

## Dispute Resolution Factsheets

# Who pays legal costs in business disputes

These include:

- Court fees.
- Barristers' fees for giving an opinion on your case or arguing your case in court for you.
- Expert witnesses' fees for preparing reports and/or giving expert evidence.

### What the court will order

#### **Small claims**

If you win a dispute in the small claims court (which usually means the claim is worth less than £5,000), the court will normally order the loser to refund any court fees you have paid and pay you a very small fixed sum (often below £100), on account of your legal costs, ie your solicitor's bill.

The court will only order the loser to contribute more towards your legal costs if he has acted unreasonably - for example, by persisting with a claim or defence long after it is clear it is bound to fail, or not turning up to hearings.

#### **Fast Track claims**

If you win a Fast Track claim the court will usually order the loser to pay part of your solicitor's bill, and all of your disbursements, as well as his own solicitor's bill and disbursements. But there are limitations on the amount the court can order the loser to pay.

A claim will usually be Fast Track where:

- the amount claimed is between £5,000 and £25,000;
- the final hearing is likely to last less than a full day; and
- the case does not involve particularly complex, technical issues.

In a Fast Track case the costs are split in two. The court will order the loser to pay reasonable preparation costs, but the costs of the lawyer preparing for and appearing at the hearing (the 'trial costs') are limited. The court may only (save for a few exceptional cases) award trial costs as follows:

- Value of claim up to £3,000, costs £485
- Value of claim more than £3,000 but not more than £10,000, costs £690
- Value of claim more than £10,000, costs £1,035

The court will usually assess the Fast Track costs to be paid by the loser at the same time as it gives its decision, although it may make its decision later.

#### **Multi Track claims**

If you win a Multi Track claim the court will usually order the loser to pay part of your solicitor's bill, and all of your disbursements, as well as his own solicitor's bill and disbursements.

A claim will usually be Multi Track if it is over £15,000, or involves complex technical issues, or the final hearing of the case is likely to last more than one day.

In Multi Track cases the court will always defer its decision as to costs until later. The winner's solicitor has to draw up a detailed bill setting out every task he has carried out, and how much he charged for it. The court goes through the bill item by item and

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'assesses it'. It is the assessed amount, rather than the actual bill, that the loser has to pay.

In assessing the bill, the court decides whether it was reasonable for the solicitor to carry out each task, and whether the charge for it is reasonable. It takes into account factors such as:

- The value of the claim (for example, the court would not be sympathetic to costs of £40,000 for a £10,000 claim- the solicitor's charges must be 'proportionate').
- Its importance to the parties involved.
- The complexity of the issues, and the novelty of any issues raised.
- The skill, effort, specialised knowledge and responsibility required.
- The time spent on it.
- The parties' financial positions.
- The conduct of each side (before the court gets involved, as well as during the court proceedings), including:
  - Whether each side has followed any relevant pre-action protocol (special court rules for certain types of cases).
  - How each side has pursued or defended the claim.
  - Any exaggeration of a claim or counterclaim by either side.
  - How reasonable each side has been in raising or contesting particular issues.
  - Whether the winner succeeded on all points or only some of them.
- Attempts made by either side to settle the dispute, or any payments into court (See below).

If there is any doubt whether a task was reasonable, or the charge for it is reasonable, the court normally errs on the side of the loser. This is called the 'standard' basis of assessment.

Rarely, the court will err on the side of the winner when assessing costs (this is called the 'indemnity' basis), and the amount payable will then be much closer to the winner's actual legal bill than under the standard basis. The loser must have behaved badly - perhaps by bringing a clearly 'unmeritorious' case.

The amount the court will order the loser to pay you is usually well below the total amount of your solicitor's bill - a rule of thumb is 75% - and you will have to pay the balance out of any damages you have won, or from your own pocket. Solicitors sometimes call this the 'nuisance value' of a legal case.

If the loser is bankrupt, or publicly funded (eg legally aided), he may not be able to afford to pay what the court would normally order him to pay. In that case the court will only order him to contribute what is 'reasonable'. It will take into account his financial circumstances and also his conduct - for example, if he made preliminary applications that the court decided were for tactical purposes and were without a legal basis, that would count against him.

