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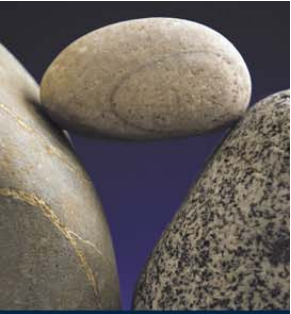
# Litigation Funding and ADR

Michael Frisby

8 September 2009

Service  
Quality  
Relationships  
Results

 Stevens & Bolton LLP

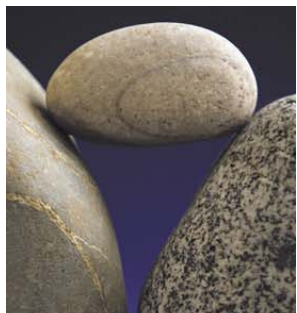


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## Introduction

- Litigation Funding
  - Costs in litigation
  - Conditional fees
  - After The Event insurance
  - Third Party funding
  - Example funding arrangement
  - Jackson Review
- Alternative Dispute Resolution
  - Mediation
  - Attitude of the Courts



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## Costs in litigation

- Own costs
  - Solicitor's costs
  - Counsel's fees
  - Expert's fees
  - Other disbursements
- Other side's costs

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# Costs in litigation

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- Recoverability of costs
  - General rule: loser pays winner's costs
  - Costs assessed
  - Indemnity principle

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# Costs in litigation

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- Contingency fees
  - Not allowed in litigation/arbitration
  - Maintenance and champerty

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## Conditional fees

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- “No win no fee”
- Normal fees/base cost
- Uplift of up to 100% on normal fees/base costs
  - Define success
- Disbursements
- Claimants or Defendants

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# Conditional fees

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## Disbursements and CFAs

- Counsel CFA
- Experts
  - *Factortame (No 8)* [2002] EWCA Civ932 - Grant Thornton charged 8% of final settlement achieved
  - Caution – independence of expert

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## Conditional fees

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- July 1995 introduced for limited categories of case
- April 2000 regulations allowed recovery of success fee
- 1 November 2005 regulations revoked
- Initially personal injury cases
- Open to all
  - Campbell -v- MGN (No 2) [2005] UKHL 61

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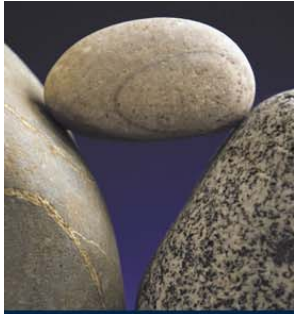


## Conditional fees

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- Technical challenges prior to 1 November 2005
- Formalities
  - In writing
  - Notice to opponent
- Reasonableness of uplift can be challenged

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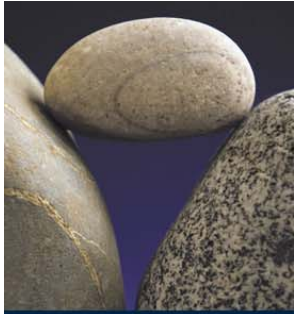


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## After the event insurance (“ATE”)

- Opponent’s costs covered in the event of loss
  - Often linked to a CFA
- Insurers assess risk
- Premium recoverable
- Notice to opponent
- Premium can be challenged

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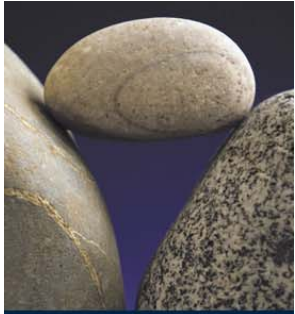
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## Third party funding

*Arkin -v- Borchard Lines [2005] EWCA Civ 655*

- Professional funders should be potentially liable for the costs of the opposing party “*to the extent of funding provided*”
- Agreement to fund in return for share of damages not champertous
- All on basis of impecunious client
- Funder did not control litigation
- Funder had paid £1.3m and ordered to pay defendants same

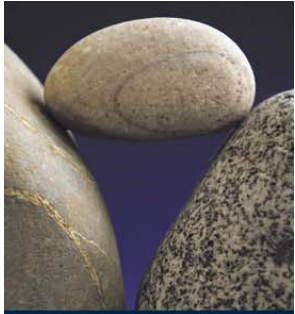


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## Third party funding

- CJC report June 2007
- Recommends support for third party funding subject to:
  - *Arkin* approach
  - regulation of funders

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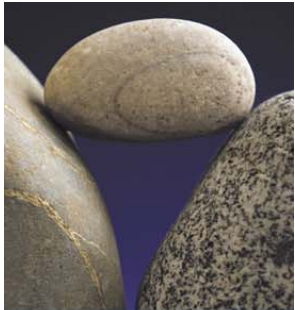


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## Third party funding

- Typically
  - CFA 70% + balance and uplift for lawyers
  - Fund expert
  - Fund ATE
- In return for % of recoveries and costs  
or
- Funding for part of a case
  - Commercial return



