

## **International Conference on Litigation Funding**

**Oxford University, 19 May 2010**

Welcome by Professor Timothy Endicott, Dean of the Law Faculty, Oxford

### **A. The Litigation Funding Project and its Findings to Date**

#### **1. Litigation Funding in Australia:** Dr Christopher Hodges, CSLS, Oxford

In Australia litigation funding has grown the mid-1990s in support of insolvency claims to a thriving service sector, by end 2009 supporting over 21 class actions involving 35,000 class members and claims totalling A\$2.6 billion. There are around seven commercial funding companies, two of whom are publicly quoted. Continuous public disclosure requirements for public companies produces transparency of information but can lead to disclosure of information about a case that may be tactically disadvantageous to a party where, for example, funding is withdrawn. Various licences are required under different state laws, some covering investigation or debt collection. There is some uncertainty over what mode of key regulation should exist: the Full Federal Court ruled in *Brookfield Multiplex* in 2009 that funding is a managed investment scheme, and this led to instability in the market and in ongoing litigation, since only the one or two largest funders held ASIC licenses, but the ASIC imposed a moratorium until June 2010. In May 2010 the government announced that it would exempt litigation funding from full licensing and consider a light touch regime, in view of the importance of litigation funding for access to justice.

The mode of operation of litigation funding in Australia is influenced by its particular regime on costs: there is a cost shifting rule and a prohibition against lawyers charging contingency fees. Litigation funders pay the cost of litigation and underwrite the risk of adverse costs in return for (a) reimbursement of costs spent as a first slice, (b) a percentage of the recovery and (c) a management fee. They act as economic rationalists, investigating the merits of cases carefully through a risk assessment procedure, before accepting a case as an investment. Cases are not taken if merits are under around 60%. Certain types of case are funded or not funded: cases tend to be ones that depend on clear written evidence and not oral evidence, and be claims for money damages (not injunctions) against solvent defendants. Preferred types are commercial breach of contract or licensing claims (often SMEs against larger companies), and investor or antitrust class actions.

Funders can undertake full investigation of a case, and replace clients in choosing the lawyer and giving instructions to the lawyer, taking full management decisions. The primary model is full assignment of the right of action by client to funder: agreements can be lengthy but there is considerable standardisation. After legislative change abolishing maintenance and champerty as crimes and torts, the courts, rather than legislators, have been the primary source of change over the reinterpretation of policy on the permissibility of third party funding (*Fostif* 2006), based on maintaining access to justice in the particular litigation and class action environment.

Funding has produced a change in the technical regime that applies to class actions. The basic legislative model for class actions in Australia is an opt-out system. However, the courts have effectively changed this by accepting opt-in classes, where the clients are restricted to those who have all signed up with the funder who is backing the case, interpreting the legislation as

permitting representation of 'some or all' of the full class of members. This solution is required since funders need to have binding contracts with sufficient class members, and to avoid too many free riders, otherwise their financial projects make funding decisions impossible.

## **2. Litigation Funding in Germany:** Dr Arndt Eversberg, AllianzProcessFinanz

The architecture of the civil justice system in Germany, with tariffs for lawyers' costs and shiftable lawyers' costs, encourages before-the-event (BTE) legal expenses insurance (LEI), which has long been held by many individuals. Litigation funding (LF, an after-the-event, ATE) bespoke product for consumers and SME companies, spread from around 2000, when major insurers entered the market. There are currently around 12 companies, with a 'big 4'. Allianz is one of these, and assessed 5,000 claims worth around €500 million.

Historically, contingency fees were not allowed in Germany (there has been a recent but very limited permission for contingency fees) and banks were not providing funding for cases without securities. Now, around 50% of clients are consumers and 50% are companies (mainly SMEs). Cases funded are mostly individual cases, but there are some class actions. Every case is assessed by a risk assessment committee. The tariff system for lawyers' fee in Germany means that it is simple to assess costs. In the UK, in contrast, litigation costs are much harder to assess, and much higher than in Germany, which increases funding costs. The loss rate is roughly 1 in 10. 90% of cases are settled before judgment. Profit is usually around 30%.

