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Litigation funding in family cases – a practitioner's guide

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Introduction

At Ampla Finance, we are dedicated to ensuring fair finance for those that need it, and this first-of-its-kind guide aims to provide family lawyers with a helpful overview of the regulatory framework surrounding the necessary, but sometimes very tricky, conversation with clients about how they intend to fund their proceedings.

The primary focus is on practical considerations and guidance. The aim is to help further best practice in relation to litigation funding in family cases, as well as making the lives of our hardworking family lawyers that little bit easier. By giving examples of the key issues that can arise and suggesting approaches that might be taken to address them, we hope to help practitioners and firms develop a fair, consistent, time-efficient and cost-effective approach to the conversation with those clients contemplating litigation funding.

The guide has been written primarily by family lawyer and Ampla Finance adviser Nigel Shepherd, twice Chair of Resolution and former Head of Family Law at Mills & Reeve and has been informed by a formal opinion on the regulatory framework provided to Ampla Finance by barrister Simon Popplewell of Gough Square Chambers, who specialises in consumer credit, financial services and consumer law. His full advice will be made available to all of Ampla Finance's Partner Law Firms.

However, compliance with the relevant statutory, regulatory and professional obligations remains the responsibility of individual firms and practitioners and Ampla Finance cannot accept any liability for the opinions expressed here or in that opinion.

Practitioners will be aware of the different options firms and clients have when it comes to the payment of legal fees. These include clients using their own resources; borrowing from family or friends; using credit cards or an unsecured bank overdraft, having 'credit' from the firm in the form of a Sears Tooth agreement; Legal Services Orders; and commercial borrowing.

Commercial borrowing itself takes different forms, such as a formal mortgage secured on property and requiring a monthly repayment, or alternatively a loan repayable from, and at the time of, the financial settlement on divorce.

This guide is written primarily from the perspective of the last of these commercial lending options, but, other than where necessary to put the funding conversation with the client into context, does not attempt any analysis of the respective merits of the choices or the detailed financial and other factors relevant to comparing and choosing litigation funders.

The regulatory framework

The regulatory framework underpinning this guide takes account of the requirements of the Financial Conduct Authority (FCA), the professional obligations set out in the Solicitors Regulation Authority (SRA) Codes of Conduct for solicitors and firms, the SRA Principles and the legislation that governs lending.

The regulation of lending in England and Wales is governed by both the **Consumer Credit Act 1974** and **Financial Services and Markets Act 2000 ('FSMA')**. Whilst any lender under a regulated consumer credit agreement will bear most of the responsibilities for compliance under this legislation, there are certain features of the legislation which family lawyers should take into account when introducing clients to a litigation funder. In particular, the **Financial Services and Markets Act (2000) Regulated Activities Order 2001 ('the RAO')** specifies the regulated activities which fall within the scope of FSMA.

Of relevance to referring practitioners is the regulated activity of 'credit brokerage', which is, in essence, the activity of referring people who want to obtain credit to creditors or other credit brokers.

The key point in relation to this regulatory framework insofar as it impacts upon litigation funding is that there is an exclusion from the concept of credit brokerage for certain activities carried on by solicitors 'in the course of providing advocacy services or litigation services'. If that exclusion applies, it means that the solicitor effecting the introduction of the client to a litigation funder does not require authorisation for that introduction from the Financial Conduct Authority (FCA).

The exclusion requires the credit brokerage, i.e. the introduction to the litigation funder, to be something that it is reasonable to expect a person who is exercising - or contemplating exercising - a right of audience or a right to conduct litigation in relation to any proceedings or contemplated proceedings, to provide for the purpose of those proceedings or contemplated proceedings **(Article 36F of the RAO)**.

It appears clear that any client considering litigation funding for court proceedings, for example financial remedy proceedings, will be doing so in relation to, or contemplation of, proceedings. However, it is suggested that the exclusion will apply equally to borrowing to pay legal fees for mediation or collaborative practice, something which some lenders will facilitate, because there is the possibility of proceedings being brought should the chosen process be unsuccessful.

However, there is a potential issue with whether this exclusion extends to arbitration. This is as a result of the definition of 'litigation services' and the 'conduct of litigation' in the RAO and in the **Legal Services Act 1974**. It appears that this may well result from a drafting oversight when **Article 36F** was revised, as arbitration was specifically included in the exemption in the earlier version, but the position is unclear and firms will therefore need to make their own judgment on the position.

Even if the Article 36F exclusion were found not to apply, either generally or specifically in relation to funding for arbitration, there is a further route to exemption from FCA authorisation through **section 327 of FMSA**.

That involves more detailed considerations and is covered in detail in the full opinion from Simon Popplewell, but in light of our confidence in the primary exclusion applying to all lending other than possibly for arbitration, it is unnecessary to elaborate here.

