

# Lifting the veil

Despite rapid increases in the capital on tap, third-party disputes funding remains controversial. *Legal Business* teamed up with Harbour Litigation to debate the issues at the coalface

**MARK McATEER**

**W**ith setbacks such as the House of Lords decision from the *Stone & Rolls* case in 2009 to the furore over *Excalibur* last year, the concept of third-party funding of disputes in the UK has drawn some scepticism from the senior City disputes practitioners in recent years. The litigation funders have taken the brickbats, some justified and some not, and as a result have spent almost as much of their time myth-busting as they have raising funds.

With this in mind, *Legal Business* and Harbour Litigation Funding invited some of the City's leading disputes practitioners to discuss some of the more practical issues around the funding of litigation and arbitration cases.

Harbour based the discussion around two examples of recent cases it has funded, one successful and one not, outlining the key issues that both matters threw up and guiding those attending through the most salient experiences from funding cases. The conversation then broadened into a wider discussion about key stumbling blocks. Inevitably, effective budgeting and a true assessment of costs in a dispute dominated the agenda.

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**Susan Dunn, Harbour:** In our first fund, cases ran, on average, 18% over budget. In our second fund, we are running at 2% over budget. We are definitely getting better, ►





**Craig Tevendale, Herbert Smith:** The perception is that funders only want a straightforward route to a pot of money



**Jamie Drinnan, Consensus:** There tends to be a big difference between the initial budget and the final cost

► and we will strive for no overruns in our new third fund. But budget management is the greatest challenge that we have in terms of what we do.

**Simon Salzedo QC, Brick Court Chambers:** I am amazed to hear you give those low figures for how much over budget you are

seven times difference between minimum claim value and cost. In our second fund, the average is around 26 times difference. The minimum we now look for is ten times.

**Ted Greeno, Quinn Emanuel Urquhart & Sullivan:** The idea that you can budget a large commercial case accurately, which

means that it must be more expensive. More time doesn't necessarily mean more expense. Or shouldn't.

**Ted Greeno:** It always does. It's Parkinson's Law. Work expands to fill the time allotted for it. There are often good reasons for that. Everyone has to carry the case in their minds for twice as long, and there are always things which people think should be done.

**Susan Dunn:** How often do you go back and look at your estimated costs on cases you have managed, versus actual costs? Someone said to me recently: 'Do you know, I am always 50% over my budget?' Well, here is a thing: next time you provide an estimate, why don't you take that into account?

**Stephen O'Dowd:** For the cases in our second fund we encourage the legal teams that we are working with to build a healthy amount of contingency into the budget. We cannot provision for everything, otherwise we would rarely fund a case, but having contingency, having some breathing space, is important. When pitching for work, you

## 'It is amazing how many law firms think of regular cost reporting as being submitting monthly bills.'

Jamie Drinnan, Consensus Business Group

overall on the funds. Is that because you discount what is told to you about what the budget is going to be?

**Susan Dunn:** One of the key lessons we have learned is to fund cases with as much distance between minimum claim value and cost as possible. In our first fund, we had an average of

is assumed in the courts now, is flawed, because you do not know how long it is going to take, how the factual issues will develop and how co-operative the other side is going to be.

**Stephen O'Dowd, Harbour:** I have an issue with the attitude that a longer case duration

might be inclined to pitch lower than you think it is actually going to cost, whereas we want to know what, realistically, it is going to cost for this case to be a success.

**Deirdre Walker, Norton Rose Fulbright:**

Do any of you use project managers? The idea that a partner is the right person to manage the administrative day-to-day running of a case is fanciful. The project manager should be the person to do that, who will make sure that the right people are at the relevant meetings, that the agenda is set, that it is organised properly. Just dealing with the administrative side, but also they will be tracking the budget and will be working out whether everything is running to budget, and what needs to be done to stay within budget.

**Damian Grave, Herbert Smith Freehills:**

In many of the cases we run there is a specific focus upon cost management and budgeting and we work with people who are very good in this area to assist us with presenting that information to clients in a meaningful way.

**Deirdre Walker:** We now have pricing executives, but I am talking about not just at the front end; I am talking about from beginning to end and not enough of us are doing it.

**Catherine Wolfenden, Osborne Clarke:** It will depend upon the skillset of the people involved. For all legal teams involved in a matter that is to be funded, it is necessary for client care, not just for the funders, to make sure that costs are tracked accurately on a week-by-week basis.

