



FeeSolve

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Fee options for every case

FeeSolve - Fee options for every case

Introduction

Litigation is expensive, uncertain and inherently risky. The ability to pursue even a strong claim all the way to trial is dependent on the claimant being able to afford the legal costs and the financial risks of doing so.

Litigation funding rules in England and Wales changed radically on 1 April 2013, enabling lawyers now to share to a greater extent than ever before the costs risk of litigation with their clients. At the same time, the demand from commercial clients for greater choice, cost savings, costs certainty and cost risk sharing in litigation has been steadily increasing.

In response to that demand and to changes in the market place Field Fisher Waterhouse has launched FeeSolve - a unique and innovative risk management and funding package for commercial claims. FeeSolve is designed to give clients certainty in relation to costs and to reduce the financial risks faced by our clients when bringing a claim by offering a variety of alternative funding arrangements. Choosing the right funding option for their cases allows our clients better to manage their cash flow, reduces pressure on their budgets and removes some of the inherent risks of litigation which in turn enables our clients to negotiate from a position of strength.

Case Assessment

On any claim we carry out an initial assessment of the merits of the case. This case assessment includes an evaluation of liability, quantum, likely defences, the defendant's capacity to pay any judgment debt and other enforcement risk as well as any other risk factors in the litigation.

The availability of certain funding options depends on the strength of the claim or defence. Gaining a proper understanding of the case and its success prospects is therefore critical to identifying the right funding solution. As part of the initial case assessment we will review core documents, identify relevant witnesses and speak to key witnesses to gain an understanding of the main facts of the dispute and carry out a detailed case analysis. In some cases it will not be possible to reach a concluded view on all of these points at a preliminary stage, for example because detailed expert evidence is required. We will advise you further if that is the case.

Costs Estimates

The next stage is the preparation of a detailed estimate of the likely cost of proceedings, including our own fees, Counsel's fees and significant disbursements.

For all cases, we prepare a detailed costs estimate using our bespoke CostSure budgeting tool, which will identify



the key stages of litigation, show the estimated costs incurred at each stage as well as projected timescales for key stages of the litigation. We will review and revise the costs estimate as the case progresses. Costs budgets and management are relevant in all cases for cost recovery purposes, regardless of the funding option chosen.

Cost recovery rules

The rules regarding inter partes costs recovery in civil proceedings in England and Wales are complex, but the general rule is that "costs follow the event", in other words the loser pays the winner's legal costs. However, not all legal costs a successful party may have incurred in pursuing its claim will be recoverable from the unsuccessful opponent, and there is typically a significant proportion of irrecoverable costs which a litigant will have to absorb even if successful.

The rules also mean that in addition to having to pay their own costs of the litigation, litigants face the risk of having to pay a proportion of the other side's costs (or "adverse costs") if their case is unsuccessful.

Hourly Rate Basis

The conventional basis on which lawyers have charged for advice and services provided in contentious proceedings in England and Wales has been the hourly rate basis. On that basis, time spent by a lawyer on a case is recorded (typically in 6 minute units) and multiplied by the agreed hourly rate, which will vary depending on the lawyer's level of seniority. Our standard retainer provides for fees to be billed at standard hourly rates on a time spent basis, plus disbursements and VAT. These costs are sometimes referred to as "base costs" and form the basis on which a successful party can recover its costs from the losing side under the recovery rules mentioned above.

The hourly rate basis suits some clients, but not others. It is the tried and tested model often used by default. The client pays the lawyers for the time that has been spent, and assumes all of the risk. Uncertainty and risk are an inherent and unavoidable part of litigation, but one that we seek to manage, control and minimise and are prepared to share with our clients. We appreciate that all businesses are different and we are therefore offering a range of innovative funding options that can be adapted to suit our clients' individual requirements.

Alternative Funding Arrangements

Below we outline the various alternative funding arrangements available which include:

- Conditional Fee Agreements
- Damages Based Agreements
- Fixed or Capped Fee
- Third Party Funding
- After the Event Insurance

Individually or in combination these options may help our clients fund a claim or meet their objectives. Each option can be tailored to suit the specific case and client requirements.

Conditional Fee Agreements

A Conditional Fee Agreement ("CFA") is an agreement between lawyer (solicitor or barrister) and client where the lawyer agrees to work for a reduced or no fee. If the case succeeds (i.e. if certain defined success parameters are met) fees are charged at standard rates with an agreed percentage uplift (the success fee). If the case fails, only the reduced fee (or no fee) is payable.

Under a full CFA (also referred to as a "no win, no fee" agreement), the client pays nothing towards the lawyer's fees if the case is lost, but pays standard rates plus the success fee if the case is won. More common in the commercial context are partial or hybrid CFAs (also referred to as "no win, low fee" agreements) where the client pays discounted rates if the case is lost, and an agreed uplift if the case is successful.

