

## Briefing Note: Litigation Funding Options

### An Introduction to the Guide

This guide summarises the main methods of funding a case in the Civil Courts. As ever this guide should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

### Private Retainer between client and solicitor

- Under a traditional retainer, a client usually agrees to pay for work carried out on its behalf on a standard hourly rate basis, regardless of the outcome.
- Most firms calculate time in units of 6 minutes. Short routine letters and emails and phone calls are charged as a minimum of one unit each. Similarly, the time spent working on letters and emails received, documents and evidence and the like is charged on the basis of the time spent, again subject to a minimum of one unit per letter or email. Solicitors often have to pay other people or organisations on behalf of a client for “disbursements” such as court fees, search fees, land registry fees, barristers’ fees, experts’ fees and so on. VAT is also charged on costs.

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#### Summary:

This guide represents a summary note of possible funding options in commercial litigation.

Author: Jeremy Laws

**For detailed advice on all commercial litigation matters please contact:**

Jeremy Laws  
Partner

01323 435900  
[jpl@gabyhardwicke.co.uk](mailto:jpl@gabyhardwicke.co.uk)

### Damages-based agreement

- A DBA is a type of contingency fee arrangement between a representative and a client (i.e. a fee which is only payable if a particular contingency is met). A client will make a payment to his professional adviser if he obtains “a specified financial benefit” (usually damages paid by the losing side in the case). The amount of the payment will be determined as a percentage of the compensation received.
- If the case is unsuccessful, the representative is generally not entitled to be paid.
- Since 1 April 2013, DBAs can be used in almost all contentious business (except criminal and family proceedings).

### Conditional fee agreement (CFA)

- A CFA is an agreement to provide advocacy or litigation services which provides for the fees and expenses, or any part of them, to be payable only in specified circumstances. Generally, if a client loses the case, he will not be liable to pay for the fees and any expenses that are subject to the CFA (the conditional fees). If the client wins the case, he will be liable to pay all fees and expenses, including the conditional fees, and a “success fee”, if provided for in the CFA.
- A success fee is an additional amount payable for the legal services, over and above the amount that would normally be payable if there was no CFA. It must be expressed as a percentage uplift on the amount that would be payable if there was no CFA and that percentage cannot exceed 100%.
- Since 1 April 2013, success fees are no longer recoverable from the losing side and they must be paid by the client.

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### Legal expenses insurance

- After the event (ATE) insurance is a form of insurance taken out after a legal dispute has arisen. ATE insurance usually covers a party's potential liability in the event of them losing their case, in respect of their own disbursements and their opponent's costs and disbursements. It is therefore often taken out with another form of funding to cover the client's own legal costs, such as a CFA or third party funding.
- ATE insurance is different from pre-purchased before the event (BTE) insurance which can be included in certain commercial insurance policies (and in some cases in stand alone legal expenses cover) and in the case of private individuals, is often included as part of a household or motor insurance policy. It can cover legal fees and disbursements up to a specified limit for certain types of claims.

### Third party funding

- Third party funding usually involves a commercial funder agreeing to pay some or all of the claimant's legal fees and expenses in return for a fee which is payable out of the proceeds recovered from the resolution of the claim (whether by judgment or settlement).
- If the claim is unsuccessful, the funder loses its investment and is not entitled to receive any payment.

### Funding from trade bodies, associations and unions

- Trade bodies, chambers of commerce and some federations may provide a client with funding assistance.
- Trade unions typically provide legal advice and support to their members, often for no charge, depending on the nature of the dispute. However, trade union funding may be restricted to certain types or classes of dispute and there may be costs attached to the provision of funding.

### Public funding (legal aid)

- Public funding in civil cases became more limited from 1 April 2013, when Part 1 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO 2012) came into force and implemented substantive scope cuts to civil legal aid (for more information on the scope of legal aid, see the *Ministry of Justice* website or contact your local Citizens Advice Bureau). There are also certain eligibility criteria to be met, including means testing.

### Funding by a "pure" funder

- A "pure" funder is a person who funds an action on the basis that, if the claim succeeds, they will recover only the contribution that they have made. A pure funder has no control over the management of the litigation and will not profit from it. Therefore, the enforceability of the funding arrangements is unlikely to be challenged. In practice, the issues arising from pure funding have been limited to the question of whether the funder can be made liable for costs.

If you would like to know more about this topic or our other legal services, please contact Jeremy Laws: : [jeremy.laws@gabyhardwicke.co.uk](mailto:jeremy.laws@gabyhardwicke.co.uk)

Gaby Hardwicke  
33 The Avenue  
Eastbourne  
East Sussex  
BN21 3YD

Tel: 01323 435900  
Fax: 01323 435901  
[info@gabyhardwicke.co.uk](mailto:info@gabyhardwicke.co.uk)  
[www.gabyhardwicke.co.uk](http://www.gabyhardwicke.co.uk)