurance element to cover adverse costs.
c) Reward element – a reward for taking the risk in funding the litigation - to be capped.

Questions concerning how third party funding should best be deployed relative to other sources of funding, including but not limited to: legal expenses insurance; and crowd funding.

14. **What are the advantages or drawbacks of third party funding?**
    Please give answers with reference to: claimants; defendants; the nature and/or type of litigation e.g. consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.

15. **What are the alternatives to third party funding?**
    a) **How do the alternatives compare to each other? How do they compare to third party funding? What advantages or drawbacks do they have?**
    b) **Can other forms of litigation funding complement third party funding?**
    c) **If so, when and how?**
16. **Are any of the alternatives to be encouraged in preference to third party funding? If so, which ones and why are they to be preferred? If so, what reforms might be necessary and why?**

A potential litigant wishing to pursue a claim is inevitably faced with a decision on how to fund the proceedings. The choice will be affected by the claimant's personal circumstances, the availability of their own resources and other calls upon those funds, and the availability of funding provided with the assistance of a third party, whether by way of trade union funding or (in limited circumstances) legal aid, their lawyer in the case of CFAs and DBAs, their insurer in the event of legal expenses insurance, or a third party funder. The cost of each option will vary considerably.

FOIL believes that the wide range of options in funding is part of an effective market, enabling potential litigants to make an appropriate choice for them. In essence, there are no 'good' or 'bad' funding options per se, but instead, 'good' and 'bad' options for the claimant concerned. Third party funding is expensive and is likely to lead to the claimant recovering less than if the action had been self-funded or funded by a CFA, for example, but if the cheaper options are not available to the potential claimant, litigation funding may be the best option. The priority is in ensuring that the regulatory regimes require the provision of clear and transparent information both before a decision is made and in the agreements which govern the funding arrangement, to enable an informed choice to be made, with a clear understanding of the implications of that choice.

17. **Are there any reforms to conditional fee agreements or damages-based agreements that you consider are necessary to promote more certain and effective litigation funding? If so, what reforms might be necessary and why? Should the separate regulatory regimes for CFAs and DBAs be replaced by a single, regulatory regime, applicable to all forms of contingent funding agreement?**

18. **Are there any reforms to legal expenses insurance, whether before-the-event of after-the event insurance, that you consider are necessary to promote effective litigation funding? Should, for example, the promotion of a public mandatory legal expenses insurance scheme be considered?**
19. **What is the relationship between the after-the event insurance and conditional fee agreements and the relationship between after-the -event insurance and thirs party funding? Is there a need for reform in either regard? If so, what reforms might be considered necessary and why?**
20. **Are there any reforms to crowdfunding that you consider necessary? If so, what are they and why?**
21. **Are there any reforms to portfolio funding that you consider necessary? Is so, what are they and why?**
22. **Are there any reforms to other funding mechanisms (apart from civil legal aid) that you consider are necessary to promote effective litigation funding? How might the use of those mechanisms be encouraged?**

The history of conditional funding in England and Wales has been chequered. From a long-established position of conditional and speculative funding being considered unethical, through the initial steps by the government to consider the feasibility of speculative actions in its White Paper in 1989, through the introduction of the CFA regime by way of a myriad of primary and secondary legislation in the 1990s; to the post-Jackson reforms of the regime, conditional funding has been beset with unintended consequences, satellite litigation and calls for reform. It is perhaps understandable that Michael Cook choose to headline one of the chapters in 'Cook on Costs' 2006 edition, "Trench Warfare".

It has taken a period of more than 25 years for the CFA regime to be refined, to move from a widely criticised proposal, into a system which, in general, delivers access to justice. Given the history, that achievement should not be underestimated.

The post-Jackson reforms to CFAs, implemented through The Legal Aid, Sentencing and Punishment of Offenders Act 2012, were critical reforms for personal injury claims. At the time of the report, in 2009, the CFA regime was fundamentally flawed. Lord Justice Jackson set out some of the issues:

- commercial claims with a gross imbalance in the costs liability of the parties, where one party with a CFA was litigating with no costs risks, whilst another party might face liability for quadruple costs (own costs, plus other sides costs, plus ATE premium, plus other side's success fee)
- the loss of any connection between the client under a CFA and the costs being incurred in his name - whether the claim was won or lost the client would pay nothing.
- The excessive costs burden on opposing parties which "*sometimes amounts to a denial of justice".*
- The opportunity presented by the regime for 'cherry-picking' of claims, to secure a success fee on claims very likely to be successful. As Sir Rupert explained, "*it is a flaw of the recoverability regime that it presents an opportunity to lawyers to*

increase their earnings by cherry picking. This is a feature which tends to demean the profession in the eyes of the public".