**Susan Dunn:** I get frustrated when I see expensive lawyers performing administrative tasks. That is not what you are best skilled to do; none of us are. It is a project, so why not just deal with it like that? That would make everything more ordered and we see things still being quite chaotic in the way that they are managed and there is no reason for it. It is not rocket science, ultimately.

**Toby Landau QC, Essex Court Chambers:** Can I just give a Bar perspective on this, as a profession which historically, and notoriously, has never really understood much about budgets or, indeed, money? I have an experience that happens all too frequently.



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I arrive at a hearing as lead counsel. I sit at counsel’s table, facing the tribunal. I have my notes in front of me, and all of the materials that I will need to communicate my case. And when I turn to my side, I see a long line of people stretching down the length of the table, and sitting behind, who are part of my team. And as I look further down the line, there are banks of people who I have never seen before. They have apparently been working hard, and billing hard, on the case, but I have no idea what exactly they have done, or what has been produced by their labours. And certainly nothing they have done or produced has made it into my notes, or the materials in front of me, and so will be communicated to the tribunal. This scenario is a consequence of a lack of co-ordination. There is a lot of waste. There is nobody taking an overview and saying, ‘What do we really need to do to actually present and argue the case?’

**Ted Greeno:** More project management is not the answer; it is having proper hands-on partner time and reducing the number of associates on the case that controls costs. There is research from the States that the higher the leverage you have, the higher the costs will be but clients tend to look at the partner rates and think, ‘We will go for a firm with a low partner rate’, not really thinking so much about what the associate rates are and not thinking that at that rate they are not going to get that much partner time but they are going to get a lot of under-supervised associates’ time.

**Deirdre Walker:** That is the American model and I get that fully. Interestingly, the Americans are much more into use of project management and ensuring that partner time is freed up to focus on the case and the direction of the case ▶



**James Popperwell, Macfarlanes:** Solicitors are obliged to keep the client apprised of the overall cost from the outset



**Catherine Wolfenden, Osborne Clarke:** It is necessary that costs are tracked accurately on a week-by-week basis

► rather than dealing with who should be attending meetings and what the agendas are and what documents should be at those meetings.

**James Popperwell, Macfarlanes:** Solicitors are obliged by the Code of Conduct to

everybody be like that?’ But sadly not everyone does it. Those types of lawyers are still in the minority on the many cases that we fund, and that is very disappointing. I genuinely do not care what your hourly rate is. What I care about is how much this is going to cost overall and what

for its in-house lawyers part of their salary and bonus is paid according to the success, or lack of, that they have had in keeping people on budget and the extent of the external overrun on their budgets. There you have possibly the closest alignment you can imagine in terms of harnessing the externals in the right way.

*Mark McAteer, Legal Business: Can we ask the client for their view? Jamie?*

**Jamie Drinnan, Consensus Business Group:**

It is amazing how many law firms think of regular cost reporting as being submitting monthly bills. There also tends to be a big difference between the initial budget and time estimate you are given when you are pitched to and then what it turns out to be. That is where funding can have a real value for us, as a client. You get that secondary review. You get a more honest appraisal of how much this is really going to cost, because somebody else is having to fund it.

**Ted Greeno:** In one very large case, we found we were spending nearly as much

**‘A claimant who really believes in their case does not see it as a commercial risk, which is probably how they should see it.’**

**Simon Salzedo QC, Brick Court Chambers**

keep the client apprised of the overall cost at the outset and then as the matter progresses. I do not see how you can comply with that obligation and fail to project manage the case. It is not a choice; you have to do it in order to comply with your regulatory responsibilities.

**Susan Dunn:** That is the theory. When we see it we say: ‘Fantastic. Why can’t

are we going to do to conclude the case within budget.

**Craig Tevendale, Herbert Smith Freehills:**

As long as you have someone who is holding the feet to the fire on the budget or the estimate it is remarkable how quickly people can sharpen up, even if they have been recidivists before. We have a client where

time trying to discuss a project plan in the early stages than we were spending on the case itself. The head of IT then said to me, 'Look, I know you can project plan anything' and I said: 'I just do not think we can plan this case.' He kept on at me and in the end I said, 'I will do you a deal. If you can project plan next year's men's Wimbledon final, I will project plan the case' and, finally, he understood the point. Looking back at what actually happened, it was certainly impossible to have project planned that case. The reality is that you cannot anticipate, because it is a dynamic process, what the other side is going to do or what arguments they are going to raise. Nor can you anticipate what all the factual issues are going to be in a complex case.

