

A guide to **funding litigation**

Litigation

Claims which may go to court are known as 'litigation'. It is always difficult to estimate the likely costs of a claim. There are risks and uncertainties, such as might the claim be settled early, will your opponent be able to pay, will your opponent fight all the way or what is the extent of disclosure, will expert evidence be needed? These and other questions cannot always be answered when you first come to us for advice.

Funding options

Clients will normally be expected to meet the legal charges and expenses of their own claim. These include our fees, barrister's fees (also known as counsel), expert's fees, court fees and other disbursements, such as travel costs. Costs incurred in a claim should be proportional to the value of the claim. There are, however, a number of other options. We give brief details of these below. Please let us know if you want further information on any of these.

Our usual funding arrangements

Unless you agree with us one of the other funding arrangements mentioned in this leaflet, we will need you to sign our Client Care and Conditions of Business Letter (CBL) setting out our charges on an hourly rate basis. Regular payments on account of these charges will be expected, and we may not be able to continue working on your case until the CBL is signed. Under this arrangement, you do, of course, know that you are paying for wholly independent advice and that you retain control of your own claim. For instance, please tell us if you wish to place a limit on the costs being incurred up to, for example, the issue of court proceedings or to try to provide you with an estimate of the next stage of your case. Remember, an estimate is only a guide, not a binding quotation.

Before we consider other funding options, there are two other matters you need to consider

Recoverability of Your Legal Costs

The general rule is that the losing party has to pay the successful party's legal costs. So, if you win your claim, it is likely the court will order your opponent to pay your costs. This will, of course, be subject to the paying party having the actual ability to pay the costs awarded. Also, there are a number of circumstances which can change this general rule, such as you have lost on a specific part of a claim, you have not beaten an offer of settlement, or you have behaved unreasonably. You should note that you will never recover 100% of the legal costs you incur. Your case will usually be allocated to one of the various tracks that operate in the Courts. Allocation depends on a number of factors, but the major one is the value of the claim. Claims that have a value of under £10,000 are generally allocated to the Small Claims Track. In these cases, you are unlikely to recover any legal costs apart from court fees. However, it may well be that you will represent yourself in such

a claim. Claims that have a value between £10,000 and £25,000 are generally allocated to the Fast Track. Claims that have a value between £25,000 and £100,000 are generally allocated to the Intermediate Track. In both the Fast and Intermediate Track, the claim will be allocated to a complexity band and a value band. There is then a fixed amount of costs which you can recover from the other party if you are successful, depending on where your case is allocated and at which stage it ends. Claims that have a value of over £100,000 are generally allocated to the Multi Track. It will not be subject to fixed recoverable costs, and there will be a cost budgeting process.

If your case is not subject to any of the special rules about the recoverability of costs, then the legal costs you recover will be negotiated, and if it is not possible to agree on an amount, they will be assessed by the court. There are two basis of assessment:

- the Standard Basis (where you may recover 50% to 80% of your legal costs) and
- the Indemnity Basis (where you may recover 80% to 95% of your legal costs). We will provide you with specific advice on what costs you may recover if you are successful.

Your opponent's costs

If you lose your claim, then usually you will be ordered to pay your opponent's costs. In some circumstances, even if you win your case, you may have to pay your opponent's costs or a proportion of them. This may be because, for instance, you have lost on a specific part of a claim, you have not beaten an offer of settlement, or you have behaved unreasonably.

Other Funding Options

Risk sharing with lawyers

Solicitors are allowed to offer the following arrangements:

- A conditional fee arrangement – inaccurately but regularly called "no win – no fee". If this is agreed, we make no charge if the claim is lost, but you have to pay your "disbursements" and usually your opponent's legal costs. If you win, we charge a "success fee" on top of the normal hourly rate, which you must pay as it cannot be recovered from your opponent.
- A damages based agreement – again, with this type of agreement, if your claim is unsuccessful, we make no charge, but you have to pay for your disbursements and usually your opponent's legal costs. If you win, we are entitled to take as our fee a percentage of the damages you are awarded.
- Contingent fees – an agreed hourly rate is payable if the case is won, but the rate is reduced if the outcome is unsuccessful.