Against this background, Lord Justice Jackson put forward a carefully considered, balanced package of reforms to achieve a fair outcome to both claimants and defendants. It is important to recall that it was not just a matter of removing the recoverability of success fees: a number of compensating measures were also introduced including increased damages awards to enable claimants to pay success fees (limited under statue), and the introduction of QOCs (removing the risk of an adverse costs order against a personal injury claimant and thereby removing the need for ATE insurance). Professor Paul Fenn – economist assessor to the Jackson review – reported to Lord Justice Jackson that the 10% increase in general damages "*would leave claimants no worse off. Indeed, the majority of claims (whose claims settle early) will be better off. At the same time proper incentives for all parties to personal injuries litigation would have been restored."*

As indicated above, Lord Justice Jackson considered the measures a success. Speaking in 2011:

"This reform [removing recoverable success fees] has been a success. Recoverable success fees distorted incentives and drove up costs massively. The abolition of recoverable success fees was a key recommendation of the Final Report. It has substantially reduced litigation costs. When combined with several counterweight measures (including increased damages, enhanced rewards for claimant part 36 offers, restriction of success fees deductible from PI damages), this package of reforms has controlled costs without inhibiting access to justice. There is no evidence that the reforms have led to a drop off in claims, quite the reverse."

Whilst there may be calls within responses to this consultation for a reversal of the rules on recoverability to again allow success fees to be recovered, FOIL would argue strongly that this would be a serious retrograde step, a return to a regime which enabled abuse and made litigation significantly more expensive. To unpick merely part of the Jackson package would be to allow cherry picking– a reversal of the less popular elements of the package whilst retaining the benefits of the counter-measures – a significant injustice.

The CFA regime is not without weaknesses. In its March 2024 report on 'No win, no fee agreements, the Legal Ombudsman expressed some concerns over the operation of CFAs. They raised concerns over the way the fee arrangements were structured and sold and reported examples of very poor service. There was no concern that the problems were widespread: only about 8% of the complains resolved by the Ombudsman were related to CFA but two issues of specific concern were noted:

- *"Transfer of risk – there is a structural weakness in the nature of the agreement which allows some lawyers to pass the risk of unrecovered costs to the consumer.*
- *Unclear terms and conditions – the agreements are sometimes complex and there is evidence of lawyers failing to make clear to consumers the financial risks that come with entering into a 'no win, no fee' agreement."*

These are matters of consumer protection and outside FOIL's area of expertise but the highlighting of issues by the Ombudsman may suggest that some strengthening of the consumer provisions is required.

FOIL does not believe that a mandatory public legal expenses regime would be appropriate or deliverable, although the purchase and utilisation of LEI by consumers is to be encouraged.

Questions concerning the role that should be played by rules of court and the court itself…in controlling the conduct of litigation supported by third party funding and similar funding.

23. **Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules, including the rules relating to representative and/or collective proceedings, to cater for the role that litigation funding plays in the conduct of litigation? If so, in what respects are rule changes required and why?**
24. **Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules to cater for other forms of funding such as pure funding, crown funding or any of the alternative forms of funding you have referred to in answering q 16? If so, in what respects are rule changes need and why?**
25. **Is there a need to amend the Civil Procedure Rules in the light of the *Rowe* case? If so, in what respects are rule changes required and why?**
26. **What role, if any, should the court paly in controlling the pre-action conduct of litigation and/or conduct of litigation after proceedings have commenced where it is supported by third party funding?**
27. **To what extent, if any, should the existence of third party funding or the terms of such funding be disclosed to the court and/or to the funded party's opponents in proceedings? What effect might disclosure have on parties' approaches to the conduct of litigation?**

FOIL has no specific proposals to make on changes to the rules. In general, claims supported by third party funding benefit from the same robust case and costs management that deliver advantages in claims that do not have litigation funding support. In particular, effective costs budgeting provides a discipline of value in all claims.

FOIL is supportive of the recommendations set out in the reports following the CJC's reviews of the Pre-Action Protocols. Changes in the pre-action space to encourage effective evaluation of claims, disclosure and engagement with a view to early settlement will benefit parties in reducing legal costs overall and may result in lower costs for third party funding if a successful result can be achieved earlier.

There is the potential for supervision by the courts to provide a solution in the event that a more robust regulatory regime is recommended which cannot wholly be delivered by an independent regulator. In particular, the courts may have a role to play in providing oversight to protect individuals, SMEs and other vulnerable litigants.

At present there is no requirement that the existence of third party funding is disclosed to an opposing party. It would seem reasonable for it to be a requirement for opponents to be informed of the existence of third party funding and the identity of the funder (a key issue on matters of security for costs), and for the non-privileged parts of the agreement to be disclosed (to deliver better equality of arms).

