

briefing

Guide to litigation funding

The potential cost can be a major deterrent to bringing or defending litigation or arbitration proceedings even where there is a good chance of succeeding. Cost can be the single largest factor in deciding whether or not to bring or defend a case.

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With over 150 dispute resolution specialists, Mills & Reeve has one of the largest and most experienced civil litigation practices in the UK. We recognise that, above all, our clients want to retain control of the dispute resolution process and to have funding options that either bring some certainty to their costs exposure or allow them to offset the costs risk altogether.

This guide sets out some of the financing options that are available to clients who wish to bring or defend legal proceedings and answers some common questions about each. For further details, please speak to one of the contact names set out on the final page.

Conditional fees

Conditional fee agreements are often called "no win, no fee" agreements. This shorthand, however, is a little misleading. Litigation generally involves three types of expense:

- your own solicitor's fees;
- additional expenses such as barristers' fees, expert fees and court or arbitrator fees; and
- the costs of your opponent, which you might have to pay if you lose.

A conditional fee agreement will usually only deal with your solicitor's fees. It will say that, if you lose the case, your solicitor gets paid a reduced fee (if the agreement is a "partial" or "discounted" conditional fee agreement), or no fee at all if it is a "no win no fee" conditional fee agreement. However, if you win, the agreement will provide that your solicitors get paid their normal fee plus a further percentage of that fee which is called the success fee.

It is possible that your barrister may also agree to charge for his or her work under a conditional fee agreement. If so this will need to be separately negotiated to any agreement we make with you in respect of our fees, although we can discuss this with the barrister on your behalf.

Any additional expenses and the costs of your opponent will either have to be funded by you privately or by a professional funder under a third party funding arrangement (see below). You may be able to obtain insurance under an ATE insurance policy in respect of having to pay the costs of your opponent, and even your own expenses, if you lose the case (see below).

Prior to 1 April 2013, insurance premiums and success fees were recoverable from the losing party. That is no longer the case where the conditional fee agreement or the insurance policy was entered into on or after 1 April 2013 (except in relation to some claims such as publication and privacy proceedings where premiums and/or success fees continue to be recoverable).

Types of conditional fee agreement

Conditional fee agreements can be used to fund any type of proceedings for resolving disputes (whether commenced or contemplated), apart from criminal or family proceedings.

Conditional fee agreements allow both lawyer and client to be flexible in relation to fees, although the traditional model of "no win no fee" is best known.

An alternative to the all or nothing approach of "no win no fee" is a partial or discounted conditional fee arrangement. Under this type of conditional fee agreement, you pay an uplift on our normal fees if the case is successful but get a reduction if the case is unsuccessful. To reflect our reduced risk, the uplift will be lower under this type of arrangement than under the "no win, no fee" option.

Because they are self-employed, barristers may be more reluctant than solicitors to enter into conditional fee agreements. However, if a barrister is required, we will do our best to persuade them!

Benefits of conditional fee agreements

Litigating under a conditional fee agreement coupled with an insurance policy is a good way of transferring some of the risk of litigation to your lawyers and to an insurance company.

In addition to the reassurance of knowing that you will not have to pay anything but the insurance premium if you lose (and in some instances this will not be payable – see below under *Insurance*), there is also a clear benefit in not having to pay any fees until the outcome of the case is known.

Your opponent, if you choose to tell them about the conditional fee agreement, will know (a) that you are litigating without having to pay your own solicitors, and (b) that your solicitors have sufficient confidence in the case that they are prepared to share with you the risk of pursuing it. Both can be powerful psychological factors.

Common questions about conditional fees

How will the success fee be calculated?

The success fee will be a percentage of our normal fees. It will depend upon the type of case and the prospects of success but will not exceed 100 per cent of our normal fee.

If my lawyers are sure enough of a case to take it on a conditional fee basis then surely I am better off paying their normal rate and avoiding the success fee?

It all comes down to a question of risk. Suppose your claim is worth £100,000 and the estimated costs on each side of taking it through to trial are £30,000. Under a normal fee arrangement, if you win you will recover £100,000 plus the majority of your legal costs. However, if you lose, you will pay your own costs of £30,000 plus the majority of your opponent's costs. You are therefore gambling up to £60,000 to win a maximum of £100,000.

If you enter into a conditional fee agreement backed by insurance, the risk is significantly reduced. If you win, you should be able to recover the majority of your legal costs (but not, in most cases, the success fee and insurance premium where the conditional fee agreement and the policy are entered into after April 2013), and if you lose the only loss will be the cost of the insurance premium (and you could even insure against that).

Can conditional fee agreements be used by defendants?

Yes. In defendant cases, success can be defined in terms of avoiding liability altogether or alternatively reducing the quantum of the claim to below a certain figure.

Does a conditional fee agreement need to be taken out at the outset of the case?

No. But unless we agree that the conditional fee agreement should operate retrospectively you will be responsible for our fees at our normal hourly rates until the conditional fee agreement has been signed.

Will your ability to advise me objectively be compromised if you have a financial interest in the outcome of the case?

We are under a professional duty to advise clients objectively. We will not advise a client to accept an unreasonably low settlement offer in order to secure payment of our fees.

If we reach the point where we think the case is more likely to be lost than won, then we will advise you to discontinue the action even if that means we will not be paid.

