FUNDING OPTIONS

INTRODUCTION

Before embarking on litigation our clients need to be aware and understand the likely costs that may be incurred in pursuing or defending a claim. In the vast majority of cases the legal costs that may be incurred will be significant.

Clients need, therefore, to understand the options available to them in funding their claim or defence.

The purpose of this note is to set out the available options to you. This note is only a summary, but we would be willing to discuss any of these options in greater detail.

1. Legal Aid

In recent years the availability of obtaining Legal Aid for legal fees has been drastically eroded. Legal Aid is only available in limited cases in employment tribunal claims.

In order to be able to offer Legal Aid, solicitors' firms must have a franchise from the Government. Taylor Bracewell does not have such a franchise and therefore, even if Legal Aid is available for your dispute, we cannot offer such funding to you. There are other firms who are able to offer Legal Aid (if applicable). You may wish to consider investigating with such firms whether you would be eligible for Legal Aid funding for your dispute.

In the alternative, you may wish to contact the Legal Aid Agency direct via phone on 0300 200 2020, email at contactcivil@justice.gov.uk or undertake an online check via https://www.gov.uk/check-legal-aid.

2. Privately Paying

Another option available to you is to pay our legal fees on a privately paying basis.

We refer you to our Costs Information Sheet which sets out our hourly rates.

If you are to fund your dispute on this basis we will render regular invoices to you (normally each month) in order that you can monitor the amount of costs that are being incurred.

3. Legal Expenses Insurance

There are Insurance Policies available that would provide cover for legal costs incurred in the pursuit or defence of litigation. Such cover could cover both your own legal costs and/or disbursements and also your opponent's costs and/or disbursements in the event that you are unsuccessful in pursuing or defending a claim.

Each policy is unique and you would have to check the terms and conditions/level of cover or forward to us to do so on your behalf.

There are two forms of legal expenses insurance as follows:

(a) Before the Event Insurance

Clients may have legal expenses insurance as part of their insurance policy. Typically, Before The Event Insurance is an added on extra on household and motor insurance policies. Occasionally, parties also have legal expenses cover attached to a credit or debit card or if they are a member of a trade union.

Ordinarily, Before the Event Insurance would not cover commercial disputes, although it may cover such things as boundary disputes and personal injury claims.

You should check any insurance policies you have carefully to see whether or not you do have Before the Event Insurance cover and, if so, notify us as soon as possible.
If you would prefer, we will be happy to review any insurance policy you may have and liaise with your insurers to see whether or not they would agree to provide cover for your dispute.

(b) Unsatisfied Judgment

It may be that you have a claim but the potential Defendants do not have either insurance or the financial resources to satisfy the same. Under your own insurance policies, you may have an inclusion that states that your own insurers may meet unrecovered damages and costs. Therefore, it is certainly worth checking your own insurance policies for this as well as checking to see whether they would assist with any costs of bringing a claim.

We trust that if you do have such a clause that you will provide us with a copy of the insurance policy so that we may correspond with the insurers in respect of the same.

(c) After The Event Insurance

After The Event Insurance may be possible where you do not have Before The Event Insurance or such is not adequate. Such insurance policies are purchased after a legal dispute has arisen.

ATE Insurance is available to both Claimants and Defendants although it is generally only available for higher value claims. ATE Insurance typically covers your own disbursements and your liability to pay an Opponent’s Legal Costs in the event that your opponent wins.

Some policies do provide cover for your own legal costs and disbursements although this is less common. After The Event insurers typically require solicitors to enter in to some form of contingency (No Win No Fee) Agreement with their clients, details of which are set out below.

If you are able to obtain ATE Insurance cover you would, as with all insurance policies, be required to pay an insurance premium. Those premiums can be expensive. Depending on the Insurer, the payment of any insurance premium can be deferred until the conclusion of the case. Some ATE insurance policies require their premiums to be paid by way of staged payments, so that the premium payments increase as the case progresses.

Following changes in the law introduced in 2013, you are not able to recover the insurance premium from your opponent if you are successful. Therefore, you would be liable to pay that premium personally or if you win, from any monies recovered from your opponent.

