



# THE FUTURE OF THIRD-PARTY LITIGATION FUNDING

A study by AlixPartners and The Lawyer



## INTRODUCTION

The global economy is still holding its breath. Government relief measures, such as the UK's furlough scheme, have been extended and many businesses remain on life support with the pandemic having severely impacted revenue and profitability.

The predicted Great Depression-esque economic collapse has therefore yet to fully play out. The tsunami of disputes widely expected to follow is also on hold, for now. As government support is gradually reined in, we expect to see an increase in the number of cases that our courts and arbitral centres have to deal with.

For the world of litigation funding, this may well flip the old dynamic of 'too much cash and not enough cases' on its head. Tightening corporate budgets (including restrictions on legal spend) will be music to the ears of funders, who will see this as an opportunity to further develop the burgeoning funding market.

Litigation funding has grown exponentially over the past decade. Funding-backed claimants have taken on giants such as Tesco, Volkswagen and Mastercard. Meanwhile, group class actions are booming, with 128 class action rulings issued in UK courts since 2015. The introduction of the opt-out collective regime in competition law in 2015 has also fuelled the growth of litigation funding. This has the potential to increase as the current collective proceedings orders (CPOs) make their way through the Competition Appeal Tribunal and the market has greater clarity regarding the viability and value of such claims.

The growing influence of litigation funders is laid bare by the fact that 70% of the 54 class actions filed in UK courts, in the year ended 30 June 2019 were financed by a third party. It has been reported that funders' investments in UK litigation are approaching £1 billion per annum.

To assess current perceptions of the funding market and gather views on how its future might play out, AlixPartners has collaborated with The Lawyer to survey private practice litigators, leading in-house lawyers, and barristers. Our survey focused on the perceived benefits and drawbacks of funding, the situations in which respondents would typically use a funder, and the direction in which the litigation funding market is headed.

Our survey attracted over 200 responses. The majority of private practice respondents were from outside of the anti-trust and group actions space and instead practice in areas such as commercial litigation, arbitration and contentious insolvency. As such, for the most part, our survey captured the views of those operating in sections of the disputes marketplace where the use of funding is arguably not yet fully developed.

The survey has produced interesting (and perhaps unexpected) findings. There are significant differences between the opinions of instructing solicitors and their clients. Moreover, there are stark differences in the attitudes of those who have previously worked with a funder versus those who have not. The responses provide valuable insight into a market which we believe will only continue to grow in importance in the coming years.

Thank you for taking an interest in our research.  
We hope you enjoy the summary below.

## PRECONCEPTIONS OF THE MARKET

Firstly, have you worked with a third-party funder before?

Two thirds of private practice respondents indicated that they had done so, as had 73% of barristers. Interestingly, only 15% of our in-house respondents had used a funder previously.

Andrew Jones, Managing Director at Vannin Capital, found it unsurprising that lawyers within corporates generally had used funders less than their private practice counterparts however he expects some catch-up to take place as we look ahead.

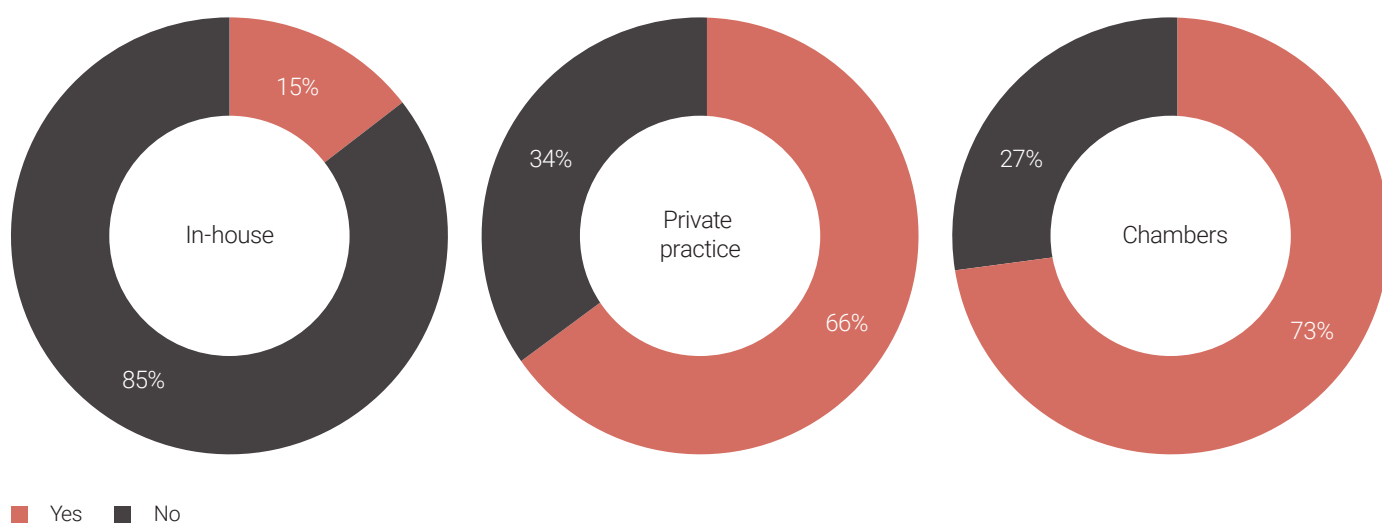
"Given the way the market has evolved, awareness within corporates of the benefits of funding has historically lagged behind law firms. However, this is changing rapidly and corporates are now proactively engaging with funders. They are increasingly seeing the benefit of using funding to aid cash flow, improve liquidity and, ultimately, to monetise valuable assets."

Andrew's comments are in line with our recent experience at AlixPartners, where we've seen real focus from the funding market on gaining access to senior individuals within corporates. Monetisation of legal assets is the hot topic for many.

*"Awareness within corporates of the benefits of funding has historically lagged behind law firms."*

– Andrew Jones, Vannin Capital

**FIGURE 1: HAVE YOU USED A LITIGATION FUNDER IN THE PAST?**



## For those who hadn't worked with a funder previously, why not?

The vast majority of in-house respondents indicated that this was simply because their company does not require external funding to support litigation. Similarly, in respect of their clients, 56% of private practice respondents and 72% of barristers gave the same response.