Litigation funding is widely known by lawyers but seldom used by them in practice (only 5% of Allianz's cases come from lawyers). The general public, however, does not know about funding due to a lack of publicity.

## **3. US Litigation Funding:** Selvyn Seidel, Burford Partners

Litigation funding is relatively new in USA. Credit Suisse focussed on USA a little historically, but several new funders have emerged: juridical, Aga Capital and Burford, which raised \$100 million in 2009. The size of the potential market is unknown: a possibly unreliable estimate puts it at \$80 billion. Clearly current supply is small, and there is considerable unsatisfied demand. Demand was limited because of the widespread use of the contingency fee system, i.e. funding from lawyers. But many companies are now requesting commercial funding. Many are currently SMEs, but large companies also have a demand in view of limitations on existing litigation budgets. Lawyers currently usually do not know about third party litigation funding, which requires wider publicity. Litigation funding is an important tool to improve legal services and is a particular asset in international litigation and arbitration.

LF shows the importance of the interrelation between law and finance. Funding can be made available for costs already spent, for future costs, and for business finance. Since there is no general loser pays rule, that aspect is irrelevant. Litigation is viewed as involving an asset: it can be traded as a matter of contract, with no difference from a share of stock, and should be able to be bought, sold or pledged.

State rules exist on maintenance and champerty, but are changing. Questions about the amount of control of litigation funding.

#### **4. Access to Justice and Funding Options in England & Wales:** Professor John Peysner, Lincoln Law School

The historical rules have been against interference with litigation (maintenance), against giving a part of the winnings (sharing a part of your field with the local baron, i.e. champerty), and on the indemnity rule (loser should not pay more than the opponent is actually liable to pay his lawyers). The rationale includes a fear of perjury in an adversarial system. In Scotland and Northern Ireland, a lawyer is allowed to work on the basis of a speculation fee, but those systems are still underpinned by legal aid. The model elsewhere recognises the need for lawyers to be involved in order to be able to institute litigation. There has been a long history of development, including motor insurers, and trade unions backing members' claims. Mr Hoon made the decision in 1999 to remove legal aid and substitute recoverability of success fees in order to embed that privatised system. But that recoverability system led to problems, and the 'costs war' between lawyers and insurers. The nature of the professions is relevant. Judges have little experience of funding and an inherent dislike of client risk-sharing. However, there was a change in 2002 with the *Factortame* case, in which Grant Thornton funded the Spanish fishermen in order to establish quantum, in return for 8% of the recovery. That arrangement was held to be lawful. In 2004, *Arkin* was a damages claim after a shipping cartel (an intrinsically less risky type of follow-on claim) but the lawyer lost and the backer was held to be liable for costs on a simple basis of £1 in costs for every £1 invested.

Third party funding is now moving into an area of small business and is of public interest. There is less asymmetry of information in a business-to-business relationship than there is where a funded party is a consumer. The arrangement is contractual, and there are other areas of information.

The Jackson Report made important suggestions on litigation and is attacking the idea of indemnity. It also deals with budgeting and proposes to abolish cost shifting and recoverability, as well as to remove contingency liability. It also considers class actions and whether a Contingency Legal Aid Fund or a Supplementary Legal Aid Scheme might be viable, but they cannot exist alongside other funding models. It is unclear whether all Jackson's recommendations will happen: the government might not find the time for primary legislation, or might not agree with the thrust of the proposals. The indemnity principle cannot be removed without legislation. If the ATE insurance function and market are limited, this would represent an opportunity for LF. The *Arkin* rule should be removed; an inquiry into risk and apportionment of liability in every case is not a good idea.

Maintenance and champerty remain important principles. Yet they remain threats to development in this market. *Hicks v Townsend* in 2008 decided that where a lawyer had entered a CFA but ignored ATE, the arrangement was champertous and struck down. Of the two principles, maintenance is more important: a ban on interfering with litigation is important in an adversarial system. Perhaps use of external independent legal advisers may give protection. Will there be a costs war for litigation funding?