What is the procedure for entering into a conditional fee agreement?

If you wish to explore the option of a conditional fee agreement, and we think that the case is potentially suitable, we will refer the matter to our Risk Assessment Panel. The panel will decide whether the firm is prepared to offer a conditional fee agreement and, if so, what type of agreement and at what level of success fee. You can then decide

whether you wish to proceed with the conditional fee option or not. Please note that unless we agree that the conditional fee agreement should be retrospective, any work carried out in connection with the setting up of a conditional fee agreement (including any necessary investigative work) will be charged at our normal hourly rates and will be payable on delivery of an invoice.

Damages-based agreements

Damages-based agreements operate in much the same way as conditional fee agreements, except that instead of billing you on a time spent basis the firm will simply take a share of any damages recovered. The percentage will be agreed in advance and will not exceed 50%.

The main advantage of a damages-based agreement is that you will only be paying costs which are proportionate to the benefit that you have obtained from the litigation. The main disadvantage is that if the case settles at an early stage then the amount paid could be considerably higher than the value of the work done. For that reason, we would usually recommend a staged agreement where the percentage increases as the case progresses.

Insurance

If you are contemplating litigation, it is worth checking your existing insurance policies. Legal expenses insurance is included as standard in many policies, or you may have taken out insurance against specific risks, which would cover the proposed litigation. If you have any doubt about this, you should review your insurance cover and/or contact your insurance broker.

After the event, or "ATE" insurance, can also be taken out after a dispute has arisen. There are a number of insurers who offer cover in connection with conditional fee or damages-based agreements. Some policies cover your opponent's costs only. Others cover your opponent's costs and your own expenses such as barristers' fees and expert witness fees.

Most insurers prefer solicitors to join in the risk by entering into a conditional fee or damages-based agreement. Some, however, provide cover even if the solicitor is retained on a normal hourly rate basis. Under this type of policy, cover can be obtained in respect of both sides' costs or just the potential liability for your opponent's costs. Either way, your solicitor will tell you how much the fees and expenses are likely to be and you pay a premium for this amount of cover. Top up insurance can be obtained later if necessary.

Policies are available which do not require the payment of a premium upfront. Under that sort of policy, the premium itself is insured so that it is not payable at all in the event that the claim is discontinued or lost.

Benefits of insurance

Given that some policies do not even require any upfront expenditure on a premium, coupling insurance with a conditional fee or damages-based agreement means that it is possible to litigate with very little initial outlay or ongoing cost.

Common questions about insurance policies

What prospects of success do I need before an insurance company will provide cover?

Most companies require at least a 60 per cent prospect of success.

What if I win the case but fail to recover any money because my opponent goes bust?

Most insurance policies will not pay out in this situation unless you have also taken out cover against the credit risk.

Can you advise me which policy is best?

While we can give you some information about various insurance products, we are not aware of all the products on the market and we are not in a position to advise you as to their respective merits. If you want advice as to the comparative merits of different insurance products, you should speak to an insurance broker.

Fixed fees

In straightforward cases, for example debt collecting, we may be prepared to agree an overall fee cap or fixed fees for each stage of the litigation. Alternatively, we could combine a fee cap with a conditional fee or damages-based agreement. If you lose the case, you will only pay the capped fee. If you win, we will charge our normal fees plus a success fee uplift or a percentage of the damages.

Normal hourly rates

The majority of our clients pay us on a normal hourly rate basis. Under that type of fee arrangement, the amount paid will be the same whether the case is won or lost. Consequently, it is important that the costs are controlled to ensure that they remain proportionate to the amount at stake. For that reason, we will always carry out a cost/benefit analysis and provide an estimate of costs before undertaking a significant amount of work.

You are free to set a limit on the fees and expenses that we can incur without obtaining your consent. In that way, you can be sure that there will be no unpleasant surprises.

Legal aid

There are certain circumstances in which you may be able to obtain public funding to assist you in bringing or defending proceedings. The ability to obtain public funding depends upon the merits of a case, the type of action and the financial eligibility of the person making the application. This firm does not undertake publicly funded work. If you believe that you may be eligible for such funding, it may well be in your interests to seek advice elsewhere.

Alternatively, consult the Legal Aid Agency website at <https://www.gov.uk/government/organisations/legal-aid-agency>

Trade union funding

If you are a member of a trade union and your case involves an accident at work or some other issue related to your employment, you may be eligible for trade union funding. If you think that this may be the case, please speak to your trade union representative.

Third party funding

In our view, most cases that are good enough to warrant a conditional fee or damages-based agreement should be pursued on that basis rather than involving a third party funder. However, where a claim is especially large and involves substantial disbursements, like counsel's fees or forensic accountancy fees, then the case may be more suitable for third party funding.

Third party funding is where a professional funder pays the litigation costs in exchange for either a multiple of the funding cost or a percentage of the fruits of the litigation. There are a number of specialist litigation funders to whom we can introduce you if you would like to explore this option further.

Conclusion

In putting together this guide, we have endeavoured to cover all of the mainstream options for funding dispute resolution. Our key message, however, is flexibility. If the claim is strong enough, we expect to be able to offer a funding arrangement that will allow you to seek the legal redress to which you are entitled.

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