With the full economic fallout from the pandemic still to play out, one must suspect that a higher proportion of organisations will explore funding options in the short term, whether to cover the cost of new/ongoing disputes or to monetise assets which, perhaps only a few years ago, would not have been considered as a potential source of value.

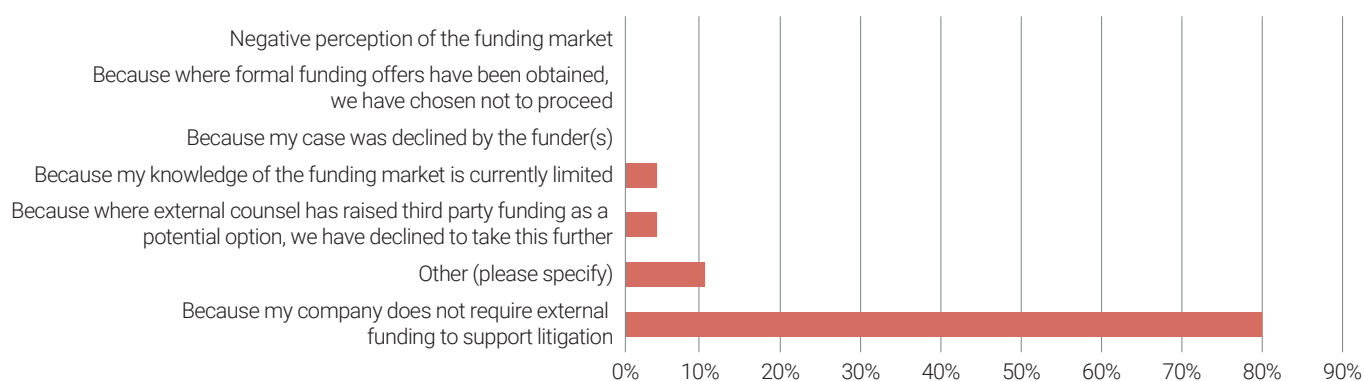
"I think it's just one more string to a GC's bow" says Peter Ho, General Counsel at Tyman PLC. "We all have a very packed schedule, but I don't know why any GC would ignore it as an option."

*"I think it's just one more string to a GC's bow."*

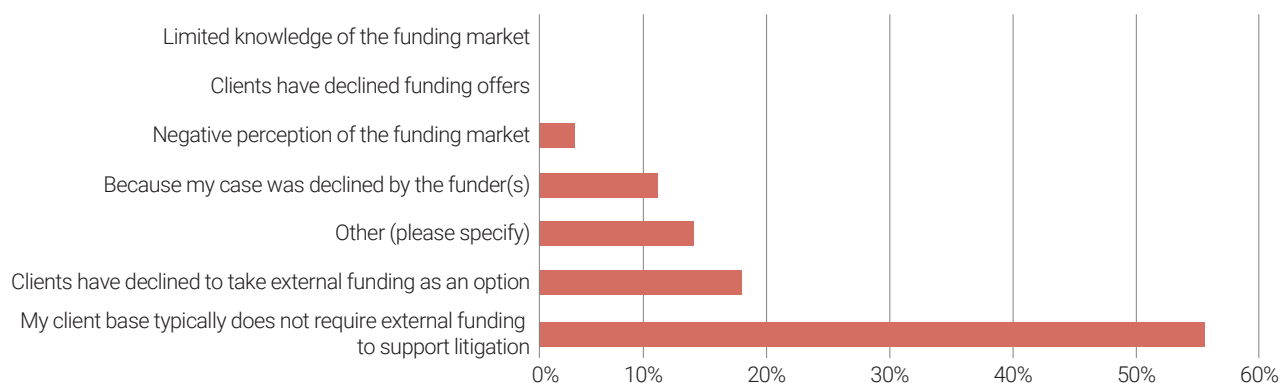
– Peter Ho, General Counsel at Tyman PLC

Gordon Stevenson, Managing Director at AlixPartners commented that "Although it's not a surprise to see these responses being weighted towards a lack of financial necessity, this nonetheless poses some interesting questions around whether funders' messaging around the wider benefits of funding are gaining traction. Might the funds allocated to a piece of litigation be better used elsewhere in the business? Or could a funder be brought in to reduce litigation risk across a portfolio of cases whether those cases are capable of being funded internally or not?"

**FIGURE 2: WHY HAVEN'T YOU WORKED WITH A FUNDER PREVIOUSLY: IN-HOUSE**



**FIGURE 3: WHY HAVEN'T YOU WORKED WITH A FUNDER PREVIOUSLY: PRIVATE PRACTICE**



# PERCEIVED BENEFITS OF LITIGATION FUNDING

## Managing risk

Risk management came through as a key theme, with approximately two thirds of in-house and private practice respondents identifying this as an advantage of working with funders. This response was broadly consistent whether respondents had previously used a funder or not. Interestingly, less than 50% of barristers identified this as a key benefit.

When viewed alongside the overwhelming view from respondents that cost is the primary factor in choosing a funder (figure. 10), and that cost is one of the perceived major drawbacks in working with a funder (figure. 7-9), there seems to be a clear message that the financial pros and cons are front of mind for claimants when contemplating, or seeking to manage, disputes. From a financial perspective, the term "risk management" encompasses reduced exposure to professional fees but also potentially to adverse cost risk and the impact of counterclaims.

Gordon Stevenson, Managing Director at AlixPartners commented that "Liquidity management has been forefront in corporates' minds for the last year or so and this is unlikely to change in the short-medium term. To an extent, the same has applied to law firms themselves although current signs are that the legal world has weathered the storm relatively well. One might imagine that any steps that can be taken to bring more certainty to legal spend (in the case of corporates) or the chances of bills being left unpaid (in the case of private practice) would be welcomed."

*"Without funding, a huge number of SMEs would not have been in a financial position to obtain the necessary legal advice."*

– Kathryn Britten, AlixPartners

## Freeing up capital

Staying with the subject of liquidity, just under 60% of all in-house respondents who had used a funder also feel that 'freeing up working capital' is a key benefit. However, with so many respondents citing that either they, or their clients, do not need third party funding (owing to strong balance sheets) it poses some interesting questions including whether the responses reflect a lack of penetration of one of the funders' key selling messages or, instead, a conscious decision by those with stronger balance sheets that the need to free up capital simply doesn't apply to their or their clients organisation.

