

CONTENTS

<i>Table of Cases</i>	xv
<i>Table of Legislation</i>	xix
<i>List of Abbreviations</i>	xxi
1. Introduction and Background	1
A. Introduction and Background	1
B. What is Litigation Funding?	4
C. History	5
D. How does it Work?	6
E. What Type of Case can be Funded?	9
F. Why is the Use of Third Party Litigation Funding Increasing?	12
G. The Effect of the Jackson Reforms	19
2. History and Development	22
A. History, Champerty, Evolution	22
1. History and development	22
2. Champerty and maintenance	23
3. Evolution	25
B. Case Law	26
1. <i>Giles v Thompson</i>	27
2. <i>Stocznia Gdanska SA v Latreefers Inc</i>	28
3. <i>The Eurasian Dream (No 2)</i>	30
4. <i>Hamilton v Al-Fayed (No 2)</i>	30
5. <i>R (on the application of Factortame) v Secretary of State for Transport, Local Government and the Regions (No 2)</i>	33
6. <i>Gulf Azov Shipping Co Ltd v Idisi</i>	36
7. <i>Arkin v Borchard Lines Ltd & Ors</i>	38
8. <i>London & Regional (St George's Court) Ltd v Ministry of Defence</i>	42
9. <i>Merchantbridge & Co Ltd v Safron General Partner 1 Ltd</i>	43
10. <i>Sibthorpe and Morris v Southwark London Borough Council</i>	45

Contents

11. <i>Jennifer Simpson (as assignee of Alan Catchpole) v Norfolk & Norwich University Hospital NHS Trust</i>	47
12. <i>Cecil & others v Bayat & others</i>	49
13. <i>Tinseltime Ltd v Eryl Roberts & Ors</i>	50
14. <i>Flatman v Germany</i>	52
15. <i>Harcus Sinclair (a Firm) v Buttonwood Legal Capital Limited & Ors</i>	53
16. <i>Excalibur Ventures LLC v Texas Keystone Inc.; Gulf Keystone Petroleum Ltd; Gulf Keystone Petroleum International Ltd; Gulf Keystone Petroleum (UK) Ltd</i>	54
C. Conclusions	56
3. Use of Funding	60
A. Use of Funding	60
B. Why is Funding Used?	61
C. Which Cases?	64
1. Subject matter	66
2. Client	66
3. Merits	67
4. Value	67
5. Forum/venue/jurisdiction/applicable law	68
6. Enforceability	68
D. Lower Value Cases	69
E. Alternative Methods	72
1. Portfolio funding	72
2. Basket of cases	74
3. Hybrid DBA funding	75
4. Alternative business structures	75
F. International Landscape	76
1. United States	76
2. Australia	79
3. New Zealand	82
4. South Africa	82
5. Canada	83
6. France	83
7. Germany	83
8. Caribbean	84
9. Channel Islands	84
10. Dubai and Qatar	84
11. Ireland	85
12. Hong Kong	85
13. Singapore	85

4. Funder Models	87
A. Funder Models	87
B. 'Case by Case' Funding	88
1. 'One-off' funders	89
2. 'Fund raiser' funders	90
C. Family Office	93
D. Private Equity	95
E. Investment Fund	95
F. Publicly Listed	97
G. Case Study: Burford Capital	98
H. Case Study: Therium Capital Management Limited	100
I. Case Study: Vannin Capital	102
J. Conclusion	103
5. The Funding Process	104
A. The Funding Process	104
B. Brokers or Direct Approach to Funders?	106
C. Key Areas	108
1. Merits and quantum	109
2. Budget	110
3. Strategy	111
D. Intake Review and Assessment	111
E. Indicative Terms	112
F. Negotiation	113
G. Term Sheet	114
H. Exclusivity	114
I. Due Diligence Assessment	116
J. Pricing	117
K. Retainers	119
L. ATE	119
M. The Litigation Funding Agreement	120
1. Section Two—'Agreement to Fund'	121
2. Section Three—'Payment Terms and Interest'	121
3. Section Four—'Changes to Project Plan'	121
4. Section Five—'Excluded Costs and Liabilities'	121
5. Section Six—'Conditions Precedent and Warranties'	122
6. Section Seven—'Payment of Reasonable Costs'	122

Contents

7. Section Eight—‘Adverse Costs’	122
8. Section Nine—‘Claimant’s Obligations’	122
9. Section Twelve—‘Security for Costs’	122
10. Section Thirteen—‘Treatment of Claim Proceeds’	123
11. Section Fourteen—‘Confidentiality’	123
12. Section Fifteen—‘Termination’	123
13. Section Twenty-Five—‘Dispute Resolution’	124
14. ‘Schedule’	124
15. Appendix 1—‘Project Plan’	124
16. Appendix 2—‘Reliance Letter’	124
17. Appendix 3—‘Priorities Agreement’	124
N. Conclusion	125
6. Costs and Insurance	127
A. Costs and Insurance	127
B. ATE Insurance	128
C. Payment of the Insurance Premium	129
1. Payment in full on inception	131
2. Deposit premium	132
3. Fully deferred premium	133
D. Security for Costs	134
E. Costs of Setting up Funding and ATE	138
F. Funders’ Costs Risk	139
G. <i>Excalibur</i>	140
H. Conclusion	141
7. Group Litigation	142
A. Group Litigation	142
B. England and Wales	143
C. Issues for Litigation Funders	149
D. Conclusion	152
8. Jackson and DBAs	154
A. Jackson and Damages Based Agreements	154
B. Outline of the Changes	155
1. Conditional fee agreements	155
2. ATE insurance premium recoverability	156
3. Increase in general damages	156

4. <i>Simmons v Castle</i>	156
5. Increased sanctions under Part 36	159
6. Proportionality	160
7. Costs management orders	163
C. Damages Based Agreements	168
1. The DBA Regulations	171
2. Practicalities	174
D. The Effect of Jackson on Third Party Litigation Funding	176
1. Lawyers' costs immunity, DBAs, and third party funding	176
2. Hodgson immunity	176
3. Alternative business structures	179
E. Conclusion	179
9. Professional Obligations	182
A. Introduction	182
B. The Association of Litigation Funders	182
1. Membership	183
2. Code of conduct	183
C. Solicitors	192
1. Conduct rules	194
2. Solicitors' duties	196
D. Conclusion	203
10. Funding and the Future	205
A. Introduction	205
B. Regulation and Self-Regulation	208
C. Education	211
D. ABS	214
E. Jurisdictions	216
F. Evolution	217
G. Conclusion	218
Appendix 1. Litigation Funding Agreement	221
Appendix 2. Preamble	248
Appendix 3. A Procedure to Govern Complaints Made against Funder Members by Funded Litigants	252

Contents

Appendix 4. Articles of Association of the Association of Litigation Funders of England & Wales	260
Appendix 5. Code of Conduct for Litigation Funders	273
Appendix 6. The Association of Litigation Funders of England and Wales	277
<i>Index</i>	285