FootAnstey

Actions speak louder.

A CLIENT GUIDE TO LITIGATION & FUNDING

1. THE LITIGATION PROCESS

HANDLING YOUR CASE

Claims or disputes which involve proceedings in the civil courts (High Court or County Court) are known as 'litigation'.

In dealing with litigation, our aim is always to achieve a practical and cost-effective outcome to your case, which is acceptable to you. Sometimes we can best achieve this without going to court, by negotiation, mediation or some other form of alternative dispute resolution. On other occasions it may be necessary to go to court to get the result you need.

We set out below some of the main requirements and obligations of litigation, so that you can understand what will be expected of you.

COST BENEFIT ANALYSIS

Litigation is typically unpredictable both as to outcome and as to cost. At the beginning of the case, and at regular intervals thereafter, we will consider with you what you hope to achieve by litigation, what the cost is likely to be, and what the likely benefit may be to you. If we doubt that it makes financial sense for you to pursue the case, we will tell you. However, the ultimate decision will be yours and by instructing us to proceed we will assume that you have decided that the risk is worthwhile.

LEGAL CHARGES AND EXPENSES

It is important that you appreciate that you are responsible for paying your own legal bills. Even if the court orders your opponent to pay your 'costs', you cannot count on being repaid, because:-

- The court usually only orders part of your legal costs to be paid. An order that your opponent pays your 'costs' will be subject to an assessment procedure, which typically results in your opponent being required to pay **you** considerably less than the amount you have to pay **us** for the work we do under the terms of our contract with you (in our experience, as a rule of thumb, the successful party can normally expect to recover between 60% to 70% of its costs on what is known as the standard basis)

- In any event, the opposing party may not have the money to pay, or might become insolvent or only have assets traceable at additional expense

- If your opponent is publicly funded, or becomes publicly funded part way through the case, you are unlikely to recover any of your own legal charges and expenses, even if successful

- Most litigation requires a considerable amount of the client's time. The cost of your time in dealing with the case and instructing your lawyer is generally not recoverable.

If you are unsuccessful with your case, the likelihood is that you will be ordered by the court to pay all or part of your opponent's legal costs, as well as your own. This potential liability can be insured in some circumstances, and if we have not already discussed this with you, make sure you ask us about this (see FUNDING LITIGATION below).

USE OF BARRISTERS AND EXPERTS

We may recommend to you that some of the work on your case be handled by 'counsel' (a barrister). If so, we will seek your agreement and obtain quotations of likely fees. Unless counsel is working under a Conditional Fee Arrangement, we will usually require a payment from you to cover counsel's likely fees before counsel does any work. This is known as a payment on account.

We may also need to have other people work on your case, for example, experts and/or expert witnesses to prepare reports, and costs draftsmen to prepare costs estimates and detailed Bills of Costs required by the court in order to assess costs. Once again, we will usually require a payment from you on account of their likely fees before we instruct them.

INFORMATION AND DOCUMENTATION

We will need information from you to help us run your case. Strict time limits in litigation mean that it is important that you do not delay in supplying that information to us. In addition, it is vital that you tell us if you think that the information is not complete or is inaccurate in any way.

The court rules which lawyers and their clients have to comply with are strict about anything which might be evidence in the case. All paperwork, records and notes, however damaging to your own case or commercially sensitive to your business, must be kept safely by you or us and made available to the other side. The only exception involves the legal advice you receive from us. The rules of **disclosure**, as it is called, require you to satisfy the court by signing a certificate that you have conducted a reasonable and proportionate search to locate all documents which could be relevant. There are penalties and sanctions for failure to do so. Accordingly, where litigation is reasonably contemplated, any routine document destruction policies should generally be suspended.

CONFIDENTIALITY

The partners and staff of this firm must not reveal confidential information about you or your case to other people. However, if someone is helping to fund your case, such as an insurer or the Legal Services Commission, we may be obliged to reveal details of your case to them. They may have the right to call for and inspect our file, perhaps to check our quality standards. It may also be necessary to allow files to be inspected by accountants or others for audit purposes or to comply with regulatory requirements. We will try to maintain the confidentiality of your affairs so far as reasonably practicable in these circumstances.

