

SoCLA National Conference 2025
"Faster, Better, Cheaper"

Brisbane
21-23 May 2025

Maximising recovery in construction disputes through litigation funding

Patrick Leader-Elliott and Liam McInerney

2025 / NC 24

www.scl.org.au

Maximising recovery in construction disputes through litigation funding

Patrick Leader-Elliott[1] and Liam McInerney[2]

I. Introduction

Legal claims are assets. Litigation funding offers an opportunity for the holder of a claim to finance against it. No businessperson would abandon an asset because they could not realise 100 per cent of its value, yet claimants can be reluctant to give a piece of the pie to a litigation funder where funding would enable them to realise a significant portion of the value of their claim.

Many of the practical, legal, and philosophical questions regarding litigation funding revolve around the funder's commission. Is it consistent with modern principles of justice and the rule of law to allow third parties to fund litigation for profit, with the effect that the claimant does not receive the full value of its claim? In recent years, a new discourse has emerged: is there a principled basis to hold a *respondent* liable for the full award of damages plus the funder's commission or uplift?

This paper has been precipitated in part by the decision of the NSW Court of Appeal in *Transport for NSW v Hunt Leather Pty Ltd* [2024] NSWCA 227 where the claimant group sought (unsuccessfully) to recover the fees it owed to a third party funder as damages,[3] and in part by recent changes to the rules of arbitral institutions which expressly allow third party funder fees to be recovered as costs. In this paper, we introduce litigation funding, discuss funding in construction claims, and consider what options are available to funded claimants to maximise their recovery.

We also draw upon the perspective of funders themselves. We conducted online interviews with a number of current and former funders in Australia and overseas to discuss funding generally, funding in the construction industry, and what lawyers need to know about litigation finance. Those interviews were conducted on the basis that all insights and opinions would remain anonymous.

II. What is litigation funding?

At its most basic, litigation funding involves a third party making a capital investment, usually by way of non-recourse funding to the claimant, in legal proceedings in return for a share of any money recovered. It is a private arrangement between the claimant and funder.

It was long posited that litigation funding arrangements might fall foul of the common law doctrines of champerty and maintenance or generally be contrary to public policy. The High Court of Australia confirmed the legality of such funding arrangements in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386. Even in jurisdictions where the tort of champerty still remains actionable, courts have declined to declare litigation funding agreements as unenforceable by reason of maintenance, champerty or public policy.[4] Absent an extraordinarily unusual set of circumstances, there is now no prospect of any litigation funding arrangement with a credible funder being set aside on these grounds.

---

1 Special Counsel at LK Law, Adelaide.

2 Senior Associate at LK Law, Adelaide.

3 Now on appeal to the High Court of Australia and listed for hearing on 15 and 16 May 2025: *Hunt Leather Pty Ltd v Transport for NSW* (S20/2025 and S21/2025).

4 *Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No 4)* [2019] QSC 228 and *Gladstone Ports Corporation Ltd v Murphy Operator Pty Ltd* (2020) 6 QR 497.

(a) Different types of litigation funding

Standard funding

Litigation funding agreements are bespoke arrangements negotiated to meet the needs of the particular claimant in the particular case. However, there are many common features. Under typical litigation funding arrangements, a funder will agree to pay some or all of the costs incurred by a claimant in litigation or arbitration and often agree to meet any adverse costs order (sometimes to a capped amount) against a party if the claim is not successful. If the claim is successful, funders will receive a return on that investment in the form of a commission on the award of damages, or a multiple of the amount invested.

This funding arrangement allows claimants who are impecunious or who simply wish to manage their cashflow and risk an opportunity to have their litigation funded by a third party in return for a portion of any proceeds being paid to the funder.

While the fees charged by funders will depend on the precise terms of each funding arrangement, the Australian Association of Litigation Funders says that most funders charge a commission in the range of 20-40%.[5] While this is a useful approximation of the typical commission, funding agreements have become increasingly bespoke and sophisticated, especially for corporate claimants.

