

## Briefing Note: Costs in Litigation

### Introduction

This guide represents a summary note on the material provisions of the Civil Procedure Rules in so far as they impact on the costs of your claim. As ever, advice tailored to your specific circumstances will always be required. This guide should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

Legal costs in litigation and other dispute resolution processes (such as arbitration) are often significant and can be the cause of real concern. It is therefore important that you understand the following essential points:

### Expense

- Litigation is very often expensive. Furthermore, significant disbursements are likely to be incurred over and above our fees (for example, Court fees and barristers' fees) and, unless expressly agreed otherwise, these will need to be paid up front, on account.

### Cost/Benefit

- It is essential to regularly carry out a cost-benefit analysis in relation to your case. This should compare the costs that you are likely to incur, your prospects of recovering those costs from your opponent and the likely outcome of the proceedings.

### Who is to pay costs

- An award of costs in litigation (for example, to the winner) is always in the discretion of the court, save in very limited circumstances (for example, where a party discontinues its claim or where a settlement offer under Part 36 of the Civil Procedure Rules applies). It is, however, often open to the parties to agree provisions as to costs before an automatic rule applies or the court is asked to make an award.
- Where the court is called upon to make an award (which it will be after any contested hearing or trial) the general rule is that the loser pays the winner's costs; however, this is very often not applied in practice. It is simply a starting point and the court can (and regularly does) make a different order in its discretion.
- In deciding what costs order to make, the court must have regard to all the circumstances of the case, including the conduct of the parties. The court can reduce the winning party's costs if - amongst other factors - their conduct has been unreasonable.
- Relevant aspects of the conduct of the parties that the court may take into account include:
  - Conduct before, as well as during, proceedings.
  - Whether it was reasonable for a party to raise, pursue or fight a particular allegation or issue.
  - The way in which a party has pursued or defended its case, particular allegation or issue.
  - Whether a winning party has exaggerated its claim.
- All work that we carry out for you, as our client, must be paid for when we invoice you for it, whether or not the court says that you are entitled to recover all or some of your costs from your opponent.

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### Discontinuing a Claim

- If you instigate but then discontinue a claim, the standard rule is that you will be liable to pay your opponent's costs. This rule can sometimes be displaced, but only in exceptional circumstances. It is important to be aware of and to understand this rule before issuing and serving a claim.

### The amount to be paid

- Even where the court orders your opponent to pay your costs, this does not mean that you can recover everything that you have paid to us (in respect of legal costs and disbursements) from your opponent. 100% costs recovery is almost unheard of, even where the winning party has been emphatically successful. Indeed, it is likely that you will only recover a percentage of your costs, in which circumstances you will not recover the difference (i.e. between what you have paid or must pay us, and what you recover) from anyone else.
- If you are successful and obtain a costs award, it is normal for the parties to try and agree what proportion of your total costs should be paid by the losing party. If this is not possible, however, the costs have to be the subject of an assessment process where the court decides what costs can be recovered. Unfortunately, this can be like a trial all over again, albeit probably less lengthy and solely concerned with the question of costs.
- If costs cannot be agreed and they have to be assessed by the court, then there are two bases for doing this: the standard basis and the indemnity basis. The standard basis is less generous than the indemnity basis. In both cases, costs which have been unreasonably incurred, or which are unreasonable in amount, will not be allowed by the court. On an indemnity basis, doubt as to reasonableness is resolved in the favour of the successful party. On the standard basis, doubt as to reasonableness is resolved in favour of the losing party. Further, on the standard basis, the court will only order the other party to pay costs which are proportionate. When considering whether costs are proportionate, the court will assess whether they bear a reasonable relationship to factors such as the sums in issue, the value of any non-monetary relief, the complexity of the litigation and the conduct of your opponent. It is this assessment process that results in only a proportion of the costs you have actually incurred being recoverable from your opponent.
- For these reasons, the proportionality and reasonableness of any costs incurred is crucial. You should, however, appreciate that notwithstanding a reduction by the court in the amount of costs that your opponent must pay, as stated above, you must still pay us all of your legal costs and disbursements.
- Where costs are payable by one party to another under a contract, these costs are presumed to have been reasonably incurred and reasonable in amount, unless the contract provides otherwise. The presumption is rebuttable.
- The court also has power to award interest on costs and, in certain circumstances, an additional sum equating to 10% of the overall damages awarded by the court as a penalty.