#### **3. Findings of this Research Project:** Dr Angus Nurse, Lincoln Law School

The research considered the following key questions:

1. What is the extent of third party litigation funding in England and Wales?
2. How is third party litigation funding constituted and what contractual terms and 'cover' are used.

3. What is the current regulatory environment for third party litigation funding in the EU and are there different regulatory mechanisms in different jurisdictions?
4. What is the relationship between the funder and lawyer?

Within these broad questions, the research has sought to obtain the views of funders themselves on how the market works, as well as how the market could or should work to achieve access to justice. We are grateful to all those funders who were willing to talk to us and discuss aspects of their business operations; our provisional conclusions presented at this conference are factual but are not intended to reflect the business operations of any one company, and throughout the research we shall maintain confidentiality.

### **Research overview:**

To date the research has involved interviews with seven funders, two consumer groups and the Ministry of Justice. Further interviews will take place during May and June and we would welcome hearing from any funders or other interested parties who wish to participate in the research. The aim of the interviews is to obtain:

1. Detailed information on the operation of the litigation funding market
2. An understanding of issues relating to regulation of the market and the requirements of regulation, whether self-regulation or statutory regulation
3. Detailed information on how the market might be developed to provide greater access to justice for consumers.

The research has made use of a range of academic studies looking at litigation funding in Australia, the USA, Europe and the UK, and a critical analysis of this material is being conducted prior to drawing final conclusions on the research. The academic literature in America indicates that there is considerable opposition to 3<sup>rd</sup> party funding in the USA and concerns about its operation, which we have considered.

### **Findings:**

The US Chamber Institute for Legal Reform's 2009 report *Selling Lawsuits*, encapsulates many of the concerns about 3<sup>rd</sup> party litigation funding. In particular it claims that:

1. If litigation funding becomes more prevalent, it will pose substantial risks of litigation abuse.
2. Third-party litigation funding increases a plaintiff's access to the courts, not to justice. But increasing plaintiff access to the courts also increases the likelihood that any potential defendant will be hauled into court on a meritless claim
3. Third-party litigation funding encourages frivolous and abusive litigation.
4. Third-party litigation funding raises ethical concerns about interference in litigation.

Our research directly considered these allegations, paying particular attention to the relationship between, lawyer, funder and client. As a result of our research we found that the concerns raised in the American literature are largely unfounded in the UK market due to the nature of the product developed by funders. We identify that there is no such thing as a standard litigation product and a range of different models are in operation, primarily in commercial cases, as follows:

1. Assignment – where rights to a claim are assigned to a funder who takes over responsibility for running the claim.
2. Full Funding, legal team in place, case brought to funder by lawyer.
3. Variable Funding – Funder ‘active participant’.
4. Brokerage of funding solutions – client has case, lawyer not necessarily in place approaches funder for options
5. Lawyer Funding

We would stress that no one model is adopted by any single company necessarily, rather these models have emerged from our discussions as the broad models in use across the market. The importance of the lawyer as the client’s representative is maintained in these model and we have found no evidence that funders’ actively wish to supervise cases (legal restrictions notwithstanding) but may adopt variable levels of involvement in a case dependent on the funding model in operation

### **Provisional Conclusions:**

Our full provisional conclusions and draft funding models are outlined in a separate paper but provisional conclusions can be summarised thus:

- **Access to Justice-** 3<sup>rd</sup> Party LF increases access to justice for small companies, not the average consumer and deals mainly with claims of £100000+ although in practice minimum claim figures are likely to exceed £200,000. Third party litigation funding is otherwise not suitable for non-commercial products.
- **Capital Adequacy** – the operation of the market and corporate nature of most funding companies suggests to us that capital adequacy concerns are not significant within the current UK market and it is unlikely that consumers will be left with a collapsing case that cannot be funded.
- **Champerly and Maintenance** - risks are rigorously assessed before any funding is agreed and funding companies generally adopt a ‘hands off’ approach to cases once funded.
- **Conflict of Interest** – we see no evidence of any concerns about this in current Lawyer-client-funder relationships, indeed funders rely on the lawyer to protect the client’s interests.
- **Settlement Issues** – many smaller firms cannot pursue a case against larger firm without third party funding and thus funding provides access to justice for SMEs
- **Consumer Protection** – litigation funding is currently a commercial market issue and so we see no major consumer protection concerns

