bray dilks solicitors

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The cost of Court proceedings

The background

Many claims settle without the necessity for court proceedings. When a settlement is not achieved, though, proceedings in the County Court may follow. The general rule in County Court proceedings is that the unsuccessful party must not only bear his own legal costs but pay his opponent's, too. A prudent litigant, therefore, makes provision:

- For the payment of his own legal costs; and
- For the payment of his opponent's legal costs against the possibility that his claim may not succeed.

Funding your own legal costs

There are a number of ways in which a claim can be funded:

- Traditionally, lawyers have been retained on an hourly rate basis where the client agrees to pay an hourly rate for work undertaken on his or her behalf regardless of the eventual outcome of the claim.

- Since 1999, lawyers have been permitted to accept retainers on what is commonly called a “no win, no fee” basis, the proper name for which is a “Conditional Fee Agreement”.

- You may have purchased legal expenses insurance against the possibility that events might occur which will give rise to a claim. This sort of insurance (called “before-the-event insurance” or “legal expenses insurance”) is commonly offered by household insurers and motor insurers as an optional extra.

Conditional Fee Agreements (“no win, no fee” arrangements)

As the common name implies, if you do not win your case then we will not make any charge to you for the work we have undertaken on your behalf. You will still have to pay any disbursements that we have paid out on your behalf. If, though, you win your case we will expect to be paid for the work we have done. We call the charge we make for the work we do “costs”. There are three elements to costs:

- Our basic charge
- Our disbursements
- A success fee

The basic charge is the charge we make for the work we do on your behalf. It is calculated by reference to an hourly rate. The hourly rate is set out in our document entitled “Conditional Fee Agreements: what you need to know”. Disbursements are sums of money that we pay out on your behalf. Disbursements include Court fees and fees paid to experts, for instance, a fee paid to a consultant or doctor for a report in a claim for compensation for injury. A success fee is a percentage uplift on the basic charge which we add to your bill in the event you win your claim. The success fee reflects the risk we take that we may not be paid at all for the work we do on your behalf.

If you are successful it is more likely than not, but not certain, that your opponent will be ordered to reimburse you the amount you have to pay us for costs. Such an order is called an Order for Costs. The Order for Costs may cover all of the costs you have to pay us; it may cover only a percentage. It is important that you understand that it is you, and not your opponent, who must pay our charges. Your opponent's liability, if an order for costs is made against him, is to reimburse you the amount you have had to pay us. Thus, if your opponent is ordered to pay your costs but defaults and pays you nothing

you will still have to pay us. The point may be of little practical significance if your opponent is insured (as will very commonly be the case, for instance, if your claim arises out of a road traffic accident) or is known to have assets of realisable value. The point may be of considerable significance if your opponent is uninsured and has little by way of assets or income.

Before-the-event Insurance – funding your own costs

If you have before-the-event insurance the insurers may be prepared to cover the costs of bringing your claim. Many insurers insist, though, that you instruct panel solicitors of their choice (as distinct from solicitors of your choosing). Panel solicitors may be geographically distant so that face-to-face meetings to discuss the progress of your claim are impractical. Your claim may be assigned to an inexperienced solicitor, legal executive, or paralegal: you will have no choice in the matter. However, should it become necessary to issue court proceedings then you will have the freedom to choose your own solicitor (as distinct from the insurers' panel solicitors) in accordance with the Insurance Companies (Legal Expense Insurance) Regulations 1990.

The terms of before-the-event insurance policies vary from insurer to insurer but, in general terms, insurance providers require solicitors to report to them upon the prospects of success from time to time as the case unfolds. Should the insurers judge the prospects of success to fall below the standard they require they may withdraw cover. The decision will be that of your insurer: not you, nor that of your solicitor. Withdrawal of cover may substantially impact upon your ability to pursue your claim.

Making provision for your opponent's legal costs

You may choose to bear the risk that your claim will not succeed. You may do this either because you consider the prospects of success are very high or because you are in the very fortunate position of being able to cover your opponent's costs with equanimity. Many litigants, though, prefer to insure against the risk of an unsuccessful outcome. These are:

• **Before-the-event Insurance** – meeting an Adverse Costs Order. If you have the benefit of before-the-event insurance and the insurers are prepared to fund your claim then the policy will usually cover, in addition to your own legal costs, your opponent's costs in the event of an unsuccessful outcome. Before-the-event insurance, if you have it, may well be your best option notwithstanding the potential drawbacks mentioned above.

• **After-the-event Insurance**. It may be possible to take out an insurance policy after the occurrence of the events which give rise to the claim (called after-the-event insurance) which, in the event you lose your case, will pay your own disbursements and your opponent's costs. Unlike normal insurance (where the insurer insures against the risk that a future event might happen) after-the-event insurance relates to events giving rise to the claim that have already occurred. The insurer will look at each insurance proposal form on an individual basis before deciding whether or not to issue a policy. There is no guarantee, therefore, that you will be able to obtain after-the-event insurance funding in respect of a claim. We can, of course, assist you in connection with a proposal.

Offers of Settlement

Your opponent may make an offer to settle your claim. For instance, if you are claiming monetary compensation your opponent may offer you a particular sum of money in settlement. Such an offer is usually described as a "Part 36 offer". If you reject your opponent's offer and go on to win your case at trial but do less well than your opponent's offer (for example, the trial Judge awards you less by way of monetary compensation than your opponent offered to pay you) then it is more likely than not that you will have to pay your opponent's costs from the date when you might have accepted his offer and that you will not be able to recover from him any of your own costs from that date. We can end a Conditional Fee Agreement if our advice in relation to an offer of settlement is rejected by our Client.