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Litigation Costs

Inside

Introduction

This guide provides a general introduction to the recovery of litigation costs from your opponent. It discusses general principles as well as issues that may arise during the course of litigation, providing practical guidance as to how to secure the best recovery.

Doesn't the loser simply pay the winner's costs?

A successful party is likely to obtain an order for costs in respect of some or all aspects of the case. However, it is important to appreciate that even if you are successful, it is rare that you will recover all your costs. There is always the possibility that your opponent might be insolvent. Even if they are solvent, the court will carefully consider whether the costs incurred are proportionate in all the circumstances of the case and, where a costs budget is required (see 'Costs budgeting' below), whether the successful party has exceeded any costs budget without good reason. Successful claimants will not recover costs which the court considers are disproportionate or which are over and above a court approved costs budget without good reason.

The making of an order as to costs is in the total discretion of the court. In certain circumstances, costs follow automatically. For example, when a claimant discontinues an action or when a Part 36 offer is accepted (see 'Tactical offers' below).

While the general presumption is that the loser pays the winner's costs (which is often referred to as "costs following the event"), this is not always the case. Sometimes the court may make different orders relating to different issues or stages in the case. Whether the court believes that a party is "successful" will affect its decision on costs. Therefore, losing on certain issues where the court considers that those issues should not perhaps have been raised, pursued or defended, may affect the way in which the court deals with costs.

Proportionality

The usual order made by the court is costs on a "standard basis". This means that the court will only allow costs which are proportionate to the matters in issue. When considering whether the costs are proportionate, the court will take into account, among other things, the amount claimed, the complexity of the dispute and the conduct of the parties (see 'Conduct of the parties' below).

Any uncertainty as to whether the costs were proportionate and reasonably incurred will be resolved in favour of the party required to pay those costs. However, proportionality is the overriding factor: even if it was reasonable and necessary to incur the costs being claimed, the court may reduce or disallow any costs it considers disproportionate.

Previously successful parties could expect an order entitling them to recover around 60-80% of their costs from their opponent. However, recent cases have focussed on whether costs are proportionate in all the circumstances of the case (including the judgment achieved). In practice this has meant that recovery is much more uncertain and difficult to predict.

Conduct of the parties

When considering the conduct of the parties, the court may consider, among other things:

- the parties' conduct before the proceedings commenced. This includes the extent to which the parties followed the relevant pre-action protocol. For example, a claimant may issue proceedings without first setting out for the defendant full details of his claim. In such circumstances, the court may penalise the claimant by making a costs order against him, even if he was otherwise successful. The reasoning behind this is that if notice had been given, the dispute may have been settled without the need for court proceedings (or the issues might have been narrowed with some areas agreed and disposed of). Equally, the court will consider efforts made by the parties before and during the proceedings to settle. In short, the court sees itself very much as the avenue of last resort;
- whether it was reasonable for a party to raise, pursue or defend a particular allegation or issue court proceedings in a particular way. For example, the claimant may have decided to pursue an allegation which was hopeless, for tactical reasons, to push the other party to a settlement. In such a case the court might conclude the claimant should have to pay the defendant's costs of defending that point;
- the level of "success" achieved by the claimant. If a claimant is awarded only a fraction of the amount it claimed (because, for example, it exaggerated the claim amount), the court may consider it appropriate to limit the costs the claimant

can recover to a proportionately small amount; and

- the way in which a party has defended his case. For example, a party who succeeds at trial might not have a costs order made in his favour because of an unreasonable refusal to agree to mediate (see 'Time to mediate?' below).

It is important to be aware that the conduct of either party at any point during the dispute can seriously affect the court's decision on costs, even where on the face of it there is only one winner.

Misconduct may result in…

As well as disallowing the recovery of one party's costs, the court has various other powers in relation to costs which may be exercised to reflect "bad behaviour" by a party. These include making an order for costs to be paid on the "indemnity basis" (rather than the standard basis described above) and/or ordering that interest be paid on costs between certain dates.

If costs are awarded on the indemnity basis, the court does not have to take proportionality into account. In addition, any doubts as to whether the costs were reasonable in amount or reasonably incurred will be resolved in favour of the receiving party.