If you were unsuccessful in litigation you may also be required to pay the insurance premium in any event. Some insurance premiums can be self-insured, such that you would not be liable to pay the premium in the event that you were unsuccessful in the litigation.

Before considering whether to provide cover, Insurers ordinarily require the solicitors to provide them with an assessment of the case. That would require the solicitors to investigate the merits of the case as insurers would ordinarily expect a minimum percentage success before considering cover.

Insurers would also want to know that you would be able to pay the premium, especially if the premium is deferred.

Some insurers would also require the opinion of a Barrister as to the likely prospects of success and recovery.

If you wanted to consider applying for an ATE insurance policy, we would be required to carry out the above investigation work and report to the insurers. You would be liable to pay those costs in any event.

(d) Qualified One-Way Cost Shifting

"As discussed with you if this matter is funded by way of a Conditional Fee Agreement (CFA) should your claim be unsuccessful, you will not have to pay anything towards our fees subject to complying with the terms of the CFA. **(document 3).** The only costs that you may have to pay are the cost of the Defendant's insurers.

Personal Injury claims funded by way of a Conditional Fee Agreement after the 1st April 2013 are subject to rules known as qualified one-way shifting (QOCS). This means that in the majority of cases you would not be liable for the Defendant's costs if your claim is unsuccessful. There are however circumstances where you would be liable for the Defendant's costs, the first is if you fail to beat an offer known as a Part 36 offer to settle or if your claim is struck out on the basis that the claim should not have been brought i.e. no reasonable cause of action or if there has been an abuse of the Court process. In addition to this you may be liable to meet your opponent's costs if it is held that your claim was fundamentally dishonest.

Please note, I am obliged to advise anyone contemplating litigation about the consequences of a finding of fundamentally dishonesty in any aspect of any claim they pursue. The significance of a finding by the Court of being fundamentally dishonest is detailed below.

Please appreciate that I am not suggesting that I consider you have been fundamentally dishonest but if I did not advise you of the implications of the same, I could be criticised.

The issue of fundamental dishonesty is relevant to the question of your liability for the Defendant's costs in Court proceedings if you lose.

Ultimately, as your accident happened after 01/04/13, the starting position up to 06/04/2023 was that if you are unsuccessful in your claim, you would be liable to pay the Defendant's costs of defending your claim but for the Court Rules regarding “qualified one way costs shifting” would prevent the Defendant from being able to enforce any Costs Order you were liable to pay.

However, please note that in any cases issued on or after 7 April 2023 if any Order for Costs is made against you, a defendant will now be able to enforce costs up to the total amount in money terms of any orders for or agreements to pay or settle a claim for, damages, costs and interest.

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Civil Procedure Rule Part 44.14 has been amended to confirm:

1. Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for, or agreements to pay or settle a claim for, damages, **costs** and interest made in favour of the claimant.

2. For the purposes of this Section, orders for costs includes orders for costs deemed to have been made (either against the claimant or in favour of the claimant) as set out in rule 44.9.

3. Orders for costs made against a complainant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed. Where enforcement is permitted against any order for costs made in favour of the claimant, rule 44.12 applies.

4. An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.

Exceptions to qualified one-way costs shifting where permission not required.

44.15 Orders for costs made against the clamant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that:-

(a) the claimant has disclosed no reasonable grounds for bringing the proceedings;

(c) the conduct of-

(i) the claimant; or

(ii) a person acting on the claimant’s behalf and with the claimant’s knowledge of such conduct, is likely to obstruct the just disposal of the proceedings.

Exceptions to qualified one-way shifting where permission required

44.16

(1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.

(2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where –

(a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or

(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies.

(3) Where paragraph (2)(a) applies, the court may, subject to rule 46.2, make an order for costs against a person, other than the claimant, for whose financial benefit the whole or part of the claim was made.

For the avoidance of any doubt the definition of "costs" as defined by Civil procedure 44.1 is:

'costs' includes fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person under rule 46.5 and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track;"

(e) Family Member Insurance

We would also recommend that you ask your family members if they also have any insurance cover as it may be that you are also covered for the above types of insurance.