THE LITIGATION PROCESS

You may have heard of the "Jackson reforms" which represent the biggest change to civil litigation procedure in England and Wales since the Woolf reforms of 1999 which changed the whole culture and conduct of litigation. The key points to note about the process generally are as follows:-

- The issuing of court proceedings is seen as the last resort. Attitudes such as "we will see you in court" or "issue the writ first and talk later" are not tolerated by the courts, and can result in penalties being imposed. Delaying tactics are not permitted

- Pre-action protocols and practice directions require a 'cards on the table' approach, with information and evidence being exchanged at an early stage. It is not possible to ambush your opponent by keeping key aspects of your case secret until the last minute

- The court has the power to assess the strength of a party's case and the likely cost of proceedings at an early stage, and can put pressure on either or both parties to reach a settlement. This may result in an outcome which is less satisfactory than you hoped for

- The ability of the parties to instruct their own experts is tightly controlled by the courts. If an expert's fees are to be recovered from the opponent, the court must have given permission for that expert to be used. The joint instruction of a single expert will be ordered whenever possible

- Parties are expected to take every reasonable opportunity to settle the case by negotiation or mediation. Failure to do so can be punished by the court when it comes to make orders for payment of legal costs. Settlement offers made under Part 36 of the Civil Procedure Rules (known as "Part 36 offers") require careful discussion between lawyer and client, and can have considerable financial significance.

The above matters can help to avoid a long- drawn out court case, but they do mean that investigation of the facts and evidence and analysis of the law has to be done more fully and earlier than used to be the case, tending to "front-load" the legal charges for which you are responsible.

There will be significant involvement on your part at an early stage, for example, in searching for documents and verifying the truth of documents and of witness statements.

If court proceedings have to be issued, the judges effectively take control of how the case is to be conducted or "case managed". They have wide-ranging powers and (particularly in the light of the Jackson reforms – see further below) may enforce time limits rigidly, and penalise the conduct of a party if it is thought to have acted unreasonably, or to have incurred costs out of proportion to what is at stake.

Where applications have to be made to the court, the judge will normally assess a figure for legal costs summarily and order it to be paid within 14 days. However desirable it may seem to make an application to the court, you must decide whether you are prepared to accept the possible risk of such a costs order being made against you before the proceedings are finally decided.

This approach of caution and co-operation may mean that we cannot handle the case as aggressively as you might wish. We will warn you if a proposed tactic or step runs the risk of an adverse costs order.

It is not possible to undertake litigation on a point of principle. Judges will not allow the courts to be used for cases where the likely costs are out of proportion to the financial sum or other tangible issue at stake, save where a test case is necessary in order to establish a legal precedent.

The Jackson Reforms in detail

The Jackson reforms have had an impact on all stages of the litigation process and some of the key changes are set out below:

- Success fees payable under conditional fee agreements (CFAs) are not recoverable from your opponent under CFAs entered into after 1 April 2013

- After-the-event insurance premiums are not recoverable from your opponent under after-the-event insurance policies entered into after 1 April 2013

- Contingency fee agreements (known as damages based agreements) are now possible for contentious work although there are caps on the amount of damages that can be taken on a contingency basis (see below)

- There is now a menu of disclosure options available for cases proceeding before the courts and standard disclosure (i.e. where each party discloses documents upon which they rely, which adversely affect their own case, adversely affect another party's case or support another party's case), is no longer the default option. Parties also have to file and serve reports 2 weeks before the first case management conference describing what documents exist, where and how they are stored, and the likely costs of giving standard disclosure in order to assist the court on deciding on the appropriate order

- Parties are now expected before the first case management conference and at regular stages throughout the case to prepare, seek to agree with the other side and submit for the Court's approval, detailed costs budgets, showing how much the case is going to cost

- There is a new costs management procedure for large (multi-track) cases that commenced on or after 1 April 2013 (with the exception of the Commercial Court and claims for more than £2 million in the Chancery Division, Technology and Construction Court and Mercantile Courts). Essentially, when assessing recoverable costs, the court will not depart from a party's agreed costs budget without good reason

- A new test of proportionality has been introduced for costs recoverability purposes designed to control those cases where costs become disproportionate to the issues in dispute

- An additional costs sanction has been introduced (equivalent to 10% of the value of the claim but subject to a maximum payment of £75,000 for claims of £1 million or more) payable by defendants who do not accept a claimant's reasonable Part 36 offer that is not beaten at trial

- The rules on granting relief from sanctions for breaching rules or court orders have been amended, imposing a stricter approach to compliance.

KEEPING TO THE TIMETABLE

You, with us, will have to meet strict timetables or risk having your case being struck out by the court. This may be difficult for you. You may have more pressing personal matters or commercial concerns which you feel ought to have priority over our need for your help or instructions. Particularly in the light of the Jackson reforms, the courts will not allow us more time to comply with the timetable set by the judge, where there is no good reason for delay.

Once you get involved in court proceedings, whether as claimant or defendant, you should be aware that both the pace of the litigation [and the tactics we adopt] are no longer set by us or by you, but to a large extent are imposed on us by the court.

THE OUTCOME

All this may mean that the outcome of litigation, whether achieved by negotiation or through the courts, is not what you expected or hoped for.