Points you should bear in mind:

- The idea of “no fee” or “reduced fee” is obviously attractive to clients, but there are other aspects of such arrangements:
- Instead of simply being a client and independent adviser, we will be sharing a joint venture with you. We will be entitled to have a say in the conduct of the litigation.
- We will carry out risk assessments at the start and during the case to decide whether to take it on or to continue with it.
- If we are effectively going to be sharing the rewards with you, you will have to satisfy yourself whether our proposal is fair and reasonable. You cannot expect us to advise on that!
- We will require you to pay for initial investigation into your claim before deciding whether to offer a risk sharing arrangement.

If you would like to discuss these options again or in further detail, then please ask.

Community Legal Services Scheme (previously known as Legal aid)

This is available only on a very limited basis in very few claims; eligibility is dependent upon personal financial circumstances, the type of claim and the merits of the claim. However, please note that this firm does not offer this, so if you wish to be represented under the Scheme, you will need to find a solicitor who is on the Community Legal Services Scheme Panel. We can help you with this.

Third party funding, such as legal expense insurance, a Trade Union, family or employer. You may have access to one of these options who will pay the legal costs you incur in your claim. You may have legal expense insurance, for example, as an ‘add-on’ to a home contents, car insurance policy or through your credit card. If you are potentially eligible for such cover, an application should be made immediately. You will appreciate that, unless and until any cover is accepted by an insurer, you will remain liable for our fees. We should warn you that such policies are frequently very limited in what they cover and may include restrictions on your freedom of choice of lawyer. You should check if one of these options is available. We can discuss this option further with you if one of these options is available to you.

Risk sharing. Insurance companies, lawyers, a company which invests in litigation cases, or a combination of these may offer risk sharing arrangements.

Some claims are not suitable for risk sharing. Remember that all parties who share the risk will normally expect to share the rewards of any successful claim. We can discuss these options further should you wish to consider them. However, some details are set out below.

Legal expenses insurers

“After the Event Policies”

These policies help cover litigation costs once the dispute has arisen. If the premium is affordable, then it can provide some peace of mind against the possibility of you having to pay the total litigation costs if you lose the case.

Insurance cover can be purchased to protect against:

- Your opponent’s legal charges
- Your own “disbursements” (expenses such as court fees and experts’ fees)
- Your own legal charges

The usual basis of such policies is that payment is made only if you fail completely with your case. We would be able to introduce you to brokers who may be able to help you arrange this form of insurance.

Meeting the premium

The problem with all insurance is paying the premium. Points to consider are:

- The money has to be found for the premium, although sometimes payment can be deferred until the conclusion of the case, and some premiums can be self insured.
- Premiums may be about 30% of the total legal costs against which you want to protect yourself. In substantial commercial litigation, the premiums may be higher. These cannot be recovered from the other party.

This leaflet provides information rather than specific advice. We are not aware of all of the possible insurance policies available to the public. We do not undertake any responsibility to give you any advice on these products.

Finally

If you have any queries on any other matters explained in this leaflet, please ask us, and we will be pleased to answer your questions.

Basildon:

Birkett Long LLP
Phoenix House
Christopher Martin Road
Basildon
Essex
SS14 3EZ
Tel: 01268 244144

Chelmsford:

Birkett Long LLP
Faviell House
1 Coval Wells
Chelmsford
Essex
CM1 1WZ
Tel: 01245 453800

Colchester:

Birkett Long LLP
1 Amphora Place
Sheepen Road
Colchester
Essex
CO3 3WG
Tel: 01206 217300

London:

Birkett Long LLP
8 Devonshire Square
London
EC2M 4YJ
Tel: 020 4586 1280