It is imperative that you check your insurance policies to see if you have legal cover. For certain types of claim, if you do not tell declare that you have legal cover, you may be refused payment. If for example your claim is against the Motor Insurers Bureau ("MIB"), owing to the third party being an uninsured/untraced driver and you have not checked your policies and it transpires that you do have this cover, then it may result in the Motor Insurers Bureau not making payment to you. It is therefore imperative that these are checked and all relevant information relayed to us at the start of the claim.

4. <u>Contingency (No Win No Fee) Agreements</u>

Since the abolition of Legal Aid for the majority of Civil and Commercial Disputes, parties are now permitted to enter in to an agreement with their solicitors whereby the client only pays their solicitors fees (or a portion of them) upon certain criteria being met. Typically, such agreements provide that a client would only pay their solicitors' costs in the event that they are successful in the litigation.

There are different types of Contingency Fee Agreements available to clients, subject to certain criteria. In all instances, before entering in to such an agreement, we would need to carry out extensive due diligence in order to consider whether we can enter into such an agreement. The types of things that would need to be investigated would be the likely prospects of success, taking in to account a review of all of the relevant documents, if appropriate contacting potential witnesses and, in certain circumstances, obtaining a Barrister's Advice.

The costs of such investigations would be payable by you in any event.

The various potential Contingency Fee Agreements are as follows:

(a) <u>Conditional Fee Agreement</u>

A Conditional Fee Agreement (CFA) is an agreement between a client and their solicitors whereby the client would only be liable to pay their solicitors costs if they are successful in the litigation.

CFA's are available to both Claimants and Defendants, although CFA's for Defendants are less common as when advising a Defendant, it is extremely difficult to define what is meant by "success".

In the event that you are successful in your litigation, the usual position is that your opponent would be ordered to pay a proportion of your legal costs.

In the event that you are unsuccessful in the litigation, if you entered in to a CFA you would not be liable to pay our fees. However, you would still be liable to pay disbursements such as Court fees, Barrister's fees and Expert fees.

Whilst a CFA protects a client from liability for their own legal costs should they lose, it does not protect them from an opponent's legal costs in the event that the opponent succeeds in the litigation. However, such adverse costs can be covered by Legal Expenses Insurance (referred to above).

As you will appreciate, in entering in to a CFA with a client solicitors are taking a risk that they will not get paid or, if they do get paid, it could be several years in large cases before they are paid for the legal services provided.

As such, in any CFA, solicitors ordinarily charge a success fee. A success fee is an additional amount payable for the legal services over and above the amount which would normally be payable if there was no CFA in place.

The maximum uplift permitted is 100% of the legal fees.

If we are agreeable to entering in to a CFA with you, we will need to calculate the level of the success fee, taking in to account two elements:
(i) The risk of losing the litigation; and
(ii) The cost of funding the litigation.

You should be aware that since 2013 a client is no longer able to recover the success fee from their opponent in the event that you succeed and you would be liable to pay the success fee out of any monies that you recover.

(b) <u>Discounted CFA</u>

A Discounted CFA is essentially a CFA as defined above.

The way that a Discounted CFA works is that we would require you to pay regular invoices at a discounted hourly rate, whatever the outcome of the proceedings.

If you are successful in the litigation we would be entitled to be paid all of our base costs at our usual hourly rate, with or without a success fee.

In the event that you were unsuccessful in the litigation, we will forego the balance of our base costs.

As an example of a Discounted CFA, we would charge you, say, £150 plus VAT (per hour) throughout the litigation. If, however, you were unsuccessful in the litigation you would not be required to pay any more. If, however, you were successful in the litigation we would be entitled to be paid for all of the work carried out under the Discounted CFA at, our normal hourly rate– please refer to the Costs Information sheet which sets out the hourly rates).

(c) Damages Based Agreement (DBA)

A DBA is a form of No Win No Fee Agreement between a solicitor and their client which provides that the client will make a payment to the solicitors if you obtain "a specified financial benefit" which is usually damages paid by the losing party.

The amount of the payment due to us would be determined as a percentage of the damages received by you. Currently the maximum percentage that you would be required to pay would be 50% of the sums ultimately recovered by you. However, this percentage varies on the type of claim.

As with all No Win No Fee Agreements, if you are unsuccessful we would not be paid for the work done under the DBA. However, you would still be potentially liable for your opponent's costs, but again these may be covered by After The Event insurance.