The next stage of research will consider issues such as should LF be permitted? the management and supervision of claims, the extension of LF to smaller cases and a further analysis of types

and numbers of cases. In looking at how the market might be extended, we shall consider the particular problems of consumers with smaller cases, recognising that such cases are not currently commercially viable within the litigation funding models we have identified. However, we do in this research take a broad definition of 3<sup>rd</sup> party litigation funding that extends beyond the pure corporate funder to consider other possibilities for third party funding.

In looking at regulation we shall also look at whether such regulations should be in the legal services or financial services arena. The conference suggests that the majority of delegates considered litigation funding to be a financial rather than a legal service and this is an issue we shall explore further in the next stage of the research.

#### **4. General Discussion**

Chris Hodges: The public policy rules on litigation (loser pays, assignability of claims, extent to which ‘interference’ or direction of litigation is permissible) differ between jurisdictions. Thus, factual findings on permissibility of LF differ, and it should be anticipated that different rules will apply and different markets exist. Perhaps the terminology of ‘maintenance’ and ‘champerty’ is unhelpful, but the concepts remain relevant and it is important to consider what public policy should be.

Litigation funding is currently fairly limited, especially in UK, and claims funded are essentially cases by SMEs against larger companies. There is enormous potential for change, but this is dependent on the regulatory environment and how it changes. Lord Justice Jackson adopts the policy (although without examining it) that a ‘mixed bag’ of different forms and sources of funding is required. However, not every funding mechanism will apply to every type of case. I suggest that there needs to be analysis of what demand exists for different types of claim, followed by an analysis of which types of funding are appropriate for each different type of case.

A simple model of funding has 3 players, each with a separate and distinct function: client (who takes all decision), lawyer (who provides legal services but also independent and objective legal advice, especially on merits and whether a settlement proposal is satisfactory or not) and funder (who provides funding, and who requires its own full information so as to undertake its own risk assessment for its investment, but does not have decision rights). The independent funder model is well familiar in UK from the old legal aid system. In this simple model the client is an intelligent commercial company but not heavily resourced. It might obtain legal services or advice from internal and/or external lawyers. It would traditionally need to fund litigation from its own resources or from borrowing. It can now service such function from an independent funder. Clear business advantages can be seen in that arrangement.

However, where the client is an individual, all the familiar consumer protection issues arise that occur in the provision of any external, and especially complex, service to consumers. Issues arise of supply of adequate information, and protection from mis-selling, unfair terms, and oppressive behaviour. Extensive legislation on unfair contract terms, unfair commercial practices and so is required to control against this.

A development of the model is that the roles of lawyer and funder are fused. This has long existed in USA with contingency fees, and is now proposed by Jackson LJ. However, where the roles are fused, it is easy to see the potential for conflicts of interest to arise between the two functions, such as over how much work to invest or when and how much to settle for. So far, these roles have been kept carefully separate in the UK, with funders being careful not to take decisions. That may be acceptable where funded parties are companies of some sophistication,

but not where they are unsophisticated SMEs or individual consumers. Americans might say that the level of risk is low and acceptable. Prof Kritzer's detailed and extensive work on lawyers and contingency fees is very helpful in this respect. One of his key findings is that lawyers maintain a portfolio of cases, so incentives to act inappropriately in any one case are lessened. But in an English jurisdiction, where contingency fees are (and would not be) the only or main source of funding, a different environment and different values might evaluate the risk of conflict from lawyer-funding differently to USA. There needs to be consideration of whether funding provided by either or both of third parties and lawyers is (a) needed for certain types of case, (b) in what circumstances and subject to what constraints. It should not be assumed that decisions on these matters would be the same in England, Germany, Australia, Canada or USA.