Class action funding under statutory regime

Class actions are another kind of claim that are often third-party funded. Particularly in consumer class actions, there will often be many members of a class who are not able to independently fund proceedings against large and well-resourced companies. For example, in the construction context, it would not be economically sensible for the owner of an apartment in a defective building to fund a claim against the builder themselves: such a case is an appropriate vehicle for an externally funded class action.[6]

Class actions are subject to close oversight by State and Federal Courts in Australia, and must be conducted in accordance with specific legislative requirements.[7] They are generally run by firms who specialise in class action proceedings. Before the funder receives any payment out of money recovered by the claimants, the payment must be approved by the Court, at least where the matter has been settled or discontinued.[8]

---

5 See Association of Litigation Funders, '*Litigation Funding FAQs*' http://www.associationoflitigationfunders.com.au/uploads/5/0/7/2/50720401/4._litigation_funding_faqs.pdf

6 See eg *Owners - Strata Plan No 87231 v 3A Composites Gmbh* (2019) 369 ALR 315, a representative proceeding concerning an allegation that the use of cladding in an apartment building was not safe or fit for purpose, funded by Omni Bridgeway.

7 See Part IVA of the *Federal Court of Australia Act 1976* (Cth), Part 10 of the *Civil Procedure Act 2005* (NSW), Part 13A of the *Civil Proceedings Act 2011* (Qld), Part 4A of the *Supreme Court Act 1986* (Vic) .

8 *Federal Court of Australia Act 1976* (Cth) s 33V and *Webb v GetSwift Ltd (No 7)* (2023) 414 ALR 500 at [15]-[16]; see eg *Augusta Pool 1 UK Ltd v Williamson* (2023) 111 NSWLR 378, concerning settlement approval of representative proceedings on behalf of owners against the former owner of a building site, the builder, and the structural engineer in relation to the construction and partial structural failure of a residential building. As to the position where a matter is run to judgment, see eg *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433 at [141]-[158].

ATE insurance

Another kind of litigation risk management arrangement, largely beyond the scope of this paper, is after the event (**ATE**) insurance. It is insurance purchased by a party after a dispute has arisen to cover adverse costs. While a form of insurance, ATE insurance also has some similarities with litigation funding, in that the premium on an ATE insurance policy will usually be split into an upfront premium and a deferred premium, with the deferred premium payable only where the claimant is successful in recovering funds. The ATE insurer therefore makes its money both from an upfront premium *and* recovery of funds by the claimant. By contrast, the litigation funder makes money only from any proceeds recovered in the action. It is not uncommon for ATE insurance to be bundled with a funding package, as a way for the funder to hedge its own exposure to adverse costs.

Defence Funding

As litigation funding is a capital investment in a share of money recovered in legal proceedings, it is not well-suited to financing defendants. Even the most successful defendant – one who has defeated all claims and obtained an order for indemnity costs – recovers no money from which a funder can obtain a premium.[9] One funder described monetising defendant financing as a '*holy grail*' of funding.

One possibility that is open for large players, such as Tier 1 builders, is a portfolio arrangement, whereby the funder funds actions where the company is the claimant, and also agrees to cover the costs of defending claims against that company. This will be a highly bespoke arrangement, and one in which the premium on recoveries in the funded claims is likely to increase to take account of the defence costs.

Because of the rarity of funded defendants, our focus in the remainder of the paper is on funded claimants.

(b) Why Fund?

There are two main reasons why a claimant will seek litigation funding.

First, the claimant may be unable to afford the cost of bringing and maintaining legal proceedings. In Australia, litigation funding was historically associated with class actions and insolvency proceedings,[10] both of which are paradigm instances of claimants who lack the necessary resources to bring a claim.

Second, the claimant may choose external funding to control its downside risk in legal proceedings. In exchange for a portion of its recovery, the funded claimant is able to pursue legal proceedings without paying monthly legal bills, and without the risk of needing to meet an adverse costs order if the claim fails. The claimant is free to spend the money that would otherwise have been paid in legal fees on other areas of its business. Unlike a loan, litigation funding is generally provided on a non-recourse basis, so does not create a balance sheet liability.

---

9 Although as we discuss below, counterclaims are not uncommon in construction litigation, and a defendant may be able to obtain funding to pursue a counterclaim.

10 By way of s 564 of the *Corporations Act 2001* (Cth).

A key point that repeatedly came up in our conversations with funders is that any claimant with a large claim should consider legal funding: it is not just for poorly capitalised companies, but an important tool for managing both risk and the corporate balance sheet.