The ability to pursue claims that clients might otherwise not have pursued was also identified as a key benefit, although this was more heavily recognised amongst private practice lawyers and barristers than in-house counsel. In fact, in-house counsel barely recognized this at all. The high response rate from external legal advisors presumably reflects the visibility they have over cases which are not progressed despite receiving positive merits advice.

One such area where there is high likelihood of claims not being pursued due to lack of available cash flow is in formal insolvency processes. Insolvency practitioners' duty to recover value for creditors inevitably requires potential claims to be (i) investigated and (ii) pursued where the claim has merits and the estate has access to funding. The latter might come from a supportive creditor group but where this isn't an option, litigation funding can become a critical route to value.

Ben Browne, Managing Director at AlixPartners, commented that "Funding remains a critical factor in setting the claim strategy in an insolvency. It often drives the decision as to whether to fully pursue a claim in the usual manner or alternatively look to assign the claim in its entirety when looking to mitigate the funding requirement and/or generate a return in a shorter time frame".

Kathryn commented on a different, and highly topical, example where funders are key to providing access to justice: "The recent progress of claims in respect of Business Interruption (due to Covid 19) is a case in point. Without the provision of funding, it is likely that a huge number of SMEs would not have been in a financial position to obtain the necessary legal advice and take their case forward. Whilst this has yet to fully play out, we have already seen funders play an active role in this segment of the market, particularly via group actions."

## Offering clients a wider range of alternative fee arrangements

We asked private practice lawyers and barristers whether the ability to offer clients a wider range of alternative fee arrangements represents one of the key benefits. Over two thirds (whether they had or had not used a funder previously) agreed that it is.

Over two thirds of all private practice lawyers believe that the ability to offer clients third party funding is a key benefit. In addition, over 65% of those who had used a funder before consider the use of funding as a tool in winning new work with clients. This drops to just over 40% for private practice lawyers that hadn't used a funder before. Barristers did not recognise this to be of particular benefit.

"I do think that funding can create opportunities that wouldn't otherwise be available" says Peter Burrell, managing partner of Willkie Farr & Gallagher's London office. "The cost of litigation is eye-watering for a lot of clients. Being able to include funding as an option within your pitch, to offset cost from the client's perspective, is a huge advantage as long as the merits have been properly assessed."

We asked a follow-up question to our private practice respondents regarding the fee structures and risk management options proposed to clients. The responses were as follows:

- 43% had discussed Conditional Fee Agreements (CFAs)
- 39% had discussed capped/fixed fees
- 26% had discussed after-the-event (ATE) insurance
- 13% had discussed damages-based agreements (DBAs), whilst
- 9% of respondents don't appear to have discussed any of the aforementioned options with their clients.

There was less variety in the options discussed between barristers and their clients. ATE insurance, CFAs and capped/fixed fees had all been discussed by 75% of respondents. DBAs meanwhile had been discussed by 25%.

## Limited perceived value in 'second pair of eyes'

Just 20% of private practice lawyers, see benefit in getting a second pair of eyes or additional strategic input in the litigation. In contrast, of the barristers that responded, all those that had used a funder agreed that additional strategic input would be valuable.

In conclusion, and perhaps unsurprisingly, private practice lawyers and barristers seem to value funders as a financial tool, useful as part of the selling process, rather than a legal one.

*"Including funding as an option within your pitch, to offset cost from the client's perspective, is a huge advantage."*

– Peter Burrell, Willkie Farr & Gallagher

# 68%

of private practice lawyers who had previously used funding cited it as a tool for winning new work when discussing matters with clients.

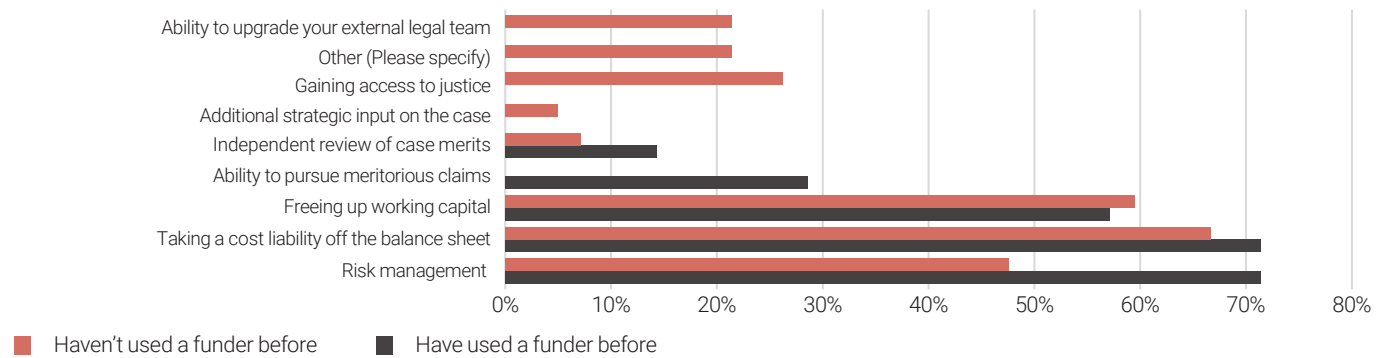
# 9%

of private practice respondents said they had not discussed any alternative fee structures (CFAs, ATE insurance, DBAs) or risk management options with their clients.