We are willing to act for clients on a CFA in appropriate cases. When we act under a CFA, part of the risk in relation to the costs of the litigation is being taken on by us, and the compensation for taking on that risk is the success fee. The level of the discount applied to our fees and the level of the success fee will depend on our assessment of the strength of the case and the risks involved.

In the past, it was possible to recover the success fee from the opponent, but success fees are no longer recoverable for CFAs entered into after 1 April 2013 (except in insolvency proceedings which are exempted from the new rules until April 2015). Instead, the success fee will be paid for by the successful party out of any damages they receive.

Damages Based Agreements

A Damages Based Agreement ("DBA") is a type of contingency fee arrangement where the fee charged by a solicitor or barrister is calculated not by reference to the amount of time spent on the case, but as a percentage of the damages recovered by the claimant in successful proceedings. Recovering a contingency fee is, as the name suggests, dependent on the success of the claim and recovery from the opponent.

Traditionally these types of arrangements were unavailable in civil court proceedings in England and Wales, but are now permitted as a result of changes introduced by the Jackson reforms. In appropriate cases we can offer clients the option of conducting a case under a DBA. A claim will usually only be appropriate for a DBA if the following criteria are met:

- the claim is for a reasonable amount of money
- the claim has good prospects of success
- the defendant can afford to pay any damages and costs it may eventually be held liable for

Ordinary inter partes recovery rules will operate where a case is conducted under a DBA, and a successful party will be able to recover its base costs from its opponent.



Fixed or Capped Fee

Even with the help of sophisticated cost budgeting tools, litigation is notoriously difficult to budget because of the inherent unpredictability. We cannot control all of the uncertainties of litigation, but to offer our clients greater costs certainty we can, where appropriate, agree to conduct a specific element of the litigation process or an agreed amount of work for a fixed fee. The fixed fee may be payable in advance, when the work is completed or on agreed dates, such as monthly. Alternatively we may agree a capped fee, where the client will pay up to an agreed sum for a specific element of the litigation process. In both models we assume the risk of any costs overrun.

Instead of a fixed or capped fee, we might also offer a capped fee with shared savings for a specific element or phase of the litigation process. Under such an arrangement the client will pay no more than the agreed cap, but if the actual cost of the work done comes in under the cap, any saving is shared between us and the client.

Third Party Funding

Third party funding is an arrangement where a professional funder or investor invests in a case and agrees to fund the costs of litigation with a view to receiving a return on its investment if the case is successful. The funder will finance the client's legal costs and expenses, and possibly potential liability for adverse costs. In return, if agreed success criteria are met, the funder will be entitled to receive a share of the damages recovered from the defendant. The funder's cut is agreed in advance with the claimant and is usually a percentage of any monies eventually received from the defendant or a multiple of the amount invested by the funder. If the claim is unsuccessful, the funder receives nothing and will have lost its investment.

As with DBAs, a funder will usually only invest in a claim if certain criteria as to value, prospects and enforceability are met. Through our network of contacts we can introduce our clients to third party funders that may be willing to provide funding for their case and assist clients in obtaining a quote for funding. Third party funding may be available on its own, or in conjunction with other funding arrangements.

After the Event Insurance

The above are options that can help reduce or remove your own costs in the litigation. While all are useful tools, they do not cover the risk of having to pay adverse costs should the case be unsuccessful. After the Event ("ATE") insurance has been developed to help cover this risk and can be a crucial part of a litigant's financial control. ATE insurance insures litigants against the risk of having to pay their opponent's costs should their case fail.



Whereas previously it was possible to recover the cost of the ATE insurance premium from the losing party, this is no longer the case (except under the exemption covering insolvency proceedings). The premiums for any policies concluded after 1 April 2013 will not be recoverable.

Service Level Guarantee

Not only are we prepared to share some of the risk of litigation with our clients, but we are so confident about the quality of the service that we provide that we will guarantee to refund 10% of our costs if, at the end of the case, our clients are, in their discretion, dissatisfied with the service we have provided.

Conclusion

Costs are a major factor in any dispute and adopting the right funding solution and strategy is an essential element of successful litigation. We collaborate with our clients to find the best solution for their cases and their particular circumstances. What sets us apart from other firms is that we are prepared to share some of the risk of litigation with our clients. This enables us to offer a range of innovative funding options so our clients have a real choice and can adopt a funding strategy best suited to their needs.

Contact

If you would like any further information or would like to discuss a particular case, please speak to Peter Stewart (peter.stewart@ffw.com) or your usual Field Fisher Waterhouse contact.



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