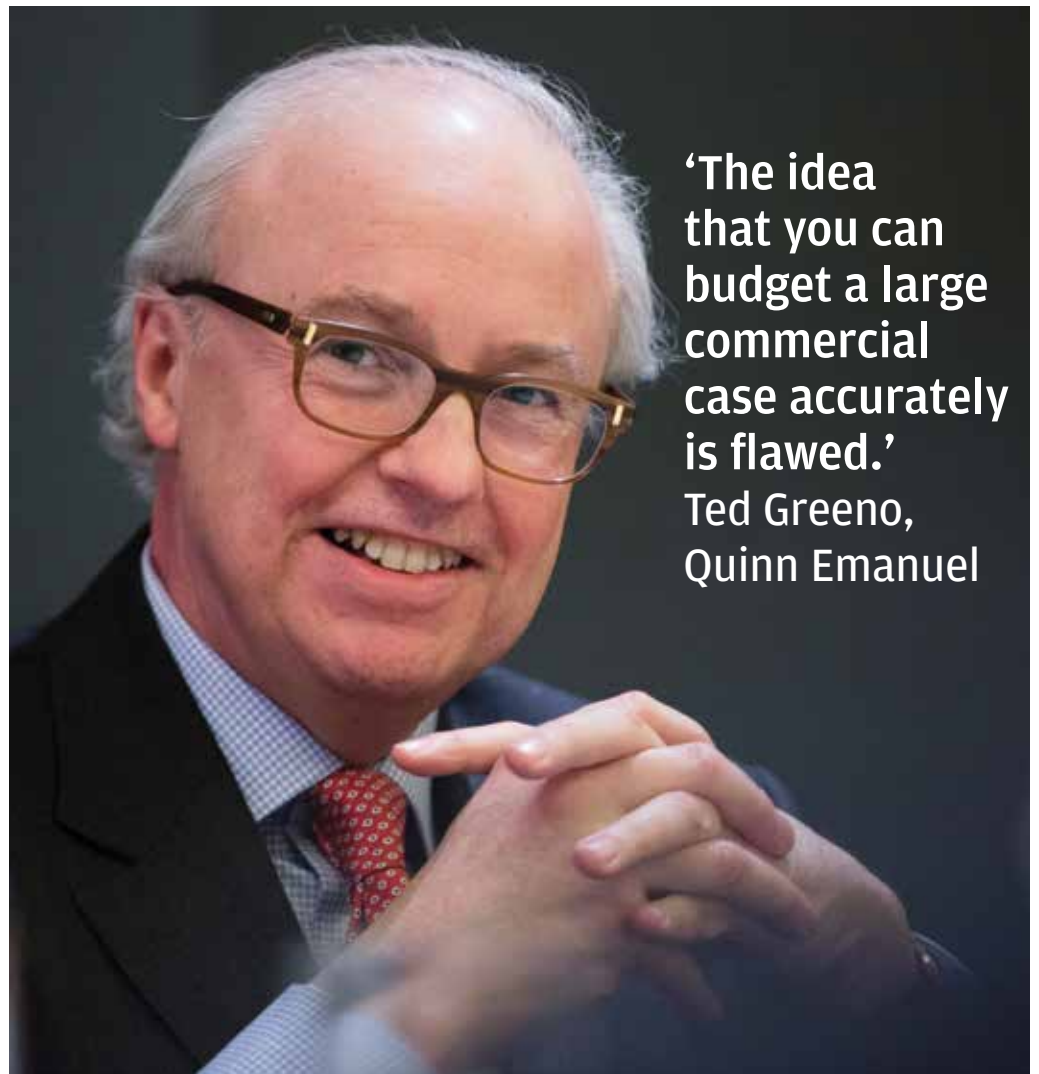
**Deirdre Walker:** It is non-consensual, so it is not like transactional work where it is easier to produce fixed fees. That is the problem. Ultimately, though, the clients want more certainty and we have to find a way to deliver it.

**Mark McAteer:** *John, you act for insurers and I imagine they are pretty unforgiving in this area?*

**John Barlow, Holman Fenwick Willan:** They are. I was about to say the flip side is that a lot of insurers have really taken this on board and they either expect you to do cases on fixed fees or within a certain budget in stages and, also, justify the personnel you are employing. Indeed, when it comes to producing a bill and putting it through the system, if those persons are not approved you will not be paid for them. It is as simple as that.

**Susan Dunn:** What are some of the myths or otherwise about funding that might lead you or your clients to say, 'I do not think that is for me'?