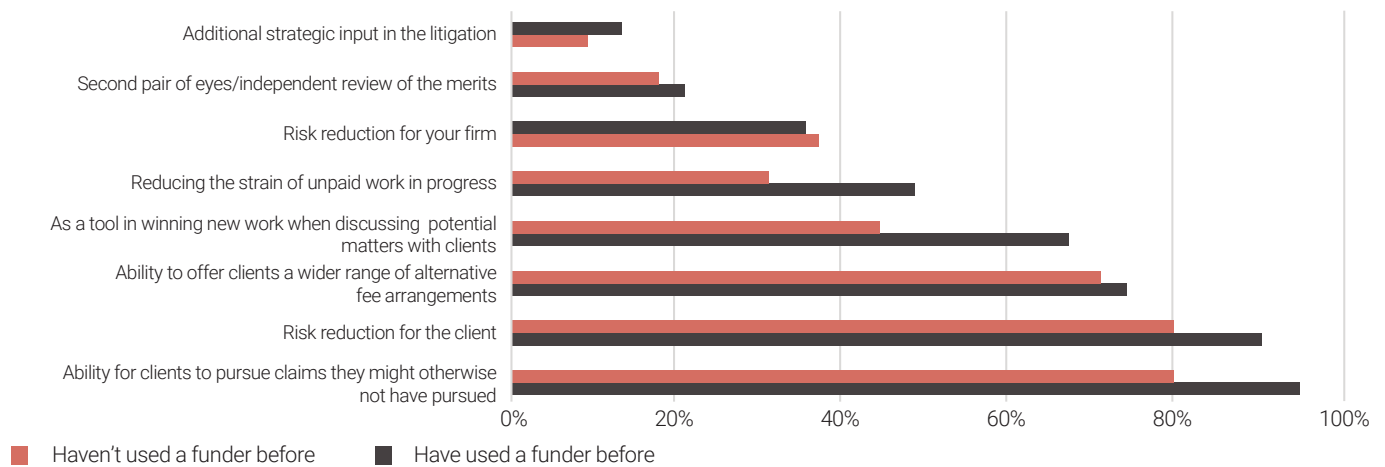
# 20%

Less than 20% of private practice respondents see benefit in 'a second pair of eyes' or 'additional strategic input in the litigation'.

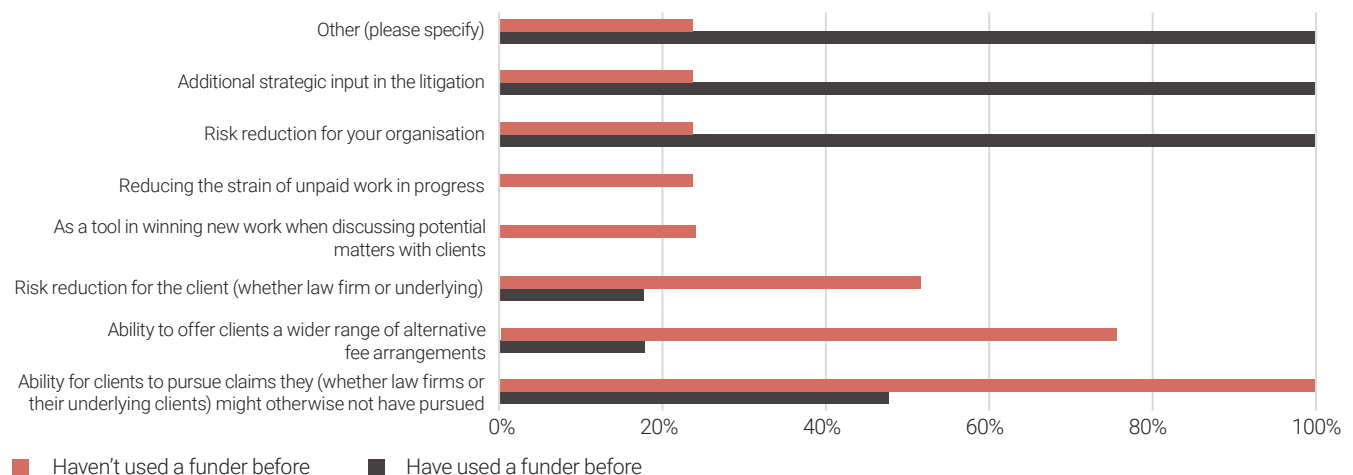
**FIGURE 4: KEY BENEFITS – IN-HOUSE**



**FIGURE 5: KEY BENEFITS – PRIVATE PRACTICE**



**FIGURE 6: KEY BENEFITS – BARRISTERS**





# PERCEIVED DRAWBACKS OF LITIGATION FUNDING

## Loss of control

When it comes to negative perceptions towards litigation funding, there are significant differences in attitudes reflected by those who have and have not previously used a funder. For example, more than 75% of in-house respondents who had never worked with a funder considered 'loss of control over the litigation' to be a key drawback. Notably, this falls to less than 30% for those who had used a funder before, suggesting that the unwelcome oversight some might anticipate from a funder's involvement is often more a fear than a reality.

"I think these statistics confirm that you should pick your funder wisely" says Andrew Jones at Vannin Capital. "It's well established that a funder cannot control the litigation and standard funding agreements will contain provisions making this clear. An important exception is if the case is being mismanaged, because in those circumstances the funder will want to be able to step in to protect the client's case, and therefore its investment. However, professional funders will have done their due diligence on the legal team before funding any matter and will only invest in cases run by teams they can trust."

Gordon Stevenson, Managing Director at AlixPartners commented that "At its core, I think the concern around losing control probably revolves around two key aspects; cost management and pressure to settle. In our survey, these two factors were listed separately but, for private practice lawyers in particular, the response rates were relatively aligned. The costs point is central to a funding relationship and many would argue that the presence of a funder brings useful rigour to the budgeting process. Others no doubt find that rigour less welcome! Regarding pressure to settle, this is another example where the survey shows private practice lawyers get more comfortable once they've worked with a funder. Interestingly, it seems the same cannot be said for corporates on this point. We had 12% more responses stating this to be a concern for those who had worked with a funder versus those who hadn't."

Peter Burrell, managing partner of Wilkie Farr & Gallagher's London office adds that: "In many cases our larger commercial clients would shy away from using a funder because they do want to retain control of the proceedings. For others though, litigation is a one-off thing that they're not used to doing, and in that case we may recommend a funder as a way of risk sharing."

## Other potential drawbacks

While more than 30% of in-house respondents who hadn't used a funder before see the potential for disagreements over budgets or invoicing, just 13% of those who had used a funder before felt the same.