### The Multi Track

- For the vast majority of cases allocated to the multi track (in simple terms, complex claims and claims with a value exceeding £25,000), the court will usually pre-manage costs. For legally represented parties, this will require the preparation of budgets for agreement by your opponent or approval by the court. This is known as 'costs management' and means that the court manages both the steps to be

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taken and the costs to be incurred by the parties to ensure cases are dealt with justly and at proportionate cost.

- Budgets have to be kept under review during the proceedings and updated, either with the agreement of your opponent or the approval of the court. Failing to comply with the rules and court timetable can result in the court limiting costs to an earlier outdated budget, or worse, limiting them to just applicable court fees, or striking out your case.
- Only proportionate costs will be approved by the court.
- Costs incurred are 'proportionate' if they bear a reasonable relationship to the sums in issue, the value of any non-monetary relief sought, the complexity of the case, additional work generated by the conduct of the paying party and any wider factors such as public importance.
- On an assessment of costs on the standard basis, approved or agreed budgets will only be departed from if there is good reason.
- We will endeavour to represent you within budgeted costs, but we cannot guarantee to do so and you will still be liable to pay all of our fees and disbursements if we do not.

### The Small Claims Track

- Most court claims are allocated to one of three tracks, depending (essentially) on their value and importance. Straightforward claims for £10,000 or less will generally be allocated to the Small Claims Track.
- Ordinarily, the costs that you incur in obtaining legal advice and representation are not recoverable in cases that are allocated to the Small Claims Track – only very limited costs (usually court fees and nominal fixed costs) are recoverable. This is so whether you win or lose. The practical effect of this is that it can be uneconomic to instruct us to act for you in a matter which is (or is likely to be) allocated to the Small Claims Track.

### Fixed Costs

- In some types of claim, the amount of costs you can recover is pre-fixed. Examples include residential possession proceedings and debt claims which are not defended. Again, where your costs recovery is limited in this way, you will still be liable to pay us all our charges and disbursements.

### Liability of non-parties

- In exceptional cases, costs orders can be made against people who are not parties to the litigation. This is relevant to both the winner and the loser. If the winner finds that the loser cannot pay, there still might be circumstances justifying an award of costs against someone else altogether. This is possible where the non-party not only funds the proceedings, but substantially also controls or at any rate is to benefit from them.

### Summary assessment

- On occasions, costs may be assessed after a particular application in litigation as opposed to after a trial (this is called summary assessment of costs). It is a rough and ready assessment which results in an order for an amount of costs to be paid within 14 days. This can happen even if you are the ultimately successful party in the overall litigation.

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- The assessment of costs after the conclusion of the litigation is a longer, more formal, process and can take months to conclude. This process can be quicker in circumstances where there are agreed cost budgets given that a court will generally not depart from such approved or agreed budgets unless satisfied that there is good reason to do so. Costs management aims to reduce the need for detailed assessment of costs at the end of a case but it does not do away with it altogether. There is little guidance on what is 'good reason' and the bar is expected to be set high. If costs claimed exceed a budget, then challenges on assessment are, however, more likely to succeed, as the party who is claiming costs will have to justify his higher costs.

### Recovery from the party liable

- Even if you are successful in the litigation and obtain a costs order against your opponent, there is no guarantee that your opponent will be able, or willing, to pay the costs. If this is the case, then the costs award can be treated like any other monetary judgment and enforced. However, again, this is no guarantee of payment. As before, you must still pay us when we invoice you.

If you would like to know more about this topic or our legal services, please contact Jeremy Laws on 01323 435900 or [jpl@gabyhardwicke.co.uk](mailto:jpl@gabyhardwicke.co.uk)

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