Selvyn Seidel: There is a gaping hole over the existence of data on LF, and the role of research such as the current project is critical. Cases are dependent on facts and risk assessment. We invest between \$5 million and £15 million in cases, so we need to be sure on risk assessment and merits before doing so. Different rules apply in retail and commercial situations: different protections are needed for consumers than for companies. We are very careful not to transcend barriers of maintenance and champerty (we retain Professor Geoffrey Hazard to advise on this). Access to justice is about giving people a voice, and there is clear demand for this. The principle of freedom of contract is paramount, as is academic freedom: the students at the University of Michigan brought a case against poultry farmers, which led to objections over use of taxpayers' funds for this, and provoked the response that such an objection was constraining academic freedom.

Guy Mansfield QC: There is an interest in maintaining the purity of the judicial process. The third party funder relationship (which is necessary for access to justice) has developed along the same lines as insurance policies (where the insurer can pull the plug in terms of further funding). The model of a funder intervening is the same as under the legal aid scheme, where support can be withdrawn and progress stopped in its tracks. That system came into dispute where funding was withdrawn just before trial. It is proper to say to a funder 'stay with us on the understanding that at some point you may want to pull out': this type of contract exists with arbitration and has worked in insurance, so this model exists.

Chris Hodges: who should control what? There needs to be a solution to privatized funding. In larger commercial cases, where funded parties are more sophisticated companies, it may be more acceptable that the market provides regulation. But in consumer cases, there is a far clearer need for protection through regulation. What are the situations and roles that need protection? To what extent problems arise in the commercial context remains unclear, and there are not enough cases yet for an empirical answer.

Malcolm Carlisle, European Justice Forum: The tripartite model should be retained. The client should be the decision-maker, advised by the independent lawyer. Once external funding arises, conflicts arise for lawyers, and regulation becomes important. Statutory regulation is needed.

Effa Farnsworth, GE: is non-recourse funding the answer for dealing with conflict among the parties? It might be very difficult to get an entity to agree to recourse funding.

Chris Hodges: It is necessary for funders to be able to ascertain the size of their risk. One aspect is potential liability for adverse costs. The German system of a tariff for shiftable costs makes it much easier to assess the size of the adverse costs risk. The German system is a classic ex-ante system of regulation, which provides far greater certainty than the English ex-post system of costs taxation at the end of a case.

Selvyn Seidel: Funders need to be able to exert investment management. Different attitudes are seen in different US states. The emerging rules are based on court systems and the opinions of judges. There is concern about funders supporting sham cases, but the reality is that we will not back them and the courts have done a good job at protecting against bad cases. The court in Florida kicked out a sham case and penalized both the funder and client.

Robert Hammesfahr, Swiss Re: In USA, litigation financing is provided by a small number of law firms, which are now well capitalised. The result is that many large law firms are dispossessed of an ability to fund cases, and LF has the power to change that. There will be some changing of power amongst law firms. Litigation funding promoted by larger firms?

Selvyn Seidel: The DNA of US plaintiff firms is contingency funding. There are only 10-12 really good contingency firms. Once larger firms learn about funders, they are happy to consider this. As long as there is full disclosure in USA, there is not a problem. Conflicts can be addressed via more disclosure.

Deborah Prince, Which?: LF seems to exist only for B2B litigation. LF will not work for consumers. What are the alternatives? The essence is to have choice. From the public policy perspective, it is generally accepted that access to justice is a good thing, but there is not enough money for access right now. More funding will not be provided by government, so one cannot rule out third party funding if it is a good choice. It is important to remember that the consumer always pays for the system whether or not there is third party funding. Is total access to justice to all a good thing? Perhaps as a society, certain cases should not be raised for utilitarian purposes.

Effa Farnsworth, GE: Access to justice for consumers tends to be more quick and less expensive through arbitration and ombudsmen than through the courts. In USA, there has been interesting development in recent months on 'pay-day-loan lenders' funding directed at consumers. Lenders offer short term loans to finance medical 'cash for crashes' or housing claims, and although the costs might be \$1,000-2,000 they charge monthly compound interest (perhaps 500%), which results in very high cost. Some states have introduced legislation as consumer protection. Some masquerade as third party funders to exploit the system in the consumer realm.