Other than in the context of Part 36 offers (see 'Tactical offers' below), generally there are no set principles as to when costs will be awarded on the indemnity basis. Typically, something outside of the ordinary must have happened such as repeated breaches of court orders, dishonesty, a wholly unreasonable pursuit of a weak claim or an abuse of the court process.

Costs budgeting

Where claims are proceeding in the multi-track, parties are required to prepare a detailed budget of their estimated costs for each stage of proceedings (i.e. pleadings, disclosure, witness statements, experts, trial etc), except where the claim is worth more than £10 million. There are a number of other limited exceptions. Even for claims above this amount, the court has discretion to order costs budgeting and the parties may also apply for budgets to be used.

Budgets must be filed with the court and exchanged and discussed with the other parties. If the parties cannot agree the whole or part of the budgets, the court will make an order following submissions by the parties at a Costs Management Conference ("CMC"). Even if the parties agree each other's budgets, they still need those budgets to be recorded by the court.

The costs budget will include the costs incurred to date but the court will only make an order in relation to future costs. However at a CMC the court can record comments on the incurred costs (for example if it considers the costs incurred to date are unreasonable or disproportionate) which will then be considered at a later detailed assessment (see further below). The budget is binding in relation to the estimated future costs and when the court assesses the parties' costs at the end of the litigation, it will take into account the budget figures. Parties should not exceed their budget without prior approval of the court, unless there is a good reason.

"Pay as you go" costs orders…

Before an action reaches trial, a number of interim hearings often take place. When a hearing takes place prior to trial, the court may make an order that one of the parties should bear the costs relating to that specific hearing. The court may also decide at the end of the interim hearing the amount of costs that should be paid. Indeed, the court is obliged to summarily assess costs where an interim hearing lasts for one day or less, unless there is a good reason not to.

The costs summarily assessed must be paid within a very short period, usually 14 days. It is therefore important that you bear this in mind when considering the funding of your case and the interim steps you wish to take or contest.

When do I get my costs?

After judgment, parties should attempt to agree among themselves the sum which should be paid in costs. If the parties cannot agree the costs to be paid, the successful party's costs will be subject to a process known as detailed assessment.

Part of the rationale behind the introduction of costs budgets was that having a budget would reduce the need for an assessment of costs as the budgets should make it more likely that the parties can agree the costs to be paid. However, assessment may be needed if, for example, the successful party has exceeded their budget and the losing party does not agree to pay the excess amount.

Detailed assessment is carried out by costs judges who are familiar with the question of legal costs. The assessment must begin no later than three months after the date of the order providing that costs will be paid otherwise the receiving party's entitlement to interest may be lost. The assessment process may take some time to complete, depending on the complexity of the case and the workload of the costs court.

A party who obtains a costs order in his favour which is to be the subject of detailed assessment may apply for an interim payment on account of those costs. In most cases, the interim payment ordered will be a significant proportion of the costs claimed by the receiving party (generally 60-70% of the costs claimed).

Time to mediate?

The effect of mediation on costs

Mediation is a common type of alternative dispute resolution. If a mediation is successful and results in a settlement, it saves the time, stress and cost of fighting a dispute all the way to trial. Today, the use of mediation is actively encouraged by the courts.

Do I have to mediate?

In short, unless you have contracted to do so (check whether the contractual language is permissive or mandatory), the answer is no. That said, you may suffer adverse costs consequences if you are found to have unreasonably refused to mediate. Generally it is advisable for parties to engage in mediation. Where parties have a clear and mandatory mediation clause in their contract, the court will require the parties to mediate before coming to court.

Can the Court order parties to mediate if they don't want to?