The payment to be made to us in the event of a successful recovery is inclusive of VAT (Barrister's fees and any other disbursements that are recoverable from your opponent maybe included or in addition depending on the agreement entered into with you).

Furthermore, in the event of success and legal fees and disbursements are recovered from your opponent, these must be offset against the Contingency Fee.

5. Trade Union Funding

Trade unions can provide legal advice and support to their members on the nature of the dispute. If you are a member of a trade union, you should enquire as to whether they are able to assist with funding a case.

6. Equality and Human Rights Commission (EHRC)

The EHRC can fund discrimination cases, in limited circumstances. The EHRC has its own funding criteria, which can vary, and cases need to be considered to set a precedent for the greater benefit of particular groups of employees before they will attract support from the EHRC.

7. Legal Expenses Insurance [LEI]

If you have LEI your legal costs in litigation may be covered, subject to the terms of your cover; you should therefore contact your insurer without delay and notify them of your potential claim.

8. Employee contribution to costs (settlement agreements)

If you require assistance with a settlement agreement, the cost of advice on the terms and effect of the agreement may be met in full or partially by your employer. However, if you require us to negotiate on your behalf or do additional work beyond advising on the terms and effect of the agreement, or if your employer refuses to make a reasonable contribution to your fees you will incur those additional costs yourself.

9. Third Party Litigation Funding

Litigation Funding is where a Third Party with no prior connection to the litigation agrees to finance all or part of the legal costs of the litigation in return for a fee payable from the proceeds recovered by the funded litigant, if successful.

Litigation funding is often used in conjunction with After The Event insurance, a CFA or a DBA.

Whilst third party funding is often considered when a party is not able to afford to pursue their action, it is possible to seek litigation funding even if you are in a position to pay your legal costs if:

- You prefer to share the risk of pursuing the claim;
- Your budgets are limited and Third Party funding allows you to finance an action when your budget would otherwise allow; and/or
- It is, in a business sense, commercially convenient to take the cost of funding litigation off the company balance sheet completely.

Third Party funding is primarily offered to commercial claimants, although claims brought by individuals can sometimes be funded. However, litigation funders do not fund personal injury claims and other consumer based claims, usually on economic and policy grounds.

Third Party funders will generally not be interested in claims for anything other than money, unless the award or outcome can be quantified within a short period of time, after the conclusion of the litigation.

As litigation funders are seeking a return on their investment, they will generally only fund claimants or defendants who have a sizeable claim or counterclaim. Funders will need to assess whether a party is likely to recover enough by way of damages from which the funder can obtain a return on their investment.

Third Party funders will only generally fund cases with good prospects of success, usually considered to have prospects of 60% or more. However, each may have their own percentage.

Third Party funders will also need to be confident that any award can be enforced so they will carry out investigations, or require us to carry out those investigations, as to:

- The credit worthiness of the opponent.

- The existence of insurance or any other indemnity covering the opponent's liability; and
- The accessibility of assets belonging to the opponent which could be seized to satisfy any award.

The services provided by Third Party litigation funders do vary but they may fund some or all of the following:

- Your own solicitors' fees;
- Your own disbursements;
- Your own Barrister's fees; and/or
- Any Tribunal or Court fees.

Third Party funders generally prefer to fund part of your own solicitors' fees with the balance being funded by the client or require the solicitors to enter in to a CFA or DBA with the client.

10. Help with court and tribunal fees (EX160)

In the event that proceedings are issued at Court, a Court Fee would be payable but it may be possible for you to obtain a fee exemption or money off the fee. In order to facilitate this, an application would need to be made on Court Form EX160 – Apply for Help with Fees.

From 20 June 2016 potential users of the court have been able to apply for "Help with Fees" online at:

www.gov.uk/help-with-court-fees

In June 2016, HM Courts and Tribunals Service updated its guide on how to apply for help with fees and that 20 page publication is on Form EX160A details of which can be found on the link above.

We suggest that at the point of issue you check if you are eligible online. If you are, then you must revert back to put us on notice so that we can notify the court at the point of issue.

For the avoidance of doubt, you do not have to pay a fee to make a claim to the Employment Tribunal.