John Peysner: The current state of LF relates to business-to-business funding. There has been an unhappy experience over consumer funding. In the post-1999 recoverability regime, Claims Direct and The Accident Group (Mark Lawson) captured all of the personal injury litigation market in England and Wales. They then crashed, and regulation for claims farming was introduced in the Compensation Act 2006. This raises the question of whether smaller claims are viable, and the moral issue of how to provide access to justice in personal injury cases. One considers the potential for collective redress. That is being considered in Europe in competition cases, especially over damages caused by cartels. Such cases seemed easy (they are all follow-on cases after a regulatory finding of infringement, so liability should not be in issue) but not much progress has been made in the area because of difficulty over establishing quantum. In the UK, the conclusion has been that the solution is to adopt the Danish Ombudsman model, through creating a Consumer Advocate. So maybe that leaves personal injury work to be funded by lawyers, through contingency fees and/or ATE insurance. ATE is not always off-set: some people bear their own risk. ATE cannot solve business problems. Law firms can perhaps fund their own caseloads themselves, so perhaps they can fund the ATE risk? LF (TPF) would simply be equivalent to risk management of the firm, perhaps in tiers of finance. One should not ignore the considerable potential impact of the change in the environment that will occur from

2011 with the permissibility of Alternative Business Structures for law firms, which will introduce external capital into them. Corporates will buy or create law firms. This will extend competition: rather than law firms competing, corporates may extend services directly to consumers, perhaps on a vertically integrated model (investigation, medical advice, rehabilitation, payment). Who will or should call the shots? Lawyers will be regulated by the profession they are members of but managers will be corporate: what controls will apply to managers? What conflicts of interest will arise?

Deborah Prince: Should there be an Ombudsman for competition law damages claims? There would be no need for this if regulators worked to deliver compensation. Collective redress will not work without an opt-out system. Follow-on cases take too long. After the experience of the football shirt case, Which? will not fund another collective competition damages case. The proposed Consumer Advocate is the solution: that office could outsource claims and funding to commercial third party funders.

Chris Hodges: The Consumer Advocate does fill the gap for collective claims, and could outsource to LFs. This solution solves the problem identified earlier of the conflict of interest created where the lawyer and funder are the same in the collective redress situation. In USA, the dominant model is private enforcement theory (private enforcement of both public and private law), with lawyers acting as ‘private attorneys general’ in place of any consumer. So there is no client control of the litigation. In the English (and Nordic) model, the collective litigation would be run by a trusted independent, quasi-public official (the Consumer Advocate), thereby providing effective control and distinguishing the lawyer’s role as adviser and (if funding is outsourced) the funder’s role as funder.

Lord Justice Jackson: What would be the cost of a Consumer Advocate? How would that person be funded? If liability were sorted out then cost is not an issue. Issues of cost-capping and the public interest. Under CPR Part 36 a Consumer Advocate might have a greater liability for cost.

Chris Hodges: Cost and risk might be outsourced by the Consumer Advocate to a funder (a privatisation function).

Effa Farnsworth: Allowing consumer groups to hire contingency counsel is very questionable. The US history of tobacco litigation shows this: there was no check on the ethics of contingency fee counsel. Private consumer groups may be fronts of plaintiffs lawyers.

Malcolm Carlisle: Public policy is the most important issue, and certain points need to be established: first, the ‘loser pays’ rule should be protected; secondly, we should not encourage a system that could lead to abusive litigation.

Jackson LJ: I raised the question of principle of whether to retain cost-shifting or not. I concluded that we should keep the principle, subject to identifying certain areas to be carved out as exceptions. Funding systems must fill gaps. In relation to the Consumer Advocate, it needs to be considered how she/he is going to pay adverse costs: should there be qualified one-way cost shifting? Part 36 protects defendants. ATE sets aside funds against the costs risk.

