Devonshires solicitors

DBULLETIN

Risk Free Litigation

This is an overview of a new litigation model that can create risk free litigation by your own lawyers working on the basis that they do not get paid unless they succeed (by winning at trial or settling the case) and then the other side paying their costs. In addition, insurers will put in place cover to protect you from the other side's costs if you lose and with a structure whereby you only pay the premium if you win and then you can seek to recover it as part of your costs.

Then

Historically, the three main reasons why individuals and organisations have chosen not to pursue claims through the Courts have been:

- Expense - Litigation can be very expensive, particularly when a team of solicitors and barristers are required;
- Risk - The risk of losing, with the resultant liability for both party's costs; and
- Winning - Not every case provides a full recovery as, even if parties are successful, they do not recover all of their costs.

Now

The Rules of Court and funding market have now changed to permit solicitors and barristers to act on Conditional Fee Agreements (CFAs, often mistakenly referred to as No Win No Fee agreements). Such agreements can have the effect of limiting, or in some cases eliminating, the above risks and can be entered into where a claim has a better than 50% chance of success.

If solicitors advise good prospects of success and back that advice by entering into a CFA, they can earn a success fee if the case is won. That sends a powerful message to opponents in a case as they are then aware that the solicitor is acting in the case at risk. Under a CFA, the solicitor's base fees and success fee are only payable if the case is won and, thereby, by the losing party.

CFAs

CFAs are a new way of working which create a quasi partnership between a client and their solicitor. Both parties have a stake in the success of the litigation. Whilst CFAs are obviously detailed commercial documents and this pamphlet does not intend to advise on their specific content, amongst other things the client must ensure that all relevant facts and documents are disclosed to their solicitor in advance of the agreement and the solicitor retains the right to cease acting if a client rejects what he regards as a reasonable settlement offer or if the client fails to disclose all relevant material and facts.

Liability for Costs

The benefit of a CFA is that a client with a good case can now avoid having to pay their own solicitor's costs and, if agreed, this can extend to Counsel's fees. Further, clients can seek to insure against the risk of paying their opponent's costs in the event that they are not successful. Payment of the premium can, in some cases, be deferred to the conclusion of the case and will then only be paid if the case is won. Such premiums are recoverable as part of the costs awarded in the event of success.

If the case is lost, your insurers will bear the insurance premium and the costs of your opponent, and you will not be liable to pay any fees to your solicitor.

CFAs cannot extend to experts, who must be paid to maintain their independence, or to other out of pocket expenses such as Court fees.

As an alternative to a CFA, third party funding is also now permitted. This enables a funder to meet the costs of a case, in whole or in part, in return for a share of any damages awarded. These arrangements are usually agreed on the basis that the funder meets the other side's costs in the event that the claim is not successful. Again, this pamphlet does not intend to advise on the specific content of such commercial deals.

