

Litigation Funders Beware

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Litigation is an expensive and risk-laden enterprise. It is not to be embarked upon lightly, especially having regard to the ever-increasing cost of access to justice.

Litigants who are unable to afford funding often turn to third parties who, if they agree, might unwittingly put themselves at risk to meet all or part of the opponents' costs.

Potential private funders should therefore approach any request for financial assistance in funding litigation with extreme caution, especially if they are offered a share in any "winnings".

An obvious example of third party funding is where a non-party funder meets the legal costs of a Defendant who loses his case to the Claimant. The Claimant is then unable to recover its costs against the Defendant and looks for other targets.

An obvious target is the funder, who is termed a "non-party". The Court has wide powers to make non-party costs orders (NPCO) under [Section 51 of the Senior Courts Act 1981](#).

If the non-party is a "pure funder" and has no interest in the outcome of the litigation, then an NPCO is very unlikely to be made. A Court will usually consider that an NPCO is inappropriate where, for example, a disinterested relative has, out of natural affection, funded costs of a claim or a Defence that is reasonably advanced.

The position however changes if the funder has a personal stake in the outcome of the litigation. Examples of such circumstances include:

- A director funding the costs of his company which is either unable to afford the litigation or is insolvent.

- Circumstances where a non-party not only funds the proceedings, but substantially controls or stands to benefit from them. He or it will be considered the "real party" to the litigation.

The fact that a non-party acted without any impropriety or upon legal advice does not prevent the making of an NPCO.

Yet further, a funder can be held liable for the opponents' costs on an indemnity basis if he did not pay sufficient attention to ongoing litigation, thereby allowing it to continue unchecked. Therefore, an absence of oversight and scrutiny of the prospects of success could prove extremely costly.

A prudent lawyer for an opposing party should consider seeking costs against a non-party where an unsuccessful opponent does not look good for the money. He should consider:

- Putting the non-party on notice of a potential NPCO application as soon as practicable.
- Whether, if litigating against a company, its financial profile is uncertain.
- Whether the Directors of a litigant company have a record of being involved with insolvent companies.

It is therefore important to ensure that:

- If you are asked to provide funds to progress a claim or aid a Defence that you are appraised of all facts and take independent legal advice. Not to do so could lead to a very nasty shock.
- If you are a litigant and suspect that your opponent has the benefit of third party funding that your lawyers

make immediate enquiries with a view to putting the funder on notice of your right to seek an NPCO.

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Note: This is not legal advice; it is intended to provide information of general interest about current legal issues.