In addition, a large number of in-house and private practice respondents flagged the potential for the unauthorised release of sensitive/privileged information as a potential concern. Private practice lawyers got more comfortable with the risk once they had worked with a funder, but even so, the results indicate that funders could do more to convince their clients that their information is secure.

Peter Ho, General Counsel at Tyman Plc says: "As GCs we're always considering the potential for release of sensitive information; it's a huge part of our job. While there is a need to be conscious of our disclosure obligations, it's also important to be sensitive to the potential waiving of legal privilege or putting commercially sensitive information out there for the competition to steal."

Using a funder can be a double-edged sword in this regard, but you would hope that you and your lawyers would have covered all the necessary areas in the deal you struck with the funder."

Peter Burrell, partner at Wilkie Farr & Gallagher commented: "I think that within private practice we have more trust towards funders because we know they have no interest in information leaking out to the market. They have a stake in the case and wouldn't want to damage the chances of success. Critically, they also have to think about brand and reputation. Clients often don't see it that way, and it takes a while for perceptions to change because funding is still relatively novel. I think things will change over the next five years or so."

Nicola Chesaites, partner at Quinn Emanuel Urquhart & Sullivan agrees, saying: "Some corporations just don't like to share information with anyone beyond their legal advisors. It's an issue of corporate culture. That said, any corporates who have experience with funders know that there are substantial confidentiality obligations, included with the funding agreement, that should provide protection."

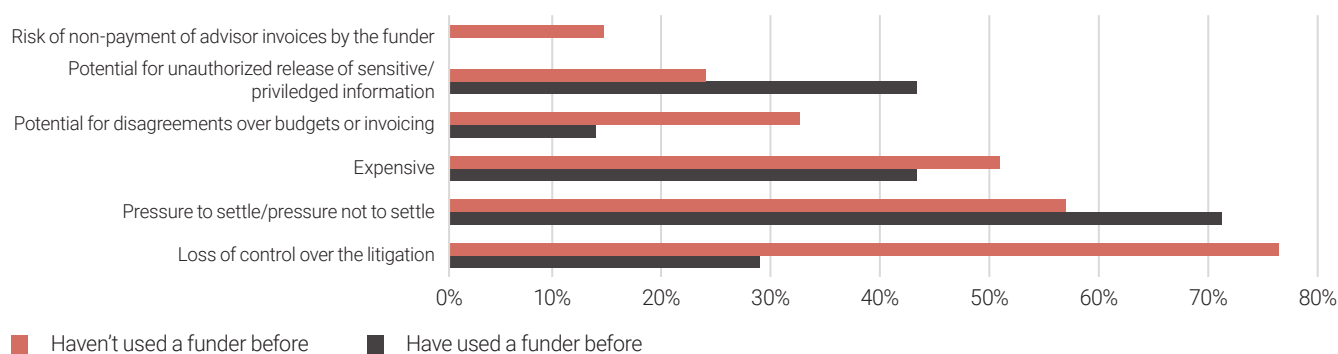


## How critical is the cost of funding?

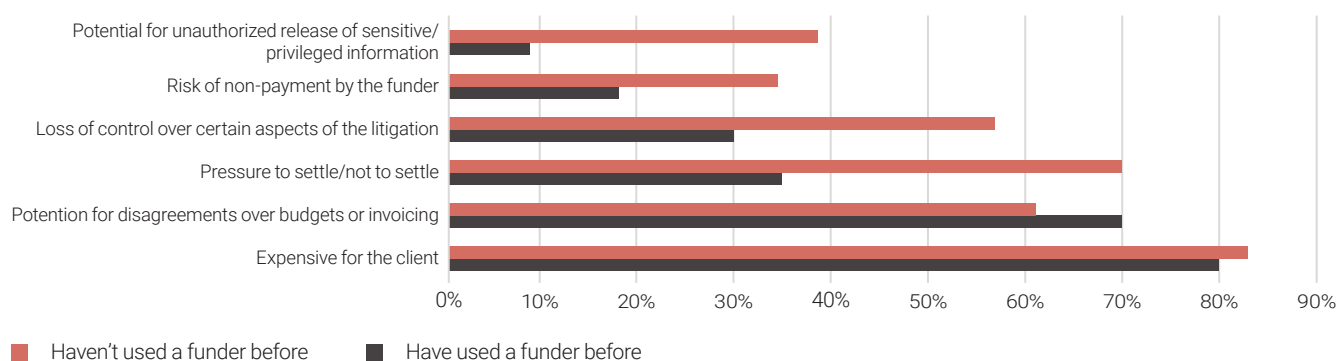
The number one drawback selected by private practice lawyers was that funding is expensive for the client. The response rate was around 80% whether the respondent had worked with a funder previously or not. Perhaps this is a signal to the funding market that there is some work to do around moving the discussion from price to value. To refer back to our initial comments, funders are seeking to educate potential clients that the benefits brought by funding are not one dimensional; that the funding decision is more than “can I fund this case myself” and “how much economic value will I give up if we win?”. Separately, in terms of pure cost, one wonders whether the continued influx of investment funds into this space will put downward pressure on pricing.

The other notable drawback selected by respondents was the potential for disagreements over budgets or invoicing, particularly amongst private practice. Of those who had used a funder before, 70% see this as a concern. This was echoed by 61% of those who hadn’t used a funder. Encouragingly, corporates showed a greater drop once funding had been used, with 33% dropping to 14%. What these statistics do highlight is that the burden of agreeing cost budgets and ultimately following these through to payment is more acute to legal advisors than to their corporate clients.