Courts robustly encourage, but do not force, parties to mediate. For now the English courts have stopped short of saying they will compel parties to mediate. While the usual rule is that the "loser" pays the "winner's" costs, there have been a number of cases where a losing party at trial has argued that he should not have to pay the "winner's" costs because the "winner"

unreasonably refused an offer to mediate. However, it should be noted:

- the burden is on the unsuccessful party to show why the general rule of "loser pays" should not apply. He must show that the successful party acted unreasonably in refusing to mediate;
- a party's reasonable belief that he has a strong case is relevant to (but not determinative of) the reasonableness of his refusal;
- where a case is evenly balanced (which will often be the case as far as the court is concerned) a party's belief that he would win should be given little or no weight in considering whether a refusal to mediate was reasonable;
- a party who refuses to take part in a mediation despite encouragement from the court will usually be considered to have acted unreasonably (and so be penalised in costs); and
- where a party declines an invitation to mediate on the basis that it is made too early - before a full understanding of the parties' respective cases has emerged - this might not be considered unreasonable. This is particularly so where the refusing party makes an alternative (reasonable) suggestion to mediate later.

Today, a party who refuses to mediate when his opponent is willing to do so takes a significant risk that he will be penalised in terms of his costs recovery if he wins at trial. In short: if you want to litigate, you should also be prepared to mediate.

Tactical offers…

When the court's Civil Procedure Rules ("CPR") were introduced, one of the stated aims was "to increase the emphasis on resolution [of disputes] otherwise than by trial".

With that objective in mind, the court drew up detailed rules setting out the consequences of making or refusing certain formal offers of settlement. While the consequences depend on the final outcome at trial, the rules seek to encourage parties to reach a settlement as early as possible rather than go to trial. These rules are set out in Part 36 of the CPR.

A claimant risks penalties where he fails to obtain a judgment which is more advantageous than a defendant's earlier Part 36 offer. He may have to pay the defendant's costs from the date on which the relevant period specified in the defendant's Part 36 offer expired (which cannot be less than 21 days from the date it is made) together with interest on those costs.

Should a claimant obtain a judgment which is at least as advantageous as his own Part 36 offer, the defendant risks paying the following to the claimant:

- interest for all or some of the period starting with the date on which the relevant period specified in the claimant's Part 36 offer expired at a rate of up to 10% above the base rate on all or part of the sum awarded to the claimant at trial;
- the claimant's costs on an indemnity basis from the date on which the relevant period specified in the claimant's Part 36 offer expired (such that, in practice, the claimant is likely to recover a larger proportion of his costs from the defendant than he would otherwise have been able to);
- interest at up to 10% above the base rate on the indemnity basis costs awarded; and
- an extra amount of either: (i) a percentage of the sum awarded to the claimant; or (ii) where the award had no monetary value, a percentage of the costs awarded. Where the court has awarded up to £500,000 to the claimant, the claimant will receive an extra 10% of the amount awarded. Where the award is greater than £500,000, the Claimant will receive 10% of the first £500,000 and 5% of any amount above that figure subject to a limit of £75,000.

Note that in relation to any money claim or money element of a claim, "more advantageous" means better in money terms by any amount, however small, and "at least as advantageous" is to be interpreted in the same way.

In light of the above, a party who receives a Part 36 offer should think long and hard before rejecting it. At the very least it may be appropriate to respond with an offer, or consider revising the terms of any existing offer made. Ultimately, a party can gain a considerable tactical advantage by making a Part 36 offer early in proceedings, or in good time before costs are due to be incurred during a busy procedural stage.

Alternative fee arrangements

For some cases, it may be appropriate to enter into a Conditional Fee Agreement or Damage Based Agreement which provide that the lawyer's fees are only paid if the client is successful. Additionally, it may also be appropriate to enter into a hybrid Conditional Fee Agreement which provides that only some of the lawyer's fees are payable if they are unsuccessful. Such agreements often provide that if successful, the lawyer is entitled to charge an additional amount, known as a "success fee". However this additional element is only recoverable from the opponent in very limited circumstances.

It is worth noting that if unsuccessful, while the client will not have to pay its own lawyer's costs, it is still likely to have to pay a proportion of the successful party's costs. It is possible to obtain an after-the-event ("ATE") insurance policy to cover those costs. While previously a successful party could recover the ATE insurance premium from the losing party, ATE insurance obtained after 1 April 2013 is now only recoverable in very limited circumstances.

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