Chris Hodges: The threat or requirements can be assessed in different situations. If the funder or lawyer is going to assume the risk of adverse costs, it is a matter for the funder whether to have ATE or not, and whether to fund such risk internally (eg by reserving against it) or externally offset the risk. Market funders do this now, as do insurers working with reinsurers. Existing practice by LF funders is to set aside sufficient funds at the start of a case as would fund the

adverse cost risk should that be necessary: that commercial discipline has not so far required regulation, as it is a matter of sensible commercial practice to protect one's investment capital.

Selvyn Seidel: We set aside money to provide such protection, for everybody involved. One might self-fund the risk, or use an insurance company. It is protecting the defendants (bad claims may be brought).

Jackson LJ: The LF will merely charge a larger percentage for funding ATE, internally or externally. In CFAs it is necessary to define what constitutes winning. LF is competing with CFAs. A third party funder takes the risk like ATE insurers, but in future the recommendation is that the ATE premium and CFA success fee is not refundable. Third party funding is good at assessing merits of cases, and provides a valuable means of access to justice. I recommended that regulation is not currently required, and there should be minimal regulation.

Guy Mansfield QC: There could be a requirement that LFs should sign up to an arrangement that an Ombudsman might decide disputes.

Selvyn Seidel: Currently some 7 states in USA have introduced regulation, all for consumer issues not for commercial funding. It is proposed in various other states.

Alastair Kinley, Berryman: The Civil Justice Council has been considering with LFs a draft Code. This should be published for consultation by July. It would form the basis of future advice to government on any regulatory framework. The major issues are capital adequacy, control and withdrawal.

Chris Hodges: there are three issues to consider:

1. Reliability of funding source (whether client or lawyer). Does it matter? In what kind of cases? It is currently in the self-interest of funders, but how will the market develop?
2. Acceptable commercial activities. This is primarily a matter for consumers –how does one regulate?
3. acceptable behaviour within the legal process.

John Peysner: lessons are available regarding funding commodity litigation. ATE insurance created a problem. If ATE declines, BTE is the answer, but it could never be sold at a sensible price. Professor Paul Fenn now thinks that the insurance sector can market BTE at an acceptable price. If so, CFAs are finished. Regulation is inevitable. The current policy is to proceed to self-regulation, but the position would be disastrous if the system collapsed.

Robert Hammesfahr: One needs to consider the timing of when decision-makers are involved in litigation decisions. ATE in intellectual property cases gave rise to significant problems for insurers.

Selvyn Seidel: There are many different areas and one suit does not fit them all.

John Peysner: LF is a new market: an analogy is with leasing a car, not owning it.

Chris Hodges: What is needed is to analyse all types of case separately in relation to level of demand, possible dispute resolution pathways, need for costs, and so on. The large range of different types of cases is apparent from reading the Jackson Report. This is the focus of the ongoing research at CSLS Oxford; to produce a single master map and plan.

Jackson LJ: I entirely agree. All these matters are interlinked. My Report is a single package, and all proposals are closely interlinked. I concluded that ATE should not be banned, and premiums should not be recovered from other side: one way cost shifting is the most expensive model that man has devised. Courts aren't the answer to everything. Courts being in place should work and have a role but not the only role. If you agree with the proposals, please say so publicly.

Malcolm Carlisle: I strongly endorse Chris' mixed model. Alternative systems are developing in place of courts. In Holland the courts provide the useful function of assessing the fairness of private negotiated settlements, and endorsing them so as to be binding. Regulators are now being encouraged to have greater involvement in finding solutions. People are solving the problem, of how to pay for the cost of funding litigation but have not solved access to justice for those who have little money.

Chris Hodges: does anyone disagree that regulation of LF is likely to be different in different parts of the world? [No dissent]

General points made: 99% of claims funded by LF are legitimate. There is a need to protect against fraudulent claims but the problem not as widespread as is perceived. Budgeting is crucial for funders. It is axiomatic that all information on the details of a case needs to be available to funders but also to remain confidential. Funders need to be able to terminate a litigation case if the situation deteriorates.

Jackson LJ: My Report has been misquoted in relation to a funder's right to withdraw: I said that a funder should continue to fund unless there are proper grounds to withdraw. The contract should specify which grounds of withdrawal should be allowed. The report remains general. If the proposal will be implemented the details have to be worked out.