But there is of course a positive side to the reforms. The new litigation procedures can bring about quicker resolution of disputes, with tighter control of the legal costs involved. Overall, we believe that the changes have improved the way in which litigation is dealt with, and are ultimately to your advantage.

2. FUNDING LITIGATION

It is impossible to give an accurate estimate of the likely costs of litigation at the outset, because there are many risks and uncertainties, such as:

- Might the dispute be settled early?
- Will the other side fight all the way?
- Will expensive expert evidence be needed?
- What issues will arise as the case progresses?
- Will additional parties (for example additional defendants) need to be added?

These and other questions cannot all be answered when you first come to us for advice.

As has been mentioned already, you are responsible for meeting the legal charges and expenses of your own case. If you lose or withdraw your claim, after it has been missed at Court you will be liable to pay your opponent's legal charges and expenses.

As a general rule once a Court claim is commenced, the three situations in which you will not have to pay the other side's costs are: (a) if you proceed to trial and win (or the other side gives up and pays your claim and costs); (b) you conclude a "drop hands" settlement (each party agrees to bear their own costs and walks away); or (c) you agree a successful settlement of the claim.

FUNDING OPTIONS

There are however, a number of different funding options available. We may have already discussed the relevant options with you. Please let us know if you want further information about any of these:-

- **Public Funding [legal aid]**
- **Funding by a third party**
- **Insurance funding**
- **No win, no fee arrangements**
- **Pay-as-you-go funding**

Public Funding [legal aid]

Public Funding is a means-tested and merits-based funding system paid for by the Government. Eligibility is assessed by the Legal Services Commission [LSC] which decides whether or not it should be granted.

The means tests apply to both capital and income, and we can give you details if required. If you qualify on your means the LSC will then consider whether your case has any merit. They will look to see whether there is an arguable case, and whether or not the matter that is in dispute (if it has a monetary value) is proportionate to the legal costs likely to be incurred. The LSC will also consider whether a privately paying client would be willing to fund the claim from their own resources.

Once Public Funding is granted it is regularly reviewed, and the LSC will require updated information in respect of your finances. If these requests are not returned promptly, or erroneous information is given, the LSC may cancel your certificate, and you could be liable to repay the LSC the legal costs incurred to date.

The LSC may limit the scope of the certificate, for example to initial enquiries to establish whether or not there is sufficient evidence to support your case.

Usually, when money or property is recovered, the LSC has a charge (the Statutory Charge) on any recovered or preserved assets to offset the expense of making the claim. In certain situations this charge may take the form of a mortgage on property, or may be postponed. Interest is payable.

Public funding is as a rule not available for business matters. As such the vast majority of commercial disputes with which the firm deals will not be eligible for such funding.

Funding by a third party

If you are a member of a Trade Union, it may be that your Union will fund claims which you bring. Alternatively, your employer may have a legal expenses scheme, or you may have a relative who is willing to provide funding. You should tell us immediately if you think that any of these may apply.

In larger cases, where the prospects of success are perceived to be high and where the other side's ability to pay appears to be good, it may also be possible to obtain funding from a specialist third party litigation funding company. These specialist companies will invest in litigation and cover all or part of your costs, any ATE premium payable and any costs that you are required to pay to your opponent in return for a substantial share of any litigation proceeds (usually up to 50% of any settlement sum and/or damages awarded). This market is still in its relative infancy, but it is a growth area for litigation funding.

Insurance Funding - 'Before the Event' Policies

These are legal expenses insurance policies which provide cover for legal problems arising in the future. Even if you do not have a specific Legal Expenses Policy, you may well have one as an "add-on" to a home contents or car insurance policy or a credit card, or as part of your membership of a club or association. Such policies are sometimes very limited in what they cover, and may restrict your freedom to

choose your own lawyer. If you think that you may have any such policy, please let us see the policy schedule as soon as possible.

Insurance Funding - 'After the Event' Policies
These are policies which help to cover the cost of litigation once the dispute has arisen, and include cover for the legal costs you may have to pay your opponent if you lose the case.

Insurance cover can be purchased to protect against both your own and your opponents' legal charges and expenses. But you should be aware that:-

- The usual basis of such policies is that payment is made only if your case fails completely. For example, if for any reason you decide to withdraw your claim, the insurance will not apply, and we will have to look to you for payment of our charges and expenses. It is possible to procure policies which cover your own expenses such as barristers' fees and expert witness fees but this added protection comes with increased up front cost

- The insurers will not pay any legal costs that you are ordered to pay your opponent while the case is progressing.