There are other benefits associated with litigation funding, including a degree of comfort for the claimant arising from the funder's due diligence process, and funders can alleviate internal management time by assisting to manage the litigation.

(c) Funding criteria

Funders are typically transparent about their funding criteria, with many funders having their criteria available on their website. We discussed typical criteria with funders, reviewed the publicly available funding criteria of six funders,[11] and distilled the criteria into the following four categories.

1. **Prospects of success and legal merit**.[12] One funder described a meritorious case as '*a given*'. It is no surprise that all the publicly available criteria we reviewed included a meritorious legal case with strong prospects of success. Funders look for a case with strong prospects based on documented (rather than oral) evidence and settled legal principles.

2. **Experienced legal team with track record of success**.[13] Funders value litigators who are experienced and with a proven track record of successfully bringing claims of the kind of which funding is being sought. Funders will often undertake due diligence on the legal team as well as the client and the claim.

3. **Economics of the claim**.[14] Funders will undertake an economic analysis to determine whether, if the claim is successful, the funder will receive the necessary return on its investment and the claimant will receive a fair share of damages. This economic analysis will include a comparison of the likely expenses of the proceeding and the amount to be recovered. For example, one funder referred to a 10:1 ratio between likely recovery and expenses. This necessarily means that the lower the likely recovery, the more difficult it is to make the economics stack up when seeking to obtain funding. In practice, litigation funding is often confined to claims that have a large monetary value. Another vital element of the economic analysis is the likely duration of the claim: the longer proceedings run, the longer the funder is out of its money, and the higher the ultimate return it will require.

4. **Enforceability**.[15] An award of damages is meaningless if it is against a respondent who cannot pay or where the award cannot be enforced. Woodsford describes it as the '*worst-case scenario for a funder*' to fund litigation that ends in a successful verdict but where recovery cannot be made '*because the respondent is insolvent or judgment-proof*'.[16]

---

11 In alphabetical order: Balance Legal Capital, Burford, Harbour, LCM, Omni Bridgeway, Woodsford. It should not be assumed that the individuals we interviewed in preparing this paper are affiliated with these funders.

12 LCM, Burford, Harbour, Omni Bridgeway, Balance Legal Capital, Woodsford.

13 LCM, Burford, Harbour, Balance Legal Capital, Woodsford.

14 LCM, Burford, Harbour, Omni Bridgeway, Balance Legal Capital, Woodsford.

15 LCM, Harbour, Omni Bridgeway, Balance Legal Capital, Woodsford.

16 See Woodsford Insight, '*A Practical Guide to Litigation Funding*', https://woodsford.com/wp-content/uploads/2022/09/A-Practical-Guide-Litigation-Funding.pdf

Another element of enforceability that funders will consider is the likelihood of appeals or the necessity for enforcement proceedings. Sometimes it will be obvious to funders at the outset that a claim will run to the highest appellate court in a particular jurisdiction. In that case, the initial funding budget will likely take appeals into account.

Multiple funders encouraged parties to engage with funders early in the dispute to pinpoint those areas of the dispute in which the funder is interested. One funder observed that parties occasionally present the funder with a comprehensive opinion from a senior counsel at their first meeting, only to find that it covers a range of issues about which the funder is not concerned, or does not address issues the funder regards as critical. Time and cost can be saved by engaging with a funder early.

(d) Funder's role in litigation

The claim always belongs to the claimant. While each funding agreement will prescribe the funder's level of oversight and involvement, funders cannot run the case and will usually not have the final say on any settlement. Therefore, funders place a great deal of trust in how the legal team will conduct the case, and will exercise rigorous due diligence on the claimant and its legal team prior to entering into funding arrangements.

Due diligence is a two-way street. A claimant with a good claim should speak to multiple funders before entering into any funding arrangement and conduct its own due diligence on each. Any reputable funder will expect a prospective claimant to ask questions about the funder's capital structure and source, the funder's experience with claims of the type brought by the claimant, and other matters the funder is currently funding (to ensure the funder is not overleveraged).

Different funders will want to have varying degrees of involvement in the litigation. Some funders will have input into claim strategy, some will receive regular updates and consult with the legal team, and others will be more passive. Claimants and their legal teams should be clear at the outset of seeking funding the degree of involvement the funder wishes to have, which will usually be clearly spelled out in the funding agreement. Speaking generally, they should expect to report regularly to the funder on the progress of litigation, budget, settlement discussions, and next steps, as well as being consulted regularly on overarching strategy and to be informed of settlement discussions.

