



Guide to litigation costs and funding



Contents

Introduction

Legal Aid

Before the Event Insurance (BTE)

Third Party Funding

Paying for the claim yourself

Alternative Billing Models (ABM)

After the Event Insurance (ATE)

Costs Risks

This document is intended to be a guide only but it contains information about litigation costs and funding which you are advised to consider carefully.

Introduction

If you are faced with a dispute the process can seem daunting and so can the costs.

Our Guide to Dispute Resolution available on our website: www.cripps.co.uk (click 'Knowledge' — 'Search for' — Disputes and select 'Guide to Dispute Resolution') explains the dispute resolution process in detail. The focus of this guide is on costs, aiming to explain how our fees and expenses can be funded, whether from your own resources or by a third party, and the range of charging options that we offer.

A fundamental principle

The basic rule in litigation in England and Wales is that the loser pays the winner's costs. This is known as 'costs shifting'. It does not guarantee 100% reimbursement, because there are limitations on what can be recovered 'between the parties', but it does mean that if you win your case your opponent will usually have to reimburse some of the costs you have paid; and if you lose your case, you will not be reimbursed and you will probably have to pay some of your opponent's costs too. The exact amount of costs payable between the parties will either be agreed between you or decided by the court.

In cases involving personal injury the rule is modified to 'qualified one way costs shifting' (QOCS). A claimant will not have to pay the defendant more in costs than the defendant has been ordered to pay to the claimant in damages and interest (subject to exceptions for the claimant's bad behaviour or if it was unreasonable to bring the claim). This means that if the claimant loses, the claimant will not have to pay the defendant's costs; and if the claimant wins but is ordered to pay some of the defendant's costs, the claimant's costs liability is effectively capped.

Legal Aid

Legal Aid is available for civil disputes only in very limited circumstances but as soon as you become involved in a dispute you are best advised to investigate whether or not you are eligible for Legal Aid. Eligibility is determined according to the type of dispute and your own financial situation.

The Citizens Advice Bureau have good on-line advice, or you can contact them in person (website: www.citizensadvice.org.uk) and the Civil Legal Advice Service (website: www.gov.uk/civil-legal-advice) should be able to give you some initial advice and put you in touch with a solicitor who can work under the Legal Aid scheme, if that is what you wish to do. We do not undertake work on a legal aid basis.

Before the event insurance (BTE)

Alternatively, you may already have the benefit of an insurance policy which covers you for legal fees for certain types of dispute. This cover is often included with other policies, for example household or car insurance. Please consider your existing insurance policies carefully and let us know if you have a policy that appears to offer legal expenses insurance for the current dispute, and whether you wish to use it. Alternatively, we can look at the policies for you.

If you do have cover we may be able to act for you under the policy. We would agree the basis for charging with your insurers, who would usually agree to cover the costs up to the policy cover limit. This limit, which is available to pay both your own costs and any you have to pay to the other side, can be insufficient if the dispute is not resolved before trial. We would need to make alternative arrangements for payment of the additional costs if it became apparent that the costs would be more than the cover. We may, for example, be able to offer you a conditional fee agreement, or help you to find third party funding (see below), for those costs. If the situation did arise, we would discuss the options with you in detail.

Alternatively, insurers may tell you that you must instruct one of their own panel of solicitors if you wish them to cover your costs. In some circumstances you can still insist on using solicitors of your choice but they/we would have to agree the basis of charging with the insurers

Third party funding

Your trade union, other professional organisation or employer may be willing to pay your legal fees for some types of dispute, or provide legal expenses insurance as part of your membership. You should investigate this possibility if you belong to any relevant organisation.

Commercial third party funding may also be available. A professional funder or investor will finance all or part of your legal costs as the case progresses. In exchange for providing this funding, the investor will take an agreed share of the money recovered if you win your claim. If you lose, the funder loses its investment and is not entitled to receive any payment. Again, please do let us know if this something that you might wish to consider. It is usually only suitable for larger cases because of the need to ensure that you keep a reasonable proportion of any money that you win whilst also paying the funder's share.