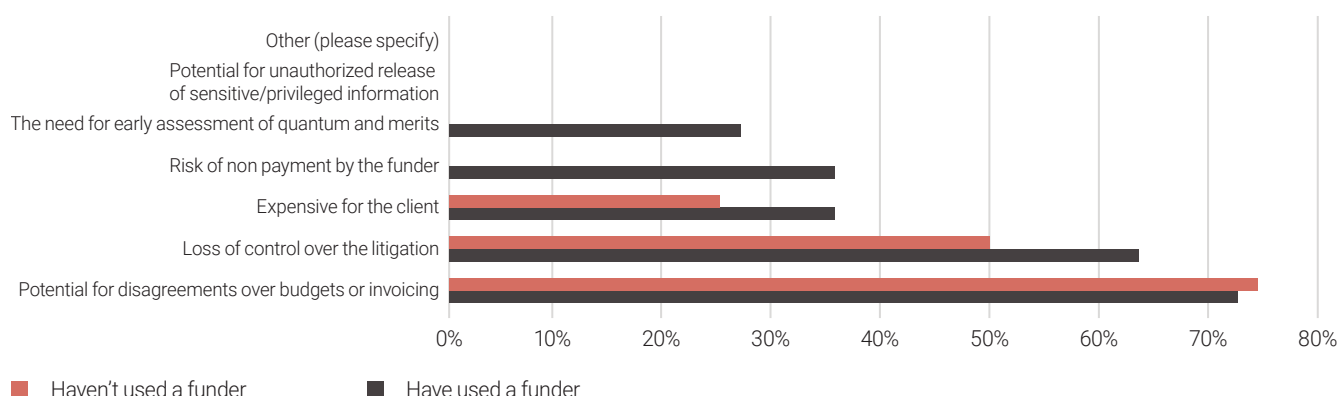
**FIGURE 7: KEY DRAWBACKS – IN-HOUSE**



**FIGURE 8: KEY DRAWBACKS – PRIVATE PRACTICE**



**FIGURE 9: KEY DRAWBACKS – BARRISTERS**



## THE PROCESS OF CHOOSING A FUNDER

### Factors affecting the buying decision

As the funding market has developed, the number of players in the market has expanded considerably. Our next question relates to which factors dominate the buying decision when choosing a funder in an ever more crowded market.

One might expect that, since the funding market is still far from "mainstream" in the eyes of many litigants, factors such as brand, membership of a recognised industry body, or existing relationships might feature highly in the list of key factors. However, our survey shows that the greatest focus is on cost, fee structure, and the ease of the litigation funding process.

Barristers and in-house respondents indicated that overall cost is an important factor when selecting a funder, with 61% and 72% respectively citing this. This falls to 36% for private practice respondents, however in that group, 55% selected fee structure which has similar elements. All three groups agreed that the ease of the litigation funding process itself is very important, as selected by 55% of in-house counsel and 75% of private practice respondents. Barristers were even higher, at 80%.

Nicola Chesaites, at Quinn Emanuel Urquhart & Sullivan, has found that for many clients, cost and inflexibility are seen as a hurdle when it comes to using a third-party funder. "It's a growing market, but it's still seen as the expensive option. Clients will often balk at the returns funders demand. If third-party funding is to become a much more important factor within the litigation market, this will go hand in hand with those funders lowering their prices and becoming more flexible."

The least selected factors were "the ability to source ATE insurance" and being a 'member of the Association of Litigation Funders', both of which were selected by less than 20% of private practice and in-house lawyers. In contrast though, this was of relevance to barristers.

*"It's a growing market, but it's still seen as the expensive option."*

– Nicola Chesaites, Quinn Emanuel Urquhart & Sullivan

In terms of the way in which funders are sourced, for corporate respondents, the preferred route is rather clear:

**97%**

indicated that they would rely on a referral from a law firm.

**22%**

included in their responses that they would look to a GC or head of legal.

**20%**

see the Association of Litigation Funders as a potential source (although, as noted above, it seems that a smaller percentage consider a funder's membership of the ALF as a determinant in which funder they ultimately choose to work with).

These responses should come as no surprise to funders or the legal market. Funders have, of course, long since focused the majority of their business development energy on building relationships with law firms. Whether this reliance on law firms will, in time, be lessened as funders forge ahead in building direct relationships with corporates, barristers, or indeed other players in the disputes market such as funding brokers, insolvency practitioners and expert witness practices remains to be seen.

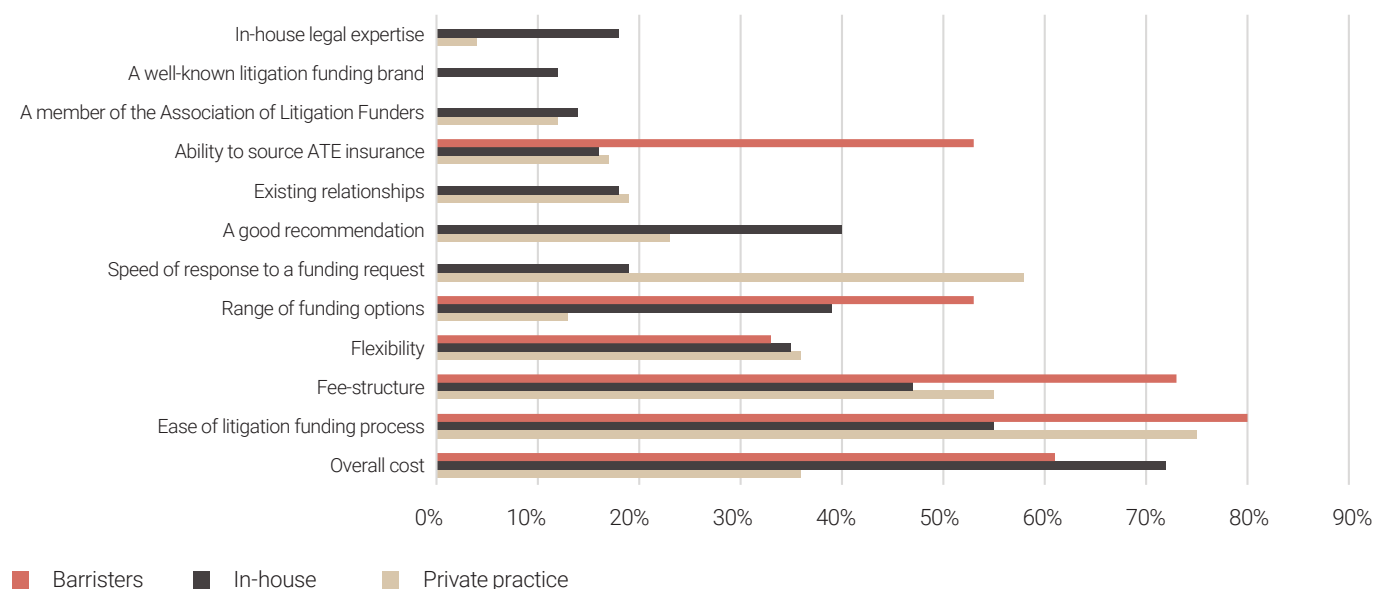
*"The funders should be marketing to us because we have the access to cases."*

– Peter Burrell, Willkie Farr & Gallagher

Peter Burrell at Willkie Farr & Gallagher comments on the varying dynamic between law firms and funders, saying: "It's always interesting when building these relationships, because there's often a question of who's buying and who's selling? In some ways, the funders should be marketing to us because we have the access to cases, but often we have to pitch a case to a number of funders as we aim to secure funding on behalf of the client."