Depending on the funder and the terms of the specific funding arrangement, there may be other mechanisms for funder oversight, including:

- Referring key strategic decisions (such as accepting a settlement offer that is substantially lower than being claimed or changing solicitors) to an independent assessor where the parties are in dispute. This independent assessor will typically be a completely independent senior counsel, sometimes agreed by the parties in advance.

- The right of termination if there is a material change to the value of the claim or expected budget. While one funder observed this can be unnerving for clients, in practice no funder would invest millions of dollars into a claim then decide without very good reason to withdraw and abandon their investment.

- The imposition of conditions subsequent at various procedural stages (such as the close of pleadings or close of evidence).

As with any commercial relationship, there is the potential for conflict between the claimant, the claimant's solicitors, and the funder. While that conflict can be managed through formal contractual means, the best method is a transparent relationship where issues are discussed and resolved in a timely manner. As one funder observed, if the parties are relying on oversight and dispute resolution provisions in the funding agreement, the relationship is in trouble.

III. Litigation funding in construction

Next, we turn to the use of litigation funding specifically in the context of construction disputes, and whether such disputes are apt to be funded by third-party funders.

Claims and disputes are part of doing business in the construction industry. Yet historically, many funders were reluctant to fund construction claims outside of the class action space, and some refused to do so as a matter of policy. The reasons for this reluctance are the factors that all construction lawyers know make construction litigation a difficult beast (as we address further below under part (b)). However, funders are now more open to funding construction claims, and some are even pitching funding packages specifically for construction litigation.[17]

(a) Why fund a construction claim?

Historically, the archetypal funded claimant was one with insufficient cash to fund litigation themselves. With margins in construction projects always tight and cashflow vital to survival, some construction companies will be most motivated by the cash position within particular projects. A claimant who cannot afford to fund litigation themselves is left with the choice of seeking external funding or abandoning what might be a good and lucrative claim.

Other claimants may have the cash available to fund a claim and choose to use litigation funding as a tool to manage expense and risk within their business. Some claimants (particularly builders) would rather spend that cash pursuing other opportunities. A builder may wish to put that cash towards pursuing a business opportunity or capital upgrades, rather than legal spend.

Similarly, if a particular project causes a client/owner or a builder to break even or make only a marginal profit, it may be in their best interest not to expose the business to further cash expenditure and the risk of an adverse costs order. This course may allow businesses to stay consistently profitable and give consistent payouts to investors, notwithstanding the existence of disputes.

(b) Why might construction claims not be suitable for litigation funding?

Several funders confirmed in interviews that the category of claim does not vary the lending criteria funders will assess. Whether the case being considered is a construction case or otherwise, '*it's still a numbers game where the numbers need to make sense*.' That said, there are factors we discussed with funders and based on our experience that may make construction claims not suitable for funding (particularly considering the funding criteria detailed earlier).

Construction claims are expensive to run. Lawyers familiar with construction claims will know that they are detailed, technical, fact intensive, and often have many different elements. It is not

---

[17] See, eg, Omni Bridgeway '*Legal Finance for the Construction Sector*' https://omnibridgeway.com/docs/default-source/insights/publications/dispute-finance-for-the-construction-sectorfd08d5b836984d5b861fcabbce55f57b.pdf?sfvrsn=834d99a_10.

unusual to require expert evidence from several disciplines, with each expert depending on the others' analysis to support the ultimate claim. Technical analysis will feed into delay analysis which will feed into quantum. The claim value therefore needs to be sufficiently large to warrant a healthy legal budget which can withstand some overspend.

It costs a lot to find out you have a good (or bad) case. Construction disputes are very document heavy, resulting in large discovery and document review expenses. Within those huge repositories, there may lurk single documents capable of turning the case but which only come to light after extensive review. Similarly, the parties may need to spend large sums of money obtaining expert opinions and reports before they reach the point of knowing that they have a claim with good prospects.