**Richard Leedham, Mishcon de Reya:** One of the things is as a rule of thumb you need ten times the damages to the costs. That rules out quite a lot of cases and then it makes the clients start thinking: 'We are giving away so much, maybe there is another way of doing it.' How the basic economics work is one thing that puts people off. Whether lawyers like it or not, litigation budgets, and sticking to those budgets, are concepts that are here



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Quinn Emanuel

to stay - GCs have to stick to budgets, their lawyers have to as well.

**Craig Tevendale:** There is a perception around the type of relief as well and how direct the link must be into recovering money. Is it a straightforward damages claim that can be easily monetised? There is definitely a perception that, unless there is a reasonably straightforward route into a pot of money, funders will not be interested.

**Susan Dunn:** We have to think quite clearly about how qualified we are to secure something that then needs selling. We have some skills, but it is not what we are best at, so that is quite difficult. If we think the litigation is being done simply to change the dynamic in an ongoing relationship, that is going to be less attractive to us.

Richard, to your point about our charges, there is no point pretending otherwise.

This is not something that is for all cases. It is for larger cases. I started funding cases that were worth between £75,000 and £100,000. I could not make any money on them because of the minimum amount of costs required to manage the case to a successful conclusion.

**Simon Salzedo QC:** I suspect one of the reasons that some clients would not want funding is because of the need to look at it as a commercial risk. Many claimants with big claims, perhaps even some quite sophisticated ones, find it hard to dismiss from their mind their own belief in their claim. If their lawyers say to them, 'You have a 70% chance of winning', what they hear is 'I am going to win'. If the lawyers say, 'You have a 30% chance of a massive downside on costs', what they then say is, 'But I am going to win, am I not?' - and you go around in a circle: 'Well, a 70% chance'; 'Okay, I am going to win'. That is the problem. A claimant who ►



**Stephen O'Dowd, Harbour:** We encourage law firms to build a healthy amount of contingency into the budget



**Simon Salzedo QC, Brick Court:** One reason clients would not want funding is the need to look at it as a commercial risk

▶ really believes in their case does not see it as a commercial risk, which is probably how they should see it.

as an open cheque book and wants to use the budget to do anything they feel like. That then creates a slight tension between you and the

**James Popperwell:** It is helpful to have the benefit of additional people with so much litigation experience to share things with as they can provide an objective and often insightful view on the issues that arise.

*Mark McAteer: Can funders be particularly helpful as regards recovery of damages or enforcement of awards?*

**Susan Dunn:** My experience of enforcement is that in practice there are very few who are good at it. If anybody is, please do say, because I would love to find a go-to person.

*Mark McAteer: What about funders offering their own ATE products? How beneficial is that?*

**Susan Dunn:** When Stephen [O'Dowd] first started at Harbour he would spend months trying to get ATE cover in place on cases. And the quality of ATE policies varied – too many onerous and, in my view, unnecessary conditions and an inconsistent approach to dealing with the issue of security for

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**Stephen O'Dowd:** What about throughout the case, the stresses and strains that you have experienced, how could funders and firms work better as a team or has your experience been positive?

**Sean Upson, Stewarts Law:** I come back to the budget. You know the budget is X and you suddenly have a client who almost treats it

client because you are telling them they cannot do it. Then you start thinking about whether you should be reporting back to the funder and saying: ‘There is this issue. They are trying to do this thing and they should not be doing it.’

**Craig Tevendale:** I can see that being quite useful to keep errant or eccentric clients in check.

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**Deirdre Walker,**  
Norton Rose  
Fulbright



costs. Therefore, after much work, we have developed our own product. We have a bespoke policy that is straightforward, contains very few conditions, and has been brilliant in helping us to deal with security for costs applications. Also, we can get ATE cover in a matter of days.

**Stephen O’Dowd:** And with Harbour as the insured we deal with the insurer’s questions, as well as ongoing material disclosures. We take that burden away from you.

**Sean Upson:** It is not just repeating yourself. We did one where we had three insurers doing three parts of the insurance cover and they all had different questions. We had to do a conference call with one with a whole bunch of questions, then another one with a different bunch of questions and then another with another bunch of questions. Then we had to put it through our conditional fee agreement committee

who had their own bunch of questions and then we went to the funder who had their own bunch of questions. It is a huge amount of work.

**James Popperwell:** Have you ever taken any security or had discussions about taking security upfront? An option would be to say: ‘We will give you funding, but we want some security to be held over assets until such time as a judgment or award is delivered.’

**Susan Dunn:** The short answer is no. There have been vague propositions about doing it. The only security we ever take is over shares in the claimant, to guard against a ‘back-door’ settlement that somehow does not come through the lawyers. However, if we are worried about that then it is probably a reason not to fund the claimant in the first place. **LB**

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