

## FUNDING

### Conditional Fee Agreements

A radical innovation in England and Wales which took effect in the early 1990s and has been further enhanced since then, is the so called “conditional fee agreement”. This can be either a “no win no fee” basis on a no win lesser fee basis, a win and pay usual fees or a win and pay increased fees basis. The fee payable is based on the solicitor's usual hourly charging rate and the fee payable on success is a percentage increase on those charges up to a maximum of 100%. A conditional fee agreement does not involve the solicitor obtaining a percentage of money recovered. The basis behind conditional fee agreements is that the solicitor takes financial risks in relation to the litigation

There are specific rules on conditional fee agreements. They may be entered in relation to any litigation between private parties. They must be in writing and they must contain certain mandatory details. The agreements must set out under what circumstances the legal representative's fees and expenses are payable or if partly payable, what proportion is payable. The basis of calculation of the fees and the amounts payable are to be stated. The method of calculation and in particular, any method linked to the level of damages, must to be set out.

Where there is to be a success fee, the agreement must state the reasons and set out the percentage increase in the usual fees. The success fee in a conditional fee agreement must be reasonable and if the Court disallows it, it will not be recoverable from the client.

The basis upon which the conditional fee agreement work is the success fee by which where it is agreed the solicitor receives an increase on normal fees up to a maximum of 100%. If the client wins and the opponent is ordered to pay the costs, these may include the success fees. However, it will only be payable to the extent that the Court decides

that it is reasonable. Where it is partly disallowed, the solicitor is not allowed to recover it from his client.

If a claimant loses in a case where there is a conditional fee agreement, he will not usually have to pay his own solicitor's fees but is likely to be liable for his opponent's costs. It is possible to purchase "after the event insurance" to cover the other side's costs and disbursements in the event of losing. The premium will depend on the strength of the case. There is an obligation on the solicitor to discuss this insurance.

Where there is a conditional fee agreement or insurance cover has been obtained this must be notified to the other side at the outset. Certain details of the arrangement must be filed with the Court.

### **Insurance against Costs**

If a claimant loses in a case where there is a conditional fee agreement, he will not usually have to pay his own solicitor's fees but is likely to be liable for his opponent's costs. It is possible to purchase "after the event insurance" to cover the other side's costs and disbursements in the event of losing. The premium will depend on the strength of the case. There is an obligation on the solicitor to discuss this insurance

After the Event Insurance is an insurance policy that provides cover for the costs incurred in the pursuit or defence of litigation. The policy is purchased after the legal dispute has arisen. After the Event insurance can be purchased for nearly all areas of litigation. The premium charged can in principle be recovered as part of costs from the losing party.

Premiums are often available on a deferred and self-insured basis so that the premium is only payable by the policyholder at the conclusion of the case, and then only if the case is successful. If the premium is paid when the policy is taken out, the cost of the premium is reimbursed by the insurer. In both examples, the insurer also pays for the client's insured legal costs liabilities.

### **Third Party Funding**

Third party funding involves a third party investor funding litigation in return for taking a proportion of the award. Although there are general common law rules against third party funding of litigation, the English Courts have decided that such arrangements can be valid under certain conditions.

The conduct and control of the case must rest with the Claimant and his lawyers. The funder usually puts up a fund of a percentage of the claim. If the case is won with costs, the funder will be repaid his contribution plus a success fee of, say, 25%. Because of its high cost, funding should only be used as a last resort. A Claimant will have to show a court that he has exhausted all other methods of funding.

The funders take high risks. They must be ready to put up security in every case. The courts will expect them to be financially capable of covering the expense and potential loss.

### **Civil Legal Aid**

Up to the year 2000 public funding was more widely available for civil litigation through the Legal Aid Scheme. The conditional fee agreement and the Civil Procedures rules were intended to reform litigation, so as to make it more accessible. In this context legal aid was focused on certain narrower areas which were perceived to be priorities and accordingly legal aid now has a limited role only in civil claims.

The civil litigation scheme is now run by the Community Legal Services which operate the community legal services funds. Funding is available in limited circumstances only. The party in receipt of funding may still be obliged to make a contribution towards costs from his disposable capital or income. This may be made payable on a monthly basis. Where a publically funded litigant recovers money, he may have to repay some or all of the community legal services.

Funding is not available for personal injury, claims for negligence for personal injury or damage to property except in very limited circumstances. In practice this would exclude the vast majority of accident and work related claims even where the claimant was resident in England and fulfilled the income and capital tests.

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This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.