

Ten Ways to Scupper Your Litigation Funding Application

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In this article, Tanya Lansky, Managing Director at LionFish Litigation Finance, explains ten key points to bear in mind to maximise the chances of preparing a successful litigation finance application.

Many industry critics accuse the litigation funding industry of financing spurious claims. However, those that have gone through the application process for litigation funding will know just how difficult it can be to engage with the industry, let alone to get a deal done. The reality of our industry is that funders reject over 95% of applications. Reasons for rejections can vary tremendously and will often extend beyond the merits of the claim.

In fact, when recently asked what makes a fundable case, I fumbled around various abstract yet relevant ways to explain the approach, culminating as follows: "To make a deal viable, we require a delicate balance of numerous elements – merits, budgets, quantum, recoverability, motivations, and so on."

Admittedly, this really did not measure up. In truth, each funder's assessment and selection processes are rooted in many different factors and nuances, which can unhelpfully vary from time to time. So instead of tackling the impossible, the answer is far easier to provide by identifying the elements that make our blood run cold.

While many or all of these may be obvious to those experienced with funding, below is a summary of the ten things best avoided to maximise the chances of a successful litigation funding application.

The "no-brainer"

Confirmation bias is present in every application but making claims that the case is a "no-brainer", the "best case ever" or "as straightforward as they come" is as unrefined a sales technique as they come. Not only should one seek a refund from the teachers of such techniques but it begs questions of credibility and competence of those uttering such broad statements, particularly against the reality of litigation risk.

10% as alignment

Selling a 10% contingency as clear-cut alignment of interest without explanation can be seen as an insult, particularly to the grey hairs in this market. It goes against the established rule of thumb: a third salaries, a third overheads, and a third profits.

Selective disclosure

Litigators are trained to be selective and strategic regarding information disclosure. However, no strong partnership can emanate from a selective or a drip-fed approach to information-sharing. A fully transparent approach that embraces the spirit of sharing the good, the bad and the ugly will maximise the chances of fostering a successful partnership.

Poor presentation

First impressions can be the most lasting, particularly when seeking to build a relationship. As such, the way information is presented to us is a tremendous testament to numerous key factors including how a lawyer copes with and digests volumes of information. A well-structured and organised file provides investors with confidence and sets a credible stage for productive discussions.

Information dumps

Having harked on about the importance of disclosure, the irony of this point is not lost. Providing a dump of an entire case file – no matter how well-structured – is unhelpful and may demonstrate a lack of confidence in the case or its issues. Not every single piece of information or correspondence will be and, although one would not take such an approach with the Court, the way the legal

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team digests and selects key documents and evidence demonstrates a real handle of the case and its issues.

Scrappy communication

While the end goal of securing funding to pay fees may be clear, this very end goal is the starting point for the funder and its investment. Where communication is lacking, incoherent or obscure when seeking the money, it is only natural to wonder what to expect once they are in funds.

Blindly passionate

Passion can demonstrate commitment and dedication, but there is a fine line that ought not to be crossed. While we acknowledge the profound injustice claimants may experience – whether real or perceived – advocating for a “day in court” or being all too eager to “walk away with nothing if it comes to that” does not make for a sound investment.

Chemistry deficits

Although these may seem like sections of a dating manual, the chemistry of the entire litigation team (client and counsel included) is key. Litigation is no exception to the approach taken when assembling a successful

team to work on any type of project. Whether on the level of interest, the relevance of skillsets or the ability to communicate with ease, these elements are some of a handful that reflect on the level of cohesiveness between the case, client, litigator and advocate. These dynamics all feed into a healthy investment.

Last hour applications

One cannot help but be put off by an application that is brought within weeks of limitation or with a hearing looming. Although this may not be fatal to the application, timing makes the list on the basis that a last-minute dash can cause an application to fail based simply on running out of time.

Entrenched confirmation bias

It would be cruel to discard an application outright on the basis of confirmation bias, which as above, is a natural feature of most applications. However, with applications generally constructed and painted by one side, contrarianism should be welcomed. Fundamentally, with all parties wanting to get the case funded, funders also must be aware of their own confirmation biases. So, questioning the claim and narrative can only be helpful across the board – especially where what arises may end up strengthening the case.

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