The **SRA Code of Conduct** and SRA Principles of course describe the standards of professionalism expected by the SRA and public from individual solicitors and firms. These of course include independence, honesty, integrity and acting in the best interests of clients. However, there is nothing in the Code which impacts specifically on the issue of litigation funding, other than clauses 5.1-5.3 of the Code of Conduct for solicitors (which is incorporated into the Code for Firms) relating to the need to get the client's .informed consent before effecting an introduction to a 'separate business' (which applies to any business, not just litigation funders) or where there is a fee sharing arrangement between the solicitors and a third party.

In conclusion, and with the caveat above about arbitration and the one below relating to the boundary between information and advice, as long as legal proceedings are either in existence or contemplated it is reasonable to conclude that there are no formal regulatory impediments to the family lawyer discussing litigation funding with clients and introducing them to a funder. There are, however, various best practice considerations, which is where the focus of this guide lies.

The litigation funding conversation with the client

Family lawyers are committed to providing the best advice and client service to those instructing them, and a key factor is ensuring that the costs of the anticipated work can be met.

Clients will want clarity to enable them to plan and budget effectively and the solicitor will be mindful of both profit and cashflow. The conversation on how this is to be done will come at the outset when the client is being engaged, but will need to be kept under review and the way a case is funded may well need to change.

The funding conversation, and resulting regulatory and best practice implications, can perhaps be broken down into a number of commonly asked questions. These are not exhaustive and inevitably overlap to a certain extent, but for each we will highlight the key issues and, where appropriate, generate options for addressing them.

Litigation funding or other options?

First choice will understandably be the client's own resources, usually followed by borrowing from family or friends. Borrowing commercially is generally seen as being towards the end of the list of preferred options for funding legal fees.

A Legal Services Order from the court under **MCA s 22 ZA** has to be the last resort, because there is a requirement to demonstrate inability to pay by any other means (including being rejected by **at least two commercial lenders** and that the firm does not facilitate *Sears Tooth* agreements).[1]

The lawyer should discuss all of the options with the client including, for example, the fact that where family might be able to help, there are potential disadvantages around whether the loan will be treated as a hard or soft liability and the danger that the relative's financial involvement might lead to the client's independence being compromised. And even though at first sight the client's own resources might seem an obvious preference, there are some important points to note and consider.

If the client has ready cash available then there probably isn't much to debate, but what if their resources are in the form of investments? Practitioners need to be careful not to stray into the territory of regulated activity by giving financial advice unless they are authorised to do so, which is not the case for the vast majority of family lawyers. For example, giving advice about whether or not to sell shares to raise funds would potentially constitute the regulated activity of advising on investments in **Article 53 of the RAO** (see above). There is an exclusion under Article 67 which the FCA recognises might apply to solicitors, but this is not a clear-cut area.

For example, even if (which is far from clear) you might be able to suggest to a client that they sell shares to fund fees, it will almost certainly be going too far to suggest selling shares rather than other investments, or one class of shares over another.

The best way to avoid any risk is to avoid giving advice. There is a distinction between providing information and providing advice.

The FCA views the latter as involving some opinion on behalf of the giver – it is a recommendation to a course of action. Giving purely factual information is not a regulated activity.

[1] See Rubin v Rubin [2014] EWHC 611 (Fam))

Whether something constitutes advice or information can be a fine distinction, and if further guidance is required it can be found in the **Perimeter Guidance section of the FCA Handbook**. Merely leaving the decision to the client is not enough, however. For example, *"it would seem a good time to sell these shares, but I will leave the decision to you"* may still constitute advice. On the other hand, *"the value of your shares is sufficient to cover your litigation costs"* does not contain any value judgment as to whether or not to sell the shares, and would be unlikely to constitute a regulated activity. It is advisable to reinforce a message like this by making it absolutely clear that you are not able to advise on what is best. Consideration should be given to referring the client to an independent financial adviser.

Choice of litigation funder – what is the family lawyer's role?

Commercial litigation funders who lend on the basis that repayment will come from the financial settlement in the family case generally fall into two camps:

- Those who lend in the expectation that investable settlement proceeds will be placed with them and are therefore looking for a long-term wealth management relationship with the client.
- Those who are pure lenders.

It is the latter model that provides the majority of litigation funding in family cases.

Although there is no regulatory requirement to do so, for a number of reasons most firms will usually have arrangements in place with more than one litigation funder. Lenders can approach funding decisions differently from case to case.

One may be able to lend on a particular case at a particular time where another may not. Lending criteria, processes and terms of business vary. Having a choice provides flexibility and will generally benefit both the client

and their lawyers, although inevitably clients will ask their lawyers to guide them on that choice.