### **Securing your position**

If you are the defendant, and you are worried that you won't be able to recover your legal costs from the other side if you win because, for example, they are overseas or (being a company) you have reason to believe they can't afford to pay your costs if they lose, or they have done something, such as 'hiding' assets or giving a false address, to avoid potential liability for costs, you can apply for an order that they pay a sum to the court (or give some other form of security), pending the outcome of the case. This is called 'applying for security for costs', and it is at the discretion of the court.

Instances when the winner may have to bear his own costs, or pay the loser's costs In certain circumstances, the courts can order you or the other side to pay costs irrespective of who eventually wins and loses. It can order that you pay:

- The costs of a particular preliminary application.
- Costs only from a certain date.

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- Costs only up to a certain date.

### **Costs of preliminary applications**

In the period leading up to the full hearing of your case, you can make various applications to the court to decide preliminary matters. For example:

- One of you might apply to have the other side's case knocked out on grounds it doesn't have any reasonable chance of succeeding.
- One of you might think that the other side hasn't disclosed all the relevant documents in his possession, and applies for a court order to make him do so.
- One of you might object to the other calling an expert witness, saying it isn't necessary.

At any stage the court can decide that one of you has to pay the other side's legal costs for that preliminary hearing, irrespective of who eventually wins the main case. For example, if the court decides the making of the preliminary application was unreasonable, or the application had to be made because one of you hadn't done something that you ought to have done. It carries out a 'summary assessment' to work out the amount of the payment, which must be made within 14 days.

### **Counterclaims**

If one side makes a claim in a case, and the other side makes a counterclaim, costs can get complicated. What if one side wins on part of a claim only, because the other side has made a successful counterclaim?

Costs usually follow the amount of damages awarded - so if one side claims £10,000 and wins, but the amount awarded is reduced by 25% because of a successful counterclaim, the winner only gets 75% of the legal costs he would have got had he won the claim completely.

### **Formal offers to settle**

At any time you can make a formal offer, or formally deposit a sum of money with the court, representing what you would be prepared to pay now to settle the case (or part of it). The aim is to encourage the other side to settle. The other side then has 21 days to decide whether to accept your offer or payment into court.

If the other side refuses to accept your offer and wins the case, but the damages awarded to them are less than your offer, then the court usually orders them to pay a contribution towards any legal costs you incurred after your offer expired, even though you have lost the case, because they could have settled at that time. If you win, you get your money back, together with any damages and/or costs due from the other side.

### **Conditional fee agreements**

Sometimes your solicitor will make an agreement with you that, if you lose, he won't charge you but, if you win, he can charge you extra. This type of no-win, no-fee arrangement is called a 'conditional fee agreement'. The solicitor's normal charges are called the 'base costs', and the extra charges if you win are often called the 'success fee'. The purpose of the success fee is to compensate the solicitor for the risk he has taken, and the fact that he doesn't get paid until the case has been decided.

You will have to pay for your own disbursements until the outcome of the case is decided.

If you win, the success fee will mean your solicitor's bill is usually about twice the normal amount. But if, as is usual, the other side is ordered to pay part of your costs, and your disbursements, you will only have to pay the balance of your solicitor's fees. The court will only order the other side to pay that part of the success fee that relates to risk, not delay, and only insofar as the success fee is reasonable.

If you lose, you won't have to pay your own solicitor, but the court is likely to order you to pay a part of your opponent's legal costs. You will also have to pay the other side's disbursements, as well as your own.

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Your solicitor will advise you to consider insurance that will cover the other side's costs if you lose. If an insurer won't insure you, your solicitor must advise you what that means. If you win, you can claim the insurance premium back from your opponent.

How much extra your solicitor can charge you if you win is regulated in some circumstances. For example, in most employee/employer disputes, success fees are fixed.

### **Insurance generally**

You may find legal costs are covered under your business insurance - your brokers will tell you if you have. If so, you must notify your insurer and discuss your plans or the insurance could be invalidated.

You can also take out legal expenses insurance once a dispute has arisen - often called 'after the event' insurance. This can cover your own costs, and those of the other side if you lose.

### **Different rules for different tribunals**

There are different rules for costs in the employment tribunal, arbitration and mediation proceedings and other special courts.

### **The parties can agree costs**

If the parties agree how legal costs are to be paid or apportioned, the court need not make an award of costs.

If in doubt, take legal advice.