Insurance Funding – Paying the Premium
As with any insurance, the amount of the premium and the means to pay it are important considerations. Points to bear in mind are:-

- It may be possible to obtain a linked loan to cover the cost of the premium, and our interim bills. The loan does not have to be repaid in the event that you lose the case

- However, for After the Event Insurance policies entered into post 1 April 2013, it is no longer possible to recover the premium payable from the other side if successful

- Premiums for accident cases are modest. For other types of litigation, they may be between 20% to 30% of the total legal charges against which you want to protect yourself. In substantial commercial litigation, the premiums may be even higher.

We are not insurance brokers, and do not pretend to be aware of all of the possible insurance policies available to the public. We do not undertake to give you "best advice" on these products. While we believe that any policy or funding arrangement which we suggest to you is suitable, we cannot guarantee that the means of funding adopted by you will necessarily be the most appropriate to your needs.

Remember that any insurance policy is a contract between you and the insurer to which we are not parties. It is essential that you read the terms of the policy carefully. Unless you ask us to do so specifically, we will not be advising you as to all the relevant terms of the policy.

No Win, No Fee Arrangements
We can offer you a 'no win, no fee' type of arrangement in suitable cases. There are four main options available:-

- A **Conditional Fee Agreement** where the lawyer makes no charge if the case is lost, but charges a "success fee" on top of his normal fee if you win. Insurance cover is available to cover your liability for your own expenses and your opponents' legal costs if you lose. Prior to 1 April 2013, success fees and insurance premiums were recoverable from the losing party. However, that is no longer the case for agreements entered into on or after 1 April 2013. You would be required to pay all of the success fee and insurance premium if you won for any post 1 April 2013 agreements

- **Partial or Discounted Conditional Fee Agreements** where a lower hourly rate is invoiced monthly during the course of the matter and, if the case is either settled or decided in your favour, an agreed further percentage is paid by you. Again, following 1 April 2013, this success fee is not recoverable from the other party

- **Contingency Fees** – where, again, you are not charged if you lose, but the fee if you are successful is a percentage of the sum which is recovered. This arrangement cannot be used for cases which actually go to court

- **Damages-based agreements (DBAs) –** these agreements operate in much the same way as conditional fee agreements but, instead of billing you on a time spent basis, your fees would be satisfied by way of an agreed share of any damages recovered. The percentage would be agreed in advance and would not exceed 50% (NB – there are caps on the amount of damages that can be taken as contingency fees which range from 25% for personal injury cases, 35% for employment cases and 50% for all other claims). The costs recovered from the other side would be set off against the DBA in a successful case, reducing the amount payable by you to any shortfall in recovery between the costs recovered and the DBA fee.

The idea of paying no fee if you lose may be attractive, but you should bear in mind that:-

- We will be sharing a joint venture with you, and will therefore be entitled to have a say in how the litigation is conducted

- In particular, the relevant agreement will give us a right to terminate the funding arrangement where the merits of the claim change or where you refuse to accept settlement offers, which, if refunded, may affect your ability to recover costs from the other side

- We will carry out a risk assessment at the beginning of the case and during the course of it, to decide whether we are prepared to take it on or to continue with it, as these agreements mean we are investing in your case. The two main risk factors which determine whether we are willing to enter into such a funding agreement are: (i) the strength of your claim; and (ii) the asset position of the Defendant

- You will have to satisfy yourself whether the success fee we propose is fair and reasonable

- We will require you to pay for some initial investigation into your case before deciding whether to offer a risk sharing arrangement, including investigation into the credit worthiness and assets of the Defendant and typically the instruction of a barrister to provide an opinion on the strength of the claim

- Under a DBA, you will only pay costs which are proportionate to the benefit that you have gained from the litigation, but if the case settles at an early stage then the amount payable could considerably exceed the value of the work done

- There will, in any event be costs, known as disbursements, payable to run a claim, including Court fees and Counsel's fees. Our standard terms of acting in contingently funded cases typically do require the client to fund those disbursements and to pay the costs to us on account, i.e. before we pay them on your behalf. Even where we act on a no win, no fee basis, therefore, you should not expect any claim to be cost-free.

- You should be aware that most claims will settle without having to go to trial. A typical tactic in such settlement discussions is for the Defendant to seek to "drive a wedge" between the Claimant and his or her lawyer by making settlement offers expressed as a lump sum, leaving the Claimant and the lawyer to apportion that amount between damages payable to the claimant and costs payable to the lawyer. You should be aware that in such situations, whilst we do not rule out discussing that split with you, our position will be that the firm's entitlement to costs is as expressed in the relevant funding agreement.

Pay-as-you-go Funding

- Unless one of the other funding arrangements mentioned above applies, we will require you to make an initial retainer payment (i.e. a payment on account), and subsequent payments to cover our interim bills, which will be rendered at regular intervals.

WARNING

The information contained in this guide is for generic use only and cannot be relied upon for any specific purpose. We recommend that specialist professional advice is taken before entering into (or refraining from entering into) a particular transaction.