Very rarely is there a single path to complete success, and prospects are difficult to assess early. Construction claims will often have several paths to success, with each path dependent on successfully building upon layers of lay and expert evidence, while rebutting counterclaims. In a typical commercial context, funders will be able to more readily identify the points on which a case might rise or fall (for example, the existence of a duty of care, whether an exclusion clause operates to exclude liability) and seek an opinion from senior counsel on that matter. According to one funder, in construction cases there is '*very rarely one particular issue that is decisive of the quantum*'.

One funder observed that claims under investment treaties or claims for misleading and deceptive conduct are outlier construction cases, which may offer a clear path to success based on settled legal principles.

Construction claims often involve multiple parties and are met with counterclaims. It is rare for a large construction claim of the sort that might attract funding to involve a single claim against a single defendant. Usually there will be multiple parties (eg contractors and subcontractors), and the claimant(s) can often expect to be met with counterclaims, which will need to be factored into the funder's economic analysis. This introduces risk into the funder's economic analysis and uncertainty into the prospects.

Difficulties with enforceability/recoverability. Because there are commonly multiple parties to a construction dispute, there is a higher than usual risk that a claimant with an otherwise good claim might find themselves unable to recover because it failed to join the correct corporate entity or (sub)contractor, or because it has succeeded in obtaining an award or judgment against an insolvent entity or an entity with a sophisticated and opaque corporate structure.

IV. Recoverability of funding expenses – maximising recovery

(a) The conundrum

As addressed at the outset, this paper has in part been precipitated by recent decisions in which the question of whether funder fees can be included in an award of damages or ordered as costs of a proceeding has been considered. No doubt, if claimants could shift the cost of obtaining litigation funding onto a defendant, there would be a significant uptake in litigation finance.

But does such a path exist? At least in litigation, the current answer is uncertain at best.

(b) Position in litigation

The New South Wales Court of Appeal has recently upheld a first instance decision that litigation funding expenses are not recoverable as damages.[18] This was a class action in nuisance against Transport for NSW (**TfNSW**) seeking compensation for loss allegedly caused by delays in the construction of the Sydney Light Rail. The class action was externally funded and the funder was to receive a 40% commission payable from any recovered amounts. At first instance and on appeal,[19] the claimants argued that the damages payable by the defendant ought to include the 40% premium payable to the funder. Both the trial Judge and the Court of Appeal rejected this argument (for which no authority was cited) and held that the funder's commission was not recoverable as damages because:

- the claimant's loss – being the 40% of the recovered amount payable to the funder – was not a foreseeable loss arising from TfNSW's conduct,[20] and in any event the claimants had broken the chain of causation between any wrongdoing by TfNSW and that loss, as the claimants freely and willingly chose to enter the funding agreement;[21]

- as a matter of policy, it was not appropriate to extend TfNSW's liability to include payment of litigation funding expenses incurred by the claimants.[22] The Court of Appeal noted that if the commission was recoverable as damages, there would be no disincentive for a claimant to enter such an agreement, nor any incentive to bargain for a smaller fee;[23]

- if the 40% commission was recoverable at all, it would be recoverable as a cost of the litigation, and '*expenditure on litigation is not recoverable loss*';[24] and

- there was a conceptual difficulty in awarding the 40% commission as damages to be paid by TfNSW when the claimant's obligation was to pay the funder 40% of the damages that it was awarded by the Court. Necessarily, prior to damages being awarded, the claimant's obligation to make that payment had not crystallised.[25]

Unless the High Court overturns the decision in the Sydney Light Rail case, the position will remain that litigation funding expenses are not recoverable as damages. Without seeking to pre-empt the High Court, and with respect to the parties' submissions on appeal, we think that outcome is unlikely.

---

18 *Hunt Leather Pty Ltd v Transport for NSW (No 4)* [2024] NSWSC 140; *Transport for NSW v Hunt Leather Pty Ltd* [2024] NSWCA 227.

19 At first instance Cavanagh J found that the claim was made out. This finding was overturned on appeal.

20 *Hunt Leather Pty Ltd v Transport for NSW (No 4)* [2024] NSWSC 140 at [100]-[102]

21 *Hunt Leather Pty Ltd v Transport for NSW (No 4)* [2024] NSWSC 140 at [108]-[111]; *Transport for NSW v Hunt Leather Pty Ltd* [2024] NSWCA 227 at [194]-[198], [209].