Questions concerning provisions to protection claimants

28. **To what extent, if at all, do thirds party funders or other providers of litigation funding exercise control over litigation? To what extent should they so do?**
29. **What effect do different funding mechanisms have on the settlement of proceedings?**
30. **Should the court be required to approve the settlement of proceedings where they are funded by third party funders or other providers of litigation funding? If so, should this be required for all or specific types of proceedings, and why?**
31. **If the court is to approve the settlement of proceedings, what criteria should the court apply to determine whether or not to approve the settlement?**
32. **What provision (including provision for professional legal services regulation), if any, needs to be made for the protection of claimants whose litigation is funded by third party funding?**
33. **To what extent does the third party funding market enable claimants to compare funding options from different funders effectively?**
34. **To what extent, if any, do conflicts of interest arise between funded claimants, their legal representatives and/or third parties where third party funding is provided?**
35. **Is there a need to reform the current approach to conflicts of interest that may arise where litigation is funded via third party funding? If so, what reforms are needed and why?**

The issue of control of the litigation is a delicate one. As the ELI report notes, "*on control, in the sense of input and influence on litigation, this is a nuanced argument. An experienced funder may well have valuable litigation experience which can assist in running a case well and tactically astutely. This may positively benefit an inexperienced litigant or group of litigants and may save them costs*". There is a strong argument that the control of the litigation should ultimately remain with the funded party, and the current ALF voluntary code reflects that: funders are to take no steps to seek to influence or control the conduct of the funded litigation. The requirements are fairly generic:

"A funder will:

- not take any steps that cause or are likely to cause the Funded Party's solicitor or barrister to act in breach of their professional duties;
- not seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder.

The issue of settlement is also considered in the ELI report, which notes that the "*most vibrant debate"* is whether it is appropriate for a third party funding agreement to

require consent of the third party funder to any settlement. The ALF Code merely requires the LFA shall state whether (and if so, how) the funder may provide input to the Funder Party's decisions in relation to settlements. It is important to note the difference between 'input' and 'decision-making'. It may be helpful if the agreement were required to set out specifically the areas where the funder may have an involvement, for example, assisting in choosing a mediator; assisting with strategic and tactical decisions; considering counsel's advice; or managing litigation expenses.

The ELI takes the view that its Principles should not prevent a third party funder from controlling proceedings or settlement in appropriate cases where this is permitted by applicable law. However, it sets out a number of protective measures which interact with the issue of control:

- any term conferring a power on a third party funder to determine the acceptability of a settlement offer to be set out clearly and unequivocally in the agreement.
- the inclusion within the agreement of a dispute resolution process in the event of disagreement over the exercise of the third party funder's rights, with an expedited timescale likely to be required.
- where control is to be permitted, a requirement that the funder is expressly made aware if the implications before entering into the agreement.

The issue of reasonableness of control also dovetails with the need for provisions with the agreement on conflict of interest.

On the issue of conflicts of interest, a licencing requirement could deal with the issue of conflicting business interests, to avoid conflicts of interests by managing, for example, conflicts which could arise through the lawyer having an interest in the funder and vice versa; conflicts between different claims the funder is supporting; and conflicts between the funded litigation and the funder's business interests.

On the issue of conflicts of interest between the funder and the funded party, the Singapore Guidance on third party funding highlights the problem:

"The risk of conflict is real because: (a) in many case, the claimant retains the lawyer but the funder pays the lawyer's fees; and (b) funding agreements may provide that he funder can give input into decisions, even where the lawyer is retained by the claimant; (c) so for example, where the claimant wishes to settle but the funder does not, the lawyer may feel pressure to accede to the funder so as to gain repeat business."

The ELI report notes that to address this problem, a provision is sometimes included within a funding agreement that a funder will not take any steps that cause or are likely to cause the funder party's lawyer to act in breach of their professional duties – as required by the ALF Code. The ELI report considers that there may be merit in strengthening the provision:

"*It is, however, dubious whether such a provision adequately covers the problem and parties may wish to consider how more specific protection can be incorporated. One*

possibility is to provide that the agreements (funding and retainer) stipulate that (i) the lawyers who have conduct of the proceedings owe their full professional and fiduciary duties to the litigants; and (ii) in the event of a conflict of interest between the litigants and the funder, the lawyer may continue to act solely for the litigants even of the funder's interests are adversely affect by them doing so."

Questions concerning the encouragement of litigation.

36. **To what extent, if any, does the availability of third party funding or other forms of litigation funding encourage specific forms of litigation? For instance:**
    a) **Do they encourage individuals o businesses to litigate meritorious claims? If so, to what extent do they do so?**
    b) **Do they encourage an increase in vexatious litigation or litigation that is without merit? Do they discourage such litigation? If so, to what extent do they do so?**
    c) **Do they encourage group litigation, collective or representative actions? If so, to what extent do they do so?**

37. **To the extent that third party funding or other forms of litigation funding encourages specific forms of litigation, what reforms, if any are necessary? You may refer back to answers to earlier questions.**
38. **What steps, if any, could be taken to improve access to information concerning available options for litigation funding for individuals who may need it to pursue or defend claims.**

Apart from noting that it is clearly the case that the availability of funding enables claims to be pursued which would otherwise not be actioned, FOIL has not evidence to assist on these issues.

General issues

39. **Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?**

No, FOIL has no further issues it wishes to raise.