Passing Risk to Solicitors

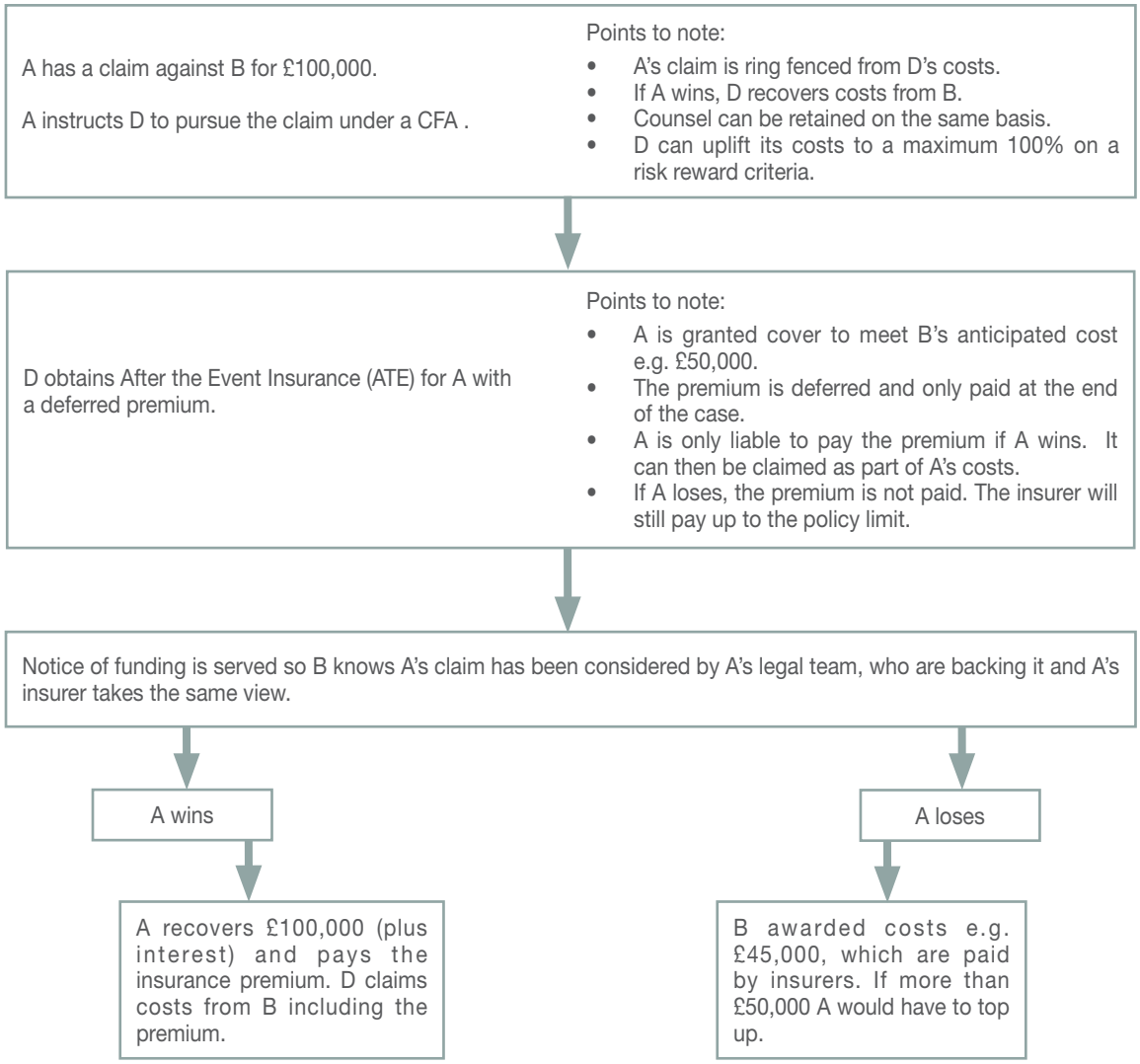
The most important benefit of either of these arrangements is that the historic risks of litigation can be eliminated. Equally significantly, solicitors will be genuinely incentivised to win their client's case as if they don't, they won't be paid.

There are, however, some cases where there is a difficulty in assessing the chances of success or of recovery. In such cases, solicitors may not agree to work on a CFA and a third party may not agree to fund them. In cases such as those, we are now permitted to agree differential rates – for example a discounted rate in the event the case is lost and an enhanced rate in the event that the case is successful. Such enhanced rates can be claimed as costs in any costs recovery exercise.

Risk Free Litigation

CFAs in Practice

The diagram below demonstrates how CFA litigation funding can be used by a Claimant with "After The Event" insurance to provide a platform in which the risks of litigation can be greatly diminished.



Fed up with Hourly Rate Litigation?

If you have a claim that you wish to pursue and are looking for a better funding solution than merely paying a solicitor an hourly rate, please speak to us as we may be able to eliminate your responsibility for costs whether you win or lose the case.

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The content of this article is intended to provide a general guide to the subject matter and does not constitute legal advice. Specialist advice should be sought about your specific circumstances. Please contact a member of the team for further assistance.