

## COSTS

### 1. **Introduction**

Going to law is notoriously expensive.

The Civil Procedure Rules introduced in April 1999 have the following objectives:

- To minimise the cost of litigation.
- To ensure the winner does not recover excessive costs bearing in mind the sum in dispute.
- To create transparency on costs – between the solicitor and his/her client and between opponents.
- So far as possible, to create a level playing field between the parties.
- To encourage the parties at all stages to agree a solution, but the earlier the better.

### 2. **Early resolution**

The emphasis throughout the rules on early resolution, before issue of court proceedings or at least before trial, assists these objectives being achieved. There are nasty stings in the tail for those who do not settle early. These have to be remembered throughout a case. Their effect governs how the case is run.

An offer to settle \* has a variety of stings in the tail, intended to encourage acceptance.

### 3. **Pursuing an issue**

No party should pursue an issue unless either well placed to win it or it is vital to the success of the case as a whole and the risk of losing is justified. This is because the court can award costs against the party who loses an issue even if that party wins the case as a whole. This applies whether the issue is a subject of a special (interim) hearing before trial or is just one of several issues at trial. No longer can a party put every possible hurdle in the opponent's way and recover all the costs of the action if the opponent fails at the last hurdle.

If any issue is resolved at an interim hearing, the court can be expected to order the loser (on that issue) to pay the costs of it and will decide how much these are in money terms there and then. The amount so ordered is payable within 14 days. This applies even if the losing party is insured or has a conditional fee agreement or any other contentious business agreements. Many insurance policies state that the insurers will only pay out if the insured loses the case as a whole. Exceptionally, the court may be persuaded to postpone payment until later, e.g. the end of the case.

### 4. **Estimating costs**

To achieve costs transparency, all solicitors must estimate the likely costs of a case (or the immediate stage at least) at the outset and as the case progresses. On the Multi Track\* there are court hearings where the costs to date and the increasing forecasts must be made clear to both sides by their solicitors. This information must be given openly in front of them and the court.

## 5. **Recovering costs**

Proportionality governs. Only rarely will a winner be able to recover from the loser any costs in excess of those the court thinks, with the benefit of hindsight, were in proportion to the sum in dispute. This is a strong incentive not to incur greater costs than is absolutely essential. This will lead to solicitors deliberately not covering all possible angles or contingencies, unless the client knows that the cost of doing that may well not be recoverable (even on success) and requires it to be done.

Small claims track\*: Generally, of the legal representatives' charges only the costs of issue are recoverable by the winner.

Fast Track \*: A table sets out the amount recoverable by the trial winner in respect of his/her advocate's fees for preparing for and presenting the case at trial. At the end of a Fast Track trial the parties should expect the court to decide there and then the amount of costs payable by the loser to the winner. That will be for the case as a whole, including all the pre-trial work as well as the trial costs. That amount is payable in 14 days.

Multi Track\*: The amount payable by the loser is decided differently. The opposing solicitors will generally try to agree a sum. If that fails, the court will conduct a "detailed assessment". Here, a law costs draftsman will analyse the case papers and prepare an itemised bill. The cost of this is generally 6% to 7% of the solicitor's fee (plus VAT). The solicitors will both have to do more work. There may be another court hearing. An additional court fee is payable. All the extra work is chargeable. The cumulative effect of all this can be very large. The paying party should seek protection by making a "Part 36 Offer to Settle" \*.

## 6. **Legal aid**

If a Fast Track case winner had legal aid for the case, the detailed assessment procedure must be followed. The court will not be able to proceed as outlined above.

If a loser of a case on a Fast Track\* or on the Multi Track\* had legal aid, the winner will be unlikely to recover any costs from the loser. There are rare exceptions.

When the court decides who is to pay what costs, it will consider the following:

- any Part 36 (or any) offer to settle\*
- whether the loser won on some issues
- the conduct of the parties before and during the case. This encourages parties to be open with each other at all times - e.g. to provide evidence at an early stage and to not "ambush" the opponent. It also encourages co-operation with each other and the court to get the case resolved fairly, by trial if necessary but preferably by agreement as soon and as economically as possible. The court may even penalise in costs a party who wins on all issues, for exaggerating their case or otherwise not assisting the opponent and/or the court to achieve justice economically and fairly.

## 7. **Interest**

A penalty the court can impose is to order the payment of interest on costs, not only from the date of judgment but for any earlier period. This is likely to be done if the court disapproves of the way the loser contributed to the fair resolution of the dispute or failed to do so.

8. **Sanctions**

If the court orders a step to be taken by one or both of the parties, usually by a specified date, and a party fails to obey that order, the court may impose a sanction. That can include ordering the offending party to pay their opponent's costs, even on the indemnity basis (see below).

9. **Standard vs indemnity costs**

Costs are awarded on a standard or indemnity basis. The differences are:-

- Indemnity costs are not confined to being in proportion to the sum in dispute, although they still have to be reasonable.
- In respect of indemnity costs it is up to the paying party to show that an expense was unreasonable to incur or unreasonable in amount. In respect of standard basis costs it is up to the receiving party to show their reasonableness.

There are specified amounts which can be recovered on success in some circumstances. Usually the actual cost incurred is greater, possibly materially so. Examples are:-

- For starting a claim (fixed according to the sum claimed).
- On entry of judgment (depending on the circumstances).
- For service of a document (depending on the circumstances).

As the detailed assessment procedure takes time (usually months) the court is likely at trial to order the paying party to pay within 14 days a substantial proportion of the likely total costs liability. Credit will be given for the sum so paid against the final amount payable when quantified.

10. **Hart Brown's charges**

You are liable to pay our fees, VAT and disbursements in full when we invoice you even if an award of any kind has been made in your favour. Delay by your opponent in paying does not mean that you can delay paying us.

11. **No guarantee of success**

It is important to be aware that no litigation case is guaranteed of success. Although a winner can still hope at the end of the day to recover his or her costs of the case, the nature and amount of the costs recoverable are likely to be significantly limited. This is especially so if the winner:-

- Ought to have accepted an Offer to Settle.
- Did not win on all issues.
- Did not conduct the case fairly and openly at all times in view of the court.

- Incurred expense which was disproportionate to the sum in dispute, in the view of the court.
- Exaggerated his or her claim.

No case should be started without appreciating the real possibility of losing and having to pay not only your own costs (including disbursements) but also your opponent's recoverable costs (including disbursements).

This fact sheet only applies to actions proceeding in the County Court or the High Court.

**NB** *The above notes are intended as general guidance only. For more detailed advice on how these matters affect you please contact the person dealing with your case.*

*This fact sheet should be read in conjunction with our fact sheets on the General Framework, Small Claims Track, Fast Track, Multi Track and Offers to Settle.*

\* See separate fact sheet on this subject