"Funders do most of the work themselves when it comes to reaching out," says Nicola Chesaites at Quinn Emanuel Urquhart & Sullivan. "But, of course, that could be different for the firms that aren't using funders as regularly as we are."

**FIGURE 10: WHICH FACTORS ARE MOST IMPORTANT WHEN CHOOSING A FUNDER?**





## THE FUTURE OF THE MARKET

Back in September 2020, The Lawyer reported that ‘burgeoning litigation funding market...is now trending clearly upward’.

Data collected by international law firm RPC reports that the value of the pipeline of court cases and cash held by the top UK litigation funders has doubled in three years to hit a record of £2bn, from £1bn in 2016/17.

The growth of the market, as well as an anticipated spike in disputes resulting from the pandemic, has led many law firms to start developing their own litigation finance products or partner with leading litigation funders.

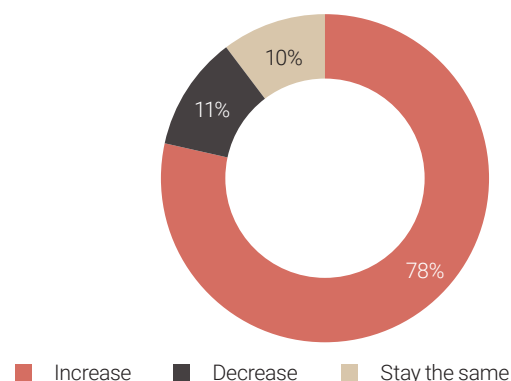
“I’ve spoken to eight or nine funders recently and they tell me that they’re seeing a buffet of cases they can now look at,” said Dechert’s Washington DC-based arbitration group co-head Arif Ali, while speaking to The Lawyer earlier in the year for the Global Litigation 50 report. “It’s almost like one of those vast Las Vegas buffets, which are massive. It’s a funder’s market when it comes to case selection.”

DLA Piper has partnered with Litigation Capital Management in a £150 million deal. Herbert Smith Freehills’ LegalOps Hub uses the firm’s own third-party funder relationships to find funding solutions for its clients. Meanwhile, in the last couple of years, Pinsent Masons and HFW have partnered with Augusta Ventures in £25 million deals.

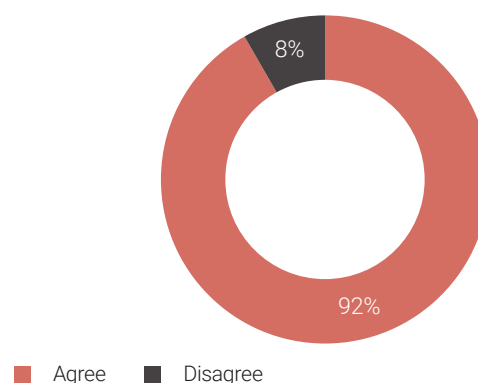
With things moving so quickly within the funding market we asked our survey respondents to make a few predictions. The majority seem to agree with The Lawyer’s assessment that the market is trending upwards by a number of measures: 92% agreed that funding will be available across a wider selection of cases in the near future and 78% expect the number of funding organisations to increase.

From an accounting perspective, there will be a growing need for many stressed businesses to utilise all available means to shore up their financial position and present their accounts in as positive a light as possible. Litigation costs can weigh down a balance sheet considerably due to the need to recognise the likely future cost burden created by litigation. On instructing a funder, that burden can be removed such that the only accounting impact is the potential upside on a successful outcome.

**FIGURE 11: IN THE FUTURE THE NUMBER OF FUNDING ORGANISATIONS WILL...**



**FIGURE 12: LITIGATION FUNDING WILL BE AVAILABLE ACROSS A WIDER SELECTION OF CASES**



*"In the current climate, the option of laying off the cost of litigation, preserving cash and monetising valuable assets is highly attractive for corporates claimants."*

– Andrew Jones, Vannin Capital

## CONCLUSION

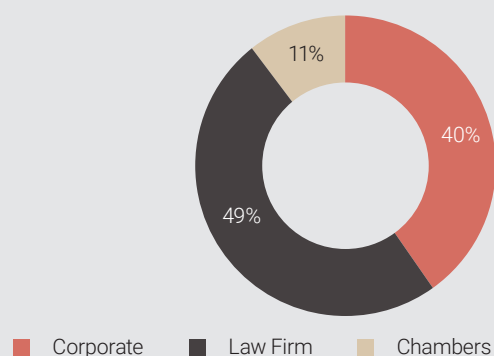
Over the past decade, third-party funding has grown from a peripheral tool into a key weapon within the arsenal of many a disputes team, for the appropriate cases. Legal teams involved in collective actions are well versed in the ways of the funding market, however, as shown by our survey, outside of this particular sphere, the market does remain ripe for expansion. Funding can bring a range of benefits including risk management, improved cash flow, and access to justice. Doubts remain regarding potential loss of control, high fees, and the potential for disagreements over the likes of budgeting and invoicing. However, perhaps the overarching observation from our survey is that negative perceptions towards funders seem to reduce once a lawyer (of whichever background) has worked with a funder on a case. In other words, it seems “the proof is in the pudding”.