22 *Hunt Leather Pty Ltd v Transport for NSW (No 4)* [2024] NSWSC 140 at [112]-[122].

23 *Transport for NSW v Hunt Leather Pty Ltd* [2024] NSWCA 227 at [199].

24 *Transport for NSW v Hunt Leather Pty Ltd* [2024] NSWCA 227 at [202]-[204].

25 *Hunt Leather Pty Ltd v Transport for NSW (No 4)* [2024] NSWSC 140 at [67]-[68]; *Transport for NSW v Hunt Leather Pty Ltd* [2024] NSWCA 227 at [205]-[206].

This leaves the only avenue for a successful claimant seeking to recover its litigation funding expenses from the respondent as costs. While there is some authority to suggest that funding expenses may, in some circumstances, be recovered as costs,[26] there is also authority to the contrary.[27] It is clear that a successful claimant may only recover its *legal* disbursements by way of costs, and it may be difficult to characterise the premium paid to a litigation fund as a legal disbursement. Any such characterisation must be a matter of substance rather than form.

(c) Unique position in class actions – court statutory power to reduce premium

The courts have power to intervene in the amount payable to a funder as part of the approval of settlement and discontinuance of a group proceeding.

Section 33V of the *Federal Court of Australia Act 1976* (Cth) provides that a '*representative proceeding may not be settled or discontinued without the approval of the Court*', and if the Court gives such approval, '*it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court*'.[28]

Justice Beach in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs & Mgrs Apptd) (In Liq) (No 3)* (2017) 343 ALR 476 opined that the s 33V approval power included the '*power in effect to modify any contractual bargain dealing with the funding commission payable out of any settlement proceeds*', whereas a contrary view was expressed by Justice Lee in *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289.

(d) Position in arbitration

Claimants commencing proceedings by way of arbitration may have greater prospects of recovering funders' fees as costs. Increasingly over the past five years, arbitral institutions have made provisions for third-party funding expenses to be recoverable as '*costs of arbitration*'. For example, the *ACICA Rules 2021* specifically provide (emphasis added):

> ***48 Costs of Arbitration***
>
> *The term "costs of arbitration" includes: …*
>
> *(d) the parties' legal and other costs, including, but not limited to, in-house costs, such as in-house counsel and other non-independent experts, and third-party funding costs, directly incurred by any party in conducting the arbitration, if such costs were claimed during the arbitration proceedings and only to the extent that the Arbitral Tribunal determines that such costs are reasonable …*

---

26 *Anderson v Canaccord Genuity Financial Ltd (No 2)* [2024] NSWCA 161 at [152]-[158] per White JA (in dissent on this point).

27 *Burford v Allan* [1998] SASC 6693, in which the SA Court of Appeal somewhat reluctantly held that interest on a bank loan taken out by the plaintiff to fund proceedings was not recoverable on a taxation of costs.

28 See similar provisions: *Civil Procedure Act 2005* (NSW) s 173, *Civil Proceedings Act 2011* (Qld), s 103R Part 4A of the *Supreme Court Act 1986* (Vic) s 33V. There is also the prospect of the Court making adjustments to the amount of a funder's premium where a class action is successfully pursued to judgment, see eg ss 33Z and 33ZF of the *Federal Court Act 1976* (Cth) and *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433 at [141]-[158].

It appears the ACICA Rules allow a claimant to receive third-party funding expenses as '*costs of the arbitration*' without needing to prove their impecuniosity or that the claimant would otherwise have been precluded from bringing the action. However, the tribunal has a general discretion to limit costs to those that are '*reasonable*'.

The HKIAC Rules are less explicit. While there is no reference to third-party funding expenses in the definition of '*costs of the arbitration*', in determining whether costs of the arbitration are reasonable and how to apportion costs of the arbitration, a tribunal is empowered to consider '*any third party funding arrangement*' (*HKIAC 2024 Administered Arbitration Rules*, Art 34.4(d)). A similar provision exists in the *Arbitration Rules of the Singapore International Arbitration Centre 2025* (Rule 38.6).

Not all arbitral institutions have followed suit. For example, the *ICC Arbitration Rules 2021* make no explicit provision for third-party funding expenses to be recovered as costs, but confers a broad costs discretion to the tribunal to '*take into account such circumstances as it considers relevant*' (Art 38(5)).