Paying for the claim yourself

If you are not eligible for legal aid and you do not have BTE cover or any other suitable alternative, you must consider funding the dispute yourself.

What will you need to pay for?

You will have to pay our fees and expenses. These are calculated according to the agreement we reach with you.

Under our standard 'pay as you go' model, we calculate the fees by multiplying our hourly rates by the time we spend working for you, as the case proceeds. We usually ask you to pay our fees on a monthly basis, so that the charges are spread evenly during the life of the case, rather than present you with a large bill at the end. If we agree to act for you on an alternative billing model basis, discussed below, a different scheme will apply.

In addition to our fees you would need to pay all expenses ('disbursements') as they arise. The main disbursements are counsel's ('barrister's') fees for specialist advice, drafting key documents and in representing you at trial and, sometimes, mediation; fees paid to experts for opinions and reports on technical issues; and court fees, which can be substantial.

As mentioned above, if you lose you will usually have to pay your opponent's costs, as well as your own. You could also have to pay some of the opponent's costs if you win but lose any application made during the case.

Alternative billing models (ABM)

Recognising that many people are not in a position to pay legal fees on the standard 'pay as you go' basis, we are willing to work with clients and potential clients to find viable alternatives.

We will consider each case on an individual basis. Some alternatives are outlined below but flexibility is the key and we are happy to discuss variations on these arrangements to work out the most appropriate option for you.

Although we try to offer ABM's wherever possible, all proposals for non-standard billing must be assessed and approved by our ABM committee and will only take effect when confirmed to the client in writing.

Conditional fee agreement (CFA) – 'no win no fee'

- This option can be considered in most cases where you are the claimant and, in some cases, for defendants.
- Our fees are only payable if you win your case, in

which case we will charge our standard hourly rate plus a success fee of up to 100% of the hourly rate.

- You do not have to pay our fees if you lose (but you are likely to have to pay the other side's costs).
- You will have to pay expenses e.g. fees for experts' reports, court fees and counsel's fees (if counsel is not also working under a CFA) as the matter proceeds whether you win or lose.
- If you win, by settlement or court order, and your opponents are required to pay your costs, they will pay a proportion of your legal fees and expenses but will not have to pay the success fee; you will have to pay this from the damages/other monies recovered or other resources.
- You may be able to protect yourself against the risk of having to pay your opponent's costs if you lose, by taking out After the Event insurance (ATE) (more details below).

Conditional fee agreement (CFA) – 'no win low fee'

- This option can be considered in most cases where you are the claimant and, in some cases, for defendants. It is popular with corporate clients.
- You agree to pay our standard fees but at a discounted rate as the case progresses.
- If you win you also pay the difference between the discounted rate and the standard rate, plus a success fee of up to 100% of our fees at the standard rate.
- If you lose, you only pay us our fees at the discounted rate (you are likely to have to pay the other side's costs too).
- You will have to pay expenses e.g. fees for experts' reports, court fees and counsel's fees (if counsel is not also working under a CFA) as the matter proceeds whether you win or lose.
- If you win, by settlement or court order, and your opponents are required to pay your costs, they will pay a proportion of your legal fees at the standard rate and expenses but will not have to pay the success fee; you will have to pay this from the damages/other monies recovered or other resources.
- You may be able to protect yourself against the risk of having to pay your opponent's costs if you lose, by taking out After the Event insurance (ATE) (more details below).

Fixed fees (including capped and collared fees)

- Fees are fixed, or capped, in advance for a specific case or task.
- This is not usually suitable for entire cases but it may be available for specific stages or steps of the dispute. We offer it most frequently for debt

collection or enforcement work. We also offer a fixed fee service for small claims, where you conduct the case but instruct us to carry out specific tasks for a fixed fee. Please ask for more details if this is of interest.