## Appendix:

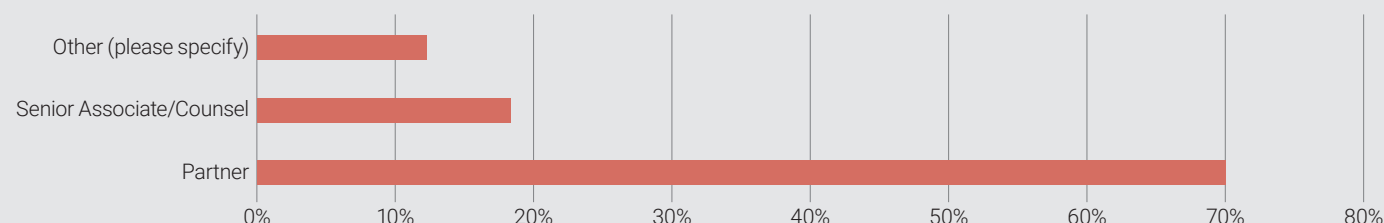
# SURVEY DEMOGRAPHICS

AlixPartners collaborated with The Lawyer to survey over 200 UK based private practice litigators, leading in-house lawyers, and barristers. We also interviewed several leading individuals to ask their views on the market, and on our findings. A breakdown of respondent demographics is illustrated below.

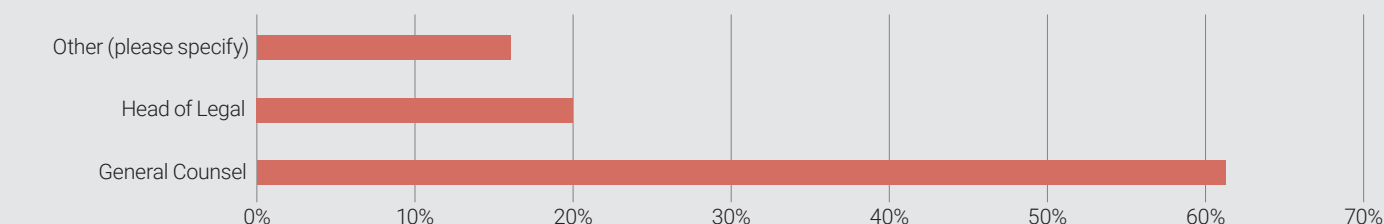
**FIGURE 13: WHAT TYPE OF ORGANISATION DO YOU WORK FOR?**



**FIGURE 14: LAW FIRM RESPONDENTS' JOB TITLES**

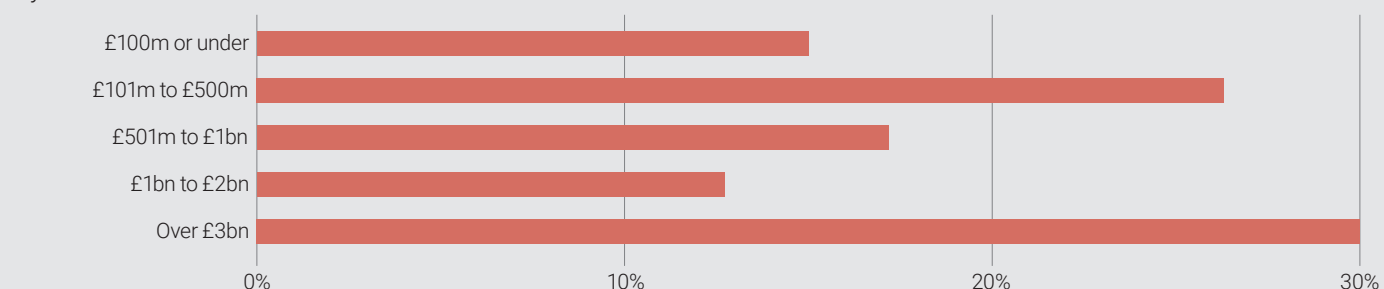


**FIGURE 15: CORPORATE RESPONDENTS' JOB TITLES**



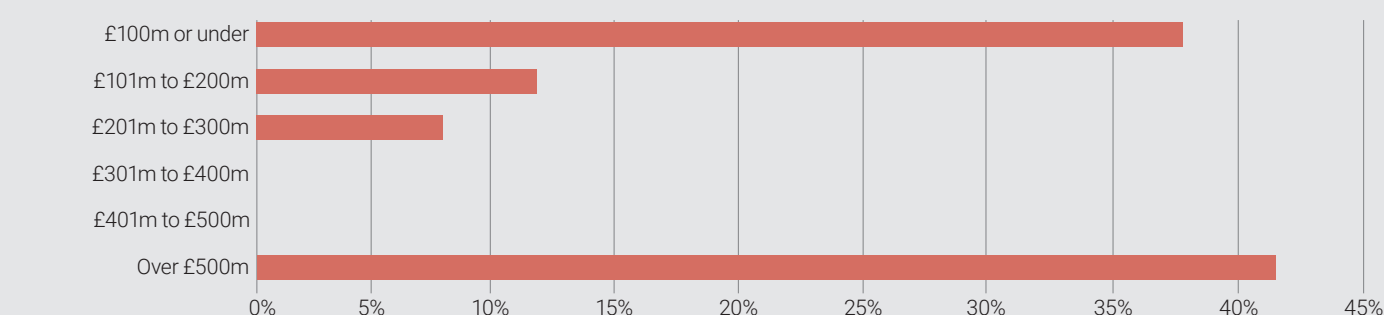
**FIGURE 16: CORPORATE DEMOGRAPHICS**

By annual turnover



**FIGURE 17: PRIVATE PRACTICE**

By annual turnover



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For more than forty years, AlixPartners has helped businesses around the world respond quickly and decisively to their most critical challenges – circumstances as diverse as urgent performance improvement, accelerated transformation, complex restructuring and risk mitigation.

These are the moments when everything is on the line – a sudden shift in the market, an unexpected performance decline, a time-sensitive deal, a fork-in-the-road decision. But it's not what we do that makes a difference, it's how we do it.

Tackling situations when time is of the essence is part of our DNA – so we adopt an action-oriented approach at all times. We work in small, highly qualified teams with specific industry and functional expertise, and we operate at pace, moving quickly from analysis to implementation. We stand shoulder to shoulder with our clients until the job is done, and only measure our success in terms of the results we deliver.

Our approach enables us to help our clients confront and overcome truly future-defining challenges. We partner with you to make the right decisions and take the right actions. And we are right by your side. When it really matters.

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