The position in the UK under the *Arbitration Act 1996* (UK) continues to be particularly favourable towards claimants who are funded. In *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361, His Honour Judge Waksman declined to set aside an arbitral award which awarded a successful claimant the full amount of almost £2 million payable to a third party funder as '*other costs*' under s 59(1)(c) of the *Arbitration Act*. Similarly, in *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* [2021] EWHC 3301 (Comm), the English Commercial Court confirmed that a costs award which awarded over £1 million in costs comprising the amount due under a litigation funding agreement did not exceed the tribunal's power.

One area in which there is broad alignment between arbitral institutions is in the requirement for parties to disclose the existence of third-party funding arrangements.[29] Funders have observed that the requirement for disclosure is a double-edged sword. While the existence of third-party funding may traditionally give rise to the perception of issues with cash-flow or solvency, or lead to peripheral skirmishes about the legality of funding, conflicts and the like, this also shows that independent lawyers (and often senior barristers) have reviewed the case and considered it to be sufficiently meritorious to proceed with funding.

V. How can parties set themselves up to recover funder's fees?

Beyond opting for a forum that expressly provides for funding fees to be awarded as costs, or more generally favouring arbitration under the ACICA Rules over litigation where possible, it appears there is little that claimants can do to have funders' fees included as damages *or* costs. There is no real silver bullet as to how parties can frame their funding agreement; as one funder observed, the court will always be interested in '*substance over form*'.

Parties should consider whether disclosing their funding arrangements may make recovery of the funding fees more likely, even if a jurisdiction does not require disclosure. As a matter of procedural fairness, a court or tribunal may be more inclined to award the funder fees as costs if the defendant was on notice of the funding, particularly where the funding was sought due to impecuniosity. By

---

[29] *Arbitration Rules of the Singapore International Arbitration Centre 2025*, r 38; *ACICA Rules 2021* r 54.2; *HKIAC 2024 Administered Arbitration Rules*, Art 44.1; *ICC Arbitration Rules 2021*, Art 11(7); *Dubai International Arbitration Centre 2022 Arbitration Rules*, Art 22.1.

way of example, the arbitrator in *Essar v Norscot* described Essar's conduct as '*exploitative*' and opined that Norscot had '*no alternative, but was forced to enter into the litigation funding*'. Therefore, in exercising its general costs discretion, the arbitrator took account of the conduct of the parties and considered '[j]*ustice and the merits*' in awarding the full funders' costs to Norscot.

Finally, parties should consider at the outset whether they will ultimately seek recovery of funder related expenses. In the class-action context, parties can expect the funding agreement to be scrutinised by the court. Similar scrutiny can be expected in an arbitration where funding expenses are sought to be recovered. Therefore, parties should turn their minds to this impending scrutiny when negotiating the terms of the funding agreement. For example, if the funding agreement will ultimately be produced in redacted form, it should be drafted in such a way that it can be conveniently redacted while still allowing the decision maker to undertake the necessary scrutiny.

VI. Conclusion

Litigation funding is much more than a last resort for otherwise impecunious claimants. It is a form of finance that should be considered by any claimant with a sizeable claim.

As the law currently stands, in litigation there is little prospect of a successful claimant being able to recoup the funder's premium from the defendant by way damages (no prospect) or costs (slim prospect). By contrast, the ACICA Rules expressly provide for recovery of external funding expenses as costs, and this is something a funded claimant must bear in mind when considering questions of forum.

Leaving aside recoverability of the funder's premium, litigation funding can be used to maximise recoveries by allowing claimants:

- to pursue claims they otherwise may not, due to impecuniosity or reluctance to incur the significant costs and risks that legal proceedings inevitably involve. A claim that is pursued to recovery necessarily produces a better outcome for the claimant than one that is abandoned;

- to pursue a claim while retaining use of the money that would otherwise be spent on the costs of that claim. Seen this way, the claim is an asset that the claimant can use to increase immediate cashflow while also hoping for a large recovery in future;

- to improve their prospects of settling for a favourable sum, using the existence of funding as a bargaining chip;

- to benefit from the funder's due diligence, strategic guidance and unique skills in investigating recoverability of a successful award; and

- to protect themselves and their investors from the risk of an adverse costs order.