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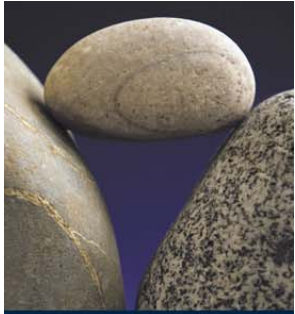
## Example funding arrangement

### Normally

	<b>Win</b>	<b>Lose</b>
Own Solicitor's costs	Pay (recoverable)	Pay
Other side's costs	No	Pay

### Using CFA and ATE

	<b>Win</b>	<b>Lose</b>
Own solicitor's costs	Pay (recoverable)	No
Success fee	Pay (recoverable)	No
ATE Premium	Pay (recoverable)	No
Other side's costs	No	No (paid by ATE up to level of indemnity)



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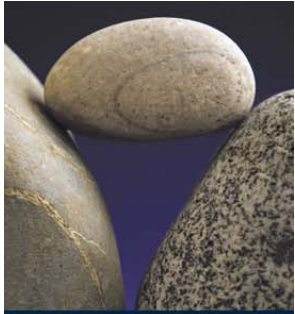
## Example funding arrangement

So for example: a claim of £300,000 with costs of £100,000 on each side

### Normally

	<b>Win</b>	<b>Lose</b>
Own solicitor's costs	£100,000 (recoverable)	£100,000
Other side's costs	No	£100,000
	<b>£100,000 (recoverable)</b>	<b>£200,000</b>

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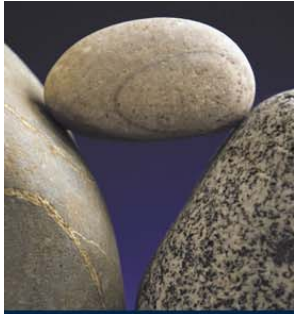
## Example funding arrangement

For example: a full CFA in place with 100% uplift  
and ATE premium of £50,000

	<b>Win</b>	<b>Lose</b>
Own solicitor's costs	£100,000 (recoverable)	No
Success fee	£100,000 (recoverable)	No
ATE Premium	£50,000 (recoverable)	No
Other side's costs	No	No (paid by ATE up to level of indemnity)
	<b>£250,000 (Recoverable)</b>	<b>Nil</b>

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Relationships  
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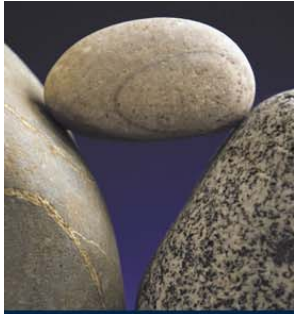
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Results

## Example funding arrangement

### Counsel's fees and expenses

- Counsel's fees
  - CFA with counsel
  - self funding by client
- Other expenses
  - self funding by client
  - third party funding
  - covered by ATE (subject to indemnity limit) if case lost

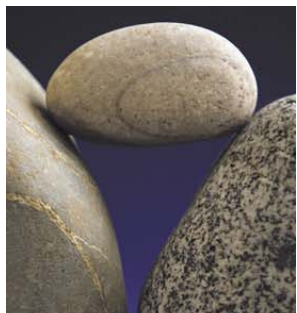


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## Benefits and pitfalls of litigation funding methods

- Risk management
- CFA/ATE model recoverable
- Third party funding can require sharing proceeds
- Notice of funding persuasive settlement tool

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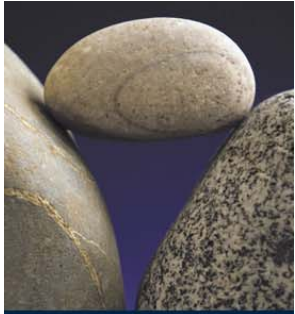


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## Litigation funding

- Lord Justice Jackson Civil Litigation Costs Review
- Final report due end 2009
- Wide ranging
- Litigation Funding
  - ATE premium recoverability
  - CFA success fee recoverability
- More information at:  
[www.judiciary.gov.uk/about\\_judiciary/cost-review/index.htm](http://www.judiciary.gov.uk/about_judiciary/cost-review/index.htm)

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Quality  
Relationships  
Results



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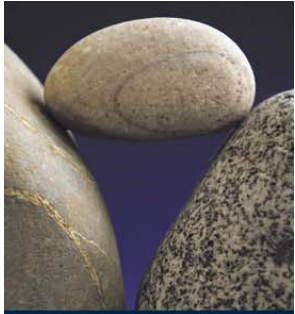
# Alternative Dispute Resolution ("ADR")

## Mediation

"Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution"

## CEDR

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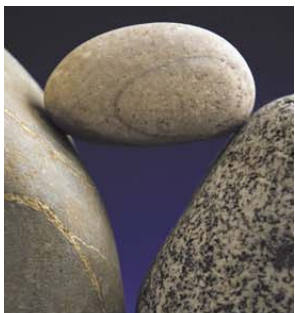


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Relationships  
Results

## Attitude of the courts to mediation

- Supportive
- Require lawyers to consider with client before and during litigation
- Penalise in costs “unreasonable refusal” to mediate
- Respect confidentiality of mediation
  - Unless privilege waived
- Practical consideration is when to mediate




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