Although there is no single 'correct' way to go about this, and each lawyer/firm will need to decide what works best for them and their clients, in the usual litigation funding situation the following pointers may help:

- Explain to the client which funders the firm uses and can therefore be considered. If you believe that a particular provider would be the best option in any given circumstance, it may be better to say that such provider is being offered rather than specifically recommended. However, in discussing the options, there is no reason not to offer your experience of working with a lender. For example: "*if you choose X we have found that their processes work well*".

- Explain that the firm, as is usually the case, has no financial interest in the choice – in other words, there are no referral fees being paid (if there are, then different regulatory considerations apply, as noted above).

- Care must be taken to avoid straying into advice unless the firm is willing to take on a duty to advise correctly. Where the line on this is drawn is not clear-cut. It may be safe to explain the key aspects of the funding – for example that it will be a formal legally binding consumer credit agreement; that interest will be charged (including giving the headline rate); what the initial set up fee from the provider is; details of any fees that the client will have to pay upfront (for example, to cover independent legal advice); that the intention is for the loan to be repaid from the settlement proceeds; and whether (as is usually the case) the loan will have to be repaid if the client changes solicitor, unless they go to a firm that has an arrangement with that lender or sets one up.

  However, the lawyer should not offer or attempt to offer any detailed financial or technical advice, for example on the calculations behind the applicable APR (as the factors influencing this vary from lender to lender).

The better litigation funding providers will have client-facing information and materials that contain all of the basic information, meaning that the client can simply be given this to reduce the risk of giving advice. Lenders should also offer to deal directly with the client in relation to giving advice, which would include an explanation of the APR.

Does the client need independent legal advice (ILA)?

ILA on the terms of the credit agreement being entered into by the client is not a regulatory requirement, but most litigation funders insist on it and the good ones will offer a panel of providers to make the process administratively efficient and reduce delay and cost for the client and lawyers. Where the funder does not require it, best practice will be for the lawyer to recommend it in any event. The ILA should be given by a lawyer experienced in advising on credit agreements, whether or not they also have family law experience or access to it.

Provision of information and documentation to lenders

Practitioners may be concerned about whether the implied duty of confidentiality that attaches to information and documentation disclosed in proceedings might restrict what can be provided to litigation funders.

Our view is that there is no issue here. The material will be produced in connection with the conduct of the litigation in the same way as when provided to counsel or experts and is necessary in order for the funder to assess the merits of the loan application and its risk both at the outset and as the case progresses.

Authority to this effect can be found most recently in the judgment of Knowles J in the long-running case of Akhmedova v Akhmedov (in particular paras 43, 44, 94 & 99)*.

If practitioners were not reassured by this analysis of the position there

*Akhmedova v Akhmedov & Ors [2020] EWHC 1526 (Fam)

is the option to request permission from the other party to disclose their information or documentation on the basis that refusal to give that permission would almost inevitably lead to an application for a Legal Services Order.

Can the family lawyer charge for the work relating to litigation funding?

The short answer is that as long as work on how the client's case is funded falls within the FCA exclusion as being in the course of conducting litigation (and see above in respect of the possible issue with arbitration), it can be charged for.

This is of course subject to the terms of engagement with the client and the discretion of the firm, but charges can be made for the funding conversation with the client; the work involved in making the application to the funder (explaining the details of the case and providing documentation); time spent complying with any obligations under the firm's agreement with the lenders to keep them advised of developments; and communications with the other party's solicitors.

The client can obviously be charged for an application to the court for a Legal Services Order and that would include communications with litigation funders to get the required rejection letters if they cannot lend.

It is important to consider how the service and processes of the litigation funding provider impact on the fees payable by the client. How is ILA factored in? How user friendly is the application process? Does the funder communicate directly with the client to reduce the work the lawyer has to do? Once the loan is approved does the funder get involved in the strategy of the case, or let the lawyer get on with running it? And if the loan needs extending can this be done without a completely new application?

Legal fees resulting from work in relation to the application and its management can be a hidden cost that needs to be factored in alongside headline interest rates and initial arrangement fees from the provider.

Afterword

We hope this guide has proved useful for steering and preparing family law solicitors for one of the more difficult conversations that must be had with clients.

For more information, or to join us as a Partner Firm and receive the full formal opinion from Simon Popplewell, please do get in touch. You can find us at:

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About Ampla Finance

Ampla Finance Legal provides bespoke legal loans to fund legal costs. It offers responsible lending with competitive rates and interest only paid on the amount used.

The digital Ampla Hub keeps clients and solicitors up to date with the loan status at all times, allowing approval in up to two days and funds to be drawn with quick client approval.

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