- Your liability for costs is fixed in advance but the costs are payable in any event whether you win or lose (if you lose you are likely to have to pay the other side's costs too).
- If you win, by settlement or court order, and your opponents are required to pay your costs they will pay a proportion of your legal fees and expenses.
- You may be able to protect yourself against the risk of having to pay your opponent's costs if you lose, by taking out After the Event insurance (ATE) (more details below).

Contingency fees

- We charge our fees as a percentage of the sum you successfully recover. It is usually an arrangement on a 'no win no fee' basis.
- This option is only available for money claims.
- If you win you pay us as set out in the agreement.
- If you lose you don't pay us but are likely to have to pay the other side's costs.
- If there are no court proceedings we can agree with you the basis on which we will charge a contingency fee.
- If proceedings are anticipated, court rules permit a 'damages based contingency fee' i.e. you pay us a percentage of your damages if you win and you pay us nothing if you lose, but the rules are complex and this type of agreement is not suitable in most cases.
- You may be able to protect yourself against the risk of having to pay your opponent's costs if you lose, by taking out After the Event insurance (ATE) (more details below).

Cash flow assistance

- You pay the projected total costs (not including any liability for opponent's costs) in equal instalments over the anticipated life of the claim (subject to periodic review).
- We will consider this option whether you are paying on a standard, no win low fee, concessionary or fixed fee basis.
- Fees are payable whether you win or lose but paying by instalments can assist with budgeting.
- You may have to pay your opponent's costs if you lose; your opponent is likely to have to pay a proportion of your costs if you win; and ATE insurance may be available, as above.

If you would like us to consider taking on your case under an ABM we will apply to our ABM committee for

approval of the proposed terms. If approved, we will draft a formal agreement setting out the detailed proposal for you to consider.

After the event insurance (ATE)

After the event insurance provides cover against the risk of having to pay an opponent's costs, your own disbursements (and, in some cases although this is very expensive, your own legal fees) if you lose the claim. It is often used hand in hand with 'no win no fee' Conditional Fee Agreements to offer you ultimate protection on costs.

Generally speaking ATE is available for claimants only, but may be available for defendants in certain cases. It gives protection on costs up to a certain level. The premium cannot be recovered from an opponent as part of a costs order if you win. It must be paid out of the damages/other monies recovered or other resources.

Availability of ATE is decided by brokers on a case by case basis. We also consider whether it is suitable or beneficial for our clients to purchase it on a case by case basis. In some circumstances it is unnecessary, too expensive or disproportionate. In others, it is a very valuable addition to the litigation strategy.

Cost risks – points to note

If you are funding the dispute yourself on a private basis, and you go on to win your case at court or achieve a settlement for damages 'plus the costs', your opponent will normally have to pay some of the costs you have incurred. The amount is usually agreed between the parties. If the parties cannot agree the costs the court will decide the figure in a process called Detailed Assessment. Even if successful in your claim, by court order or settlement, you are only ever likely to recover a proportion of your total costs. The percentage recovered will depend upon any budgets set by the court in the costs management process, whether the court thinks the costs are reasonable and proportionate and the opponent's ability to pay.

If you lose you will have to pay your own legal costs (unless you are represented under a CFA where the terms of that agreement will apply) but, in addition, it is most likely that you would also be liable for the costs of your opponent(s) (but not any success fee, if they have a CFA), and disbursements.

If you have a CFA, in place, as soon as you are deemed to have won under the terms of the CFA then our fees become payable. The same applies to any ATE

premium. Although this is the trigger, in most cases we and the ATE provider will usually await resolution of the costs issues before seeking payment.

Costs are always at the discretion of the court. Even a successful party may not be awarded costs if, for example, they have failed to beat an offer made by the other party or failed to comply with a pre-action protocol (schemes designed to get the parties to disclose their case and attempt to resolve the dispute as early as possible and without resorting to litigation).

In the majority of cases, costs incurred before a formal claim is made at court are borne by the party incurring them, if the claim is not pursued to the point of issuing proceedings. In theory, a party could bring separate proceedings in respect of those costs but in reality this is rare.

If you would like an initial, no obligation discussion with a solicitor, to discuss your particular circumstances, please use our contact details below.



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