**Notes by Lawrence Rodkin (Partner)**

**SIMONS RODKIN LITIGATION SOLICITORS**

**LITIGATION FUNDING**

These notes set out some issues in relation to costs of litigation claims and the funding options of litigation claims.

I considered these are important points to discuss (rather than setting out the type of work which my firm undertakes), because potential clients are always worried about legal costs. Cost funding issues need to be overcome before instructions can be provided.

**Time Costs and Fixed Prices**

Lawyers normally charge on a time spent basis and provide an hourly charge rate. For some commercial/conveyance transactions fixed priced costs can be agreed. It is very difficult to agree fixed prices for litigation work due to the difficulty in predicting the amount of work that will be required. This will depend upon various matters, such as the detail of the other party in defending the claim, as well as the relevant emails and other material which may be very extensive.

Time costs can be very expensive on the part of opposing solicitors.

**Ways of keeping costs within reasonable limits.**

1. Junior Lawyers

There are a number of ways to keep the price of litigation down. The first way is to instruct newly qualified lawyers/trainee barristers to undertake the relevant work at an agreed daily/half day charge rates. Relevant work includes preparation of trial bundles or disclosure lists which may take quite a number of hours to undertake. The indexing and numbering of documents can be particularly time consuming, and hence the usual delegation of such work to junior lawyers to save costs. The use of this method can seriously reduce costs, but should be used only in relevant cases where the junior lawyer can be properly supervised.

The use of junior lawyers may save considerable legal costs.

2. Budgets

The second method to keep costs down is to have a budget. Prior to starting litigation we always provide an estimate of costs which will be our estimated budget for the proceedings. The budget will always be discussed with the clients and if the proposed budget is too high it is possible to agree how to undertake the case within the clients own required budget.

However if the client suggests a figure which is too low to run the case properly, we reserve the right to turn away the instructions.

It is important to realize that participating in litigation can be a worthwhile exercise if reasonable budgets are agreed.

It may be possible to endeavor to meet required budgets, again, through the use of junior lawyers to undertake part or parts of the work.

As a comfort measure, it is possible to agree a costs authority for fees for certain cases. We are normally reluctant to agree to this as in litigation much work can be required to be undertaken at very short notice, particularly in relation to court hearings/ appointments.

3. Adverse Costs

If a litigation case is lost this is very bad news as it can lead to an adverse cost order. This means the other side can claim their costs from you. It is fairly easy for the other side’s legal costs to have run in the tens of thousands of even over one hundred thousand plus in large cases. Generally, not all costs are recoverable by the successful party – normal recoverability is between 60% and 80%.

It is possible to protect a client against an adverse costs order by three devices;-

1. Small claims jurisdiction - By initially limiting the claim to the small claims jurisdiction. The small claims track has a limit for claims to a maximum of £10,000 and within this jurisdiction only limited costs are generally recoverable. Such limited costs include court fees, expert fees and the costs of witnesses attending the hearing to give evidence.

Accordingly if you are only claiming a small amount under £10,000 you can largely avoid adverse risk exposure.

However I will add a word of warning, if a party conducts a case unreasonably then costs can be awarded against the unreasonable party even in the small claims jurisdiction.

A claim will be considered unreasonable by the courts if the claim has no merits or the defence of a party has no merits. The Court also views a party not complying with court orders etc as acting in an unreasonable manner.

1. Legal Cost Insurance – A person can also protect him/herself from legal costs by taking out insurance. Insurance can be taken out pre or post litigation.

A person can take out insurance pre litigation usually under a home contents or business contents insurance. However pre insurance cover can be quite difficult to secure in a home content or business content policy. You normally would have to support an application for insurance cover with a favorable Counsel’s opinion. Insurance companies also often require/encourage that you use a solicitor of their choice. However once proceedings have been issued you have a statutory right to choose your solicitor. To try and deter the use of outside solicitors insurers often offer very low rates to outside solicitors. However I am generally successful in challenging specified fees through the Ombudsman. We are very experienced in securing cover for insurance policies. This is generally difficult and we need to know what we are doing and be persistent. Insurance companies solicitors are usually in my experience are very junior and carry a heavy workload. Due to their pressure of work they can be at times a little slow to prosecute a claim.

Alternatively a person can acquire an insurance policy after or at the commencement of litigation. This is known as an after the event insurance policy. ATE policies can be relatively expensive, normally a third of the cost insured. They also generally require that the opponent is credit worthy or is covered by their own insurance policy and that you have a written Counsels opinion that you have a 60 percent plus chance of winning your case. Cost protection can also be protected under Part 36 of the Civil Procedure Rules. If the offer is not beaten at trial, the other side will be required to pay costs 21 days from the date of the offer as well as being liable for a 10 percent additional payment. In relevant cases, enhance interest can also be claimed.

1. No win no fee - There are two types of no win no fee agreements, the Conditional Fee Agreement (CFA) and the Damages Based Agreement (DBA).

A CFA is where there is a successful uplift. Only the basic costs may be recovered from the other party under the current rules of costs. If the case is lost, there are no solicitor’s fees – only out of pocket imbursements. However, if the case is won an enhancement will be added to the fees, which is typically between 25 and 100 percent. The enhancement cannot be recovered from the opponent, and so will be deducted from any damages recovered. There is normally a cap of about 33 percent of the amount of damages, subject to the success fee. If you lose the case you pay nothing save for your expert fees and out of pocket disbursements.

A DBA is when we agree a percentage of the damages will be taken in legal costs; this is usually about a third. Like with a CFA basic costs are recoverable under an adverse cost order and the percentage of damages we receive is an extra on top of that.

**Settling a Case**

The various litigation risks and the cost of litigation is why cases settle and it is fairly normal for cases to settle. The reason for this is there is no way to guarantee a person that they will win their case (a barrister will not usually give more than a 70% chance of successes) and even if a party wins they normally have unrecovered legal costs whilst if they lose not only will they have to pay the judgment debt but usually two sets of legal costs due to an adverse cost order.

**Mediation**

Mediation is a common method of settling proceedings. It involves an independent person, normally a lawyer trying to procure a resolution of a case at a meeting. There are normally joint and separate sessions with the mediator at the appointment. Mediation is a very effective way of settling a case. It is very rare for me to leave a mediation meeting without settling a case. If the case does not settle at the mediation appointment, there is a very good chance that it will settle within a few weeks once the parties have has the chance to reflect on their legal positions.

**Pre-Action Protocol Procedure**

This is mandatory prior to issuing proceedings. This involves a letter of claim sent in a prescribed format to the opponent. This usually requires a fairly detailed letter setting out the basis of the claim and the remedy/ remedies sought, along with other supporting documentation. The opponent will need to reply with a letter of response setting out in detail why they dispute the claim, and also provide any offers of settlement on a without prejudice basis. The Court rules also require the parties to consider mediation after the receipt of the letter.

I hope that these notes have been informative. I will be very willing to clarify any issues after the meeting.

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