LEWIS SILKIN

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 problems 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, a losing party would usually be ordered to pay between 65% and 80% of its opponent's costs. This figure may be reduced if the court comes to the view that the costs claimed are either unreasonably incurred or unreasonable in amount. In some cases, the court will allow only costs which are proportionate to the matters in issue. Recent changes to the court rules mean that the amount the court may order could change but very little guidance has been provided by the court as to the interpretation of the new rules.

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.

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 certain issues should not perhaps have been raised, pursued or contested, may affect the way in which the court deals with costs.

Conduct of the parties

The court has regard to all the circumstances in the case - including the conduct of the parties - when deciding what order to make as to costs. Relevant factors can include:

- 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. The court sees itself very much as the avenue of last resort. Equally, the court will consider efforts made by the parties before and during the proceedings to settle;
- whether it was reasonable for a party to raise, pursue or defend a particular allegation or issue 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 those cases the court might conclude the claimant should have to pay the defendant's costs of defending that point;
- 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 'Mediation' below; and
- whether a party has exaggerated the value of his claim.

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 a finding of misconduct against either party. These include making an order for costs to be paid on the "indemnity basis" and/or ordering that interest to be paid on costs between certain dates.

The usual order is costs on a "standard basis". This means that the court will:

- only allow costs which are proportionate and reasonable to the matters in issue; and
- resolve any doubt which it may have in favour of the paying party.

However, if the costs are awarded on the "indemnity basis", the court does not have to take proportionality into account, and any doubts as to whether the costs were reasonably incurred will be resolved in favour of the receiving party.

On either basis, the court will not allow costs which it considers to have been unreasonably incurred or unreasonable in amount.

Other than in the context of Part 36 offers (see 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.

"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?

All costs (except those assessed summarily by the court) which a party to litigation is ordered to pay are subject to a process known as detailed assessment if they cannot be agreed between the parties. The assessment must begin no later than three months after the date of the order providing that costs will be paid otherwise entitlement to interest on the costs may be lost.

Detailed assessment is carried out by costs judges who are familiar with the question of legal costs. Before the process begins, the parties should attempt to agree amongst themselves the sum which should be paid in costs (meaning detailed assessment will not be required).

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 (commonly 60% of the costs claimed).

Time to mediate?

The effect of mediation on costs

Mediation is a common type of alternative dispute resolution ('ADR'). 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 (and 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 term 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: if you want to litigate, you should also be prepared to mediate.

Tactical offers…

When the court's Civil Procedure Rules ("the 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 construed accordingly.

Naturally, 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.

Costs shake-up...

A wide-ranging review of the civil litigation costs system was conducted relatively recently with the aim of promoting access to justice at proportionate cost. The final report published by Lord Justice Jackson on 14 January 2010 recommended changes to litigation procedure and costs management with the aim of making litigation more efficient and affordable. The primary legislation has since been enacted and applies to claims commenced after 1 April 2013. Further changes were made in April 2014. The main changes affecting the costs regime are as follows:

- Where cases are allocated to the multi-track, parties are required to prepare a detailed budget of their estimated costs for each stage of the proceedings (except where the amount of money claimed is £10 million or more or where the claim is a non-monetary claim which is not quantified or not fully quantified but the claim is valued at £10 million or more). It will be essential to prepare accurate budgets and keep them up to date.
- There is a new test for proportionality. The rule provides that if costs are disproportionate they may be reduced or even disallowed. Proportionality must also be considered when the court makes any order concerning the claim.
- There is more active case management by courts to control the content and length of witness statements and expert reports. Failure to abide by the court's directions may incur costs sanctions.
- Contingency fees or damages-based agreements are permitted for contentious work so lawyers can now work and be paid a share of the damages. The losing party would pay costs on the conventional basis.
- Generally speaking, success fees in Conditional Fee Agreements and ATE insurance premiums are no longer recoverable from the opposing party where the agreements are entered into on or after 1 April 2013. Previously insolvency cases enjoyed an exemption from this rule but the exception has since been removed.

For further information on this subject please contact:

Mark Lim
Partner
+ 44 (0) 20 7074 8186
mark.lim@lewissilkin.com

Frances Simm
Senior Associate
+ 44 (0) 20 7074 8312
frances.simm@lewissilkin.com

LEWIS SILKIN

5 Chancery Lane – Clifford's Inn
London EC4A 1BL
DX 182 Chancery Lane
T +44 (0)20 7074 8000 | **F** +44 (0)20 7864 1200
www.lewissilkin.com