

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

With over 100 dispute resolution specialists, we have 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 the costs position or allow them to offset the costs risk altogether.

This flyer 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:

- o your own solicitor's fees;
- o additional expenses such as barristers' fees, expert fees and court fees; and
- o 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 nothing but that, if you win, then he will get paid his normal fee plus a further percentage of that fee which is called the success fee.

The other two types of expense will either have to be funded by you privately or through an "after the event" insurance policy.

If your case succeeds, potentially all of the insurance premium and all but a small part of the success fee will be recoverable from the losing party.

### 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.**

One potential alternative, however, to the all or nothing approach of "no win no fee" is a "higher fee, lower 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 are generally 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**

Currently, both the success fee and the insurance premium are recoverable from your opponent if you win. As a result, litigating under a conditional fee agreement coupled with an insurance policy is likely to be the best option for even the wealthiest litigant. In effect, you are transferring the majority of the risk to your lawyers and to your insurance company.

In addition to the reassurance of knowing that you will not have to pay anything but the insurance premium if you lose, there is also a clear benefit in not having to pay any fees until the outcome of the case is known.

Your opponent, who will receive notice of 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 are 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.

### **Will I be able to recover the full success fee and insurance premium from my opponent if I win?**

A small part of the success fee will compensate your solicitor for his inability to submit interim bills as the case progresses. That "funding cost" will not be recoverable from your opponent. Subject to that, the success fee and insurance premium are potentially recoverable in full providing they are judged by the court to be reasonable. You should bear in mind, however, that in most cases court assessed costs are somewhat lower than the actual costs (whether the case is funded by a conditional fee agreement or not) and there is therefore likely to be a shortfall.

### **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. Assuming your opponent's costs are similar to your own, you are 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, including the success fee and insurance premium, and if you lose the only loss will be the cost of the insurance premium.

### **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.

**Do I have to inform my opponent if I have entered into a conditional fee agreement?**

Yes. We will have to inform your opponent of the existence of a conditional fee agreement but not the level of the success fee.

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

No. But it cannot operate retrospectively so you will be responsible for our fees at our normal hourly rates until the conditional fee agreement has been completed.

**Will your ability to advise us 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 we think that the case is potentially suitable, we will refer the matter to our Risk Assessment Panel, who 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 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.

## 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 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 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 single premium for this amount of cover. Top up insurance can be obtained later if necessary.

As with insurance that is backed by a conditional fee agreement, if the case is successful you should be able to recover the cost of the premium (or a substantial proportion of it) from your opponent.

The market in ATE insurance has developed considerably in recent years to the point where policies are available without the payment of a premium upfront (which was often a substantial deterrent to an impecunious litigant) and the premium itself is effectively self-insured and is not payable at all in the event that the claim is discontinued or lost.

## Benefits of insurance

Insurance cover is a major psychological advantage in any dispute, particularly if coupled with a conditional fee agreement. Any party receiving notice of these funding arrangements will know that the case has been carefully reviewed before proceedings have been taken and that much of the litigation risk has been eliminated.

Policies are now available that do not even require the upfront expenditure on a premium. Coupled with a CFA, it is potentially 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.

### **Do I have to pay the insurance premium upfront?**

Not necessarily. Policies vary but it is now possible to obtain insurance where no premium is payable upfront and is self-insured against discontinuance or the failure of the claim.

### **Is the entire insurance premium recoverable from my opponent if I win?**

It depends how it has been funded. If money has been borrowed to cover the premium, then the cost of borrowing will not be recoverable from a losing opponent. Subject to that, the whole of the premium is recoverable if it is judged by the court to be reasonable.

### **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.

### **Can you advise us 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 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.

## 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.

If you would like us to prepare a detailed budget for the case, then we can do this as part of a formal case assessment.

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 transaction 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 Services Commission website at [www.legalservices.gov.uk](http://www.legalservices.gov.uk)

## 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 the investment of our time on a CFA, should be pursued on that basis. However, where a claim is especially large and involves substantial disbursements, like counsel and forensic accountancy evidence, then the case may be suitable for third party funding.

In summary, this would mean a third party funding the litigation costs in exchange for a percentage of the fruits of the litigation. There are a number of specialist litigation funders to whom we can introduce you if this option is appropriate.

## Conclusion

In putting together this flyer, 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.



Rachel Higgs  
Partner  
for Mills & Reeve LLP  
+44(0)1603 693233  
[rachel.higgs@mills-reeve.com](mailto:rachel.higgs@mills-reeve.com)



Jamie Wheatley  
Partner  
for Mills & Reeve LLP  
+44(0)1223 222206  
[jamie.wheatley@mills-reeve.com](mailto:jamie.wheatley@mills-reeve.com)

[www.mills-reeve.com](http://www.mills-reeve.com) T +44(0)844 561 0011

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