

Litigation Costs – An Overview

The general rule in litigation is that the losing party is ordered to pay the successful party's legal costs. Unless the order states to the contrary, a cost award is payable in full within 14 days of being made.

How is liability determined?

In practice, it is not always clear cut which party has "won" (for example if a claim or defence had succeeded in part only), so it is more complicated than just applying a general rule. The Court has a wide discretion to make costs orders and will consider more than just the bottom-line outcome of the case, including:

1. Allocation to track

If the proceedings are defended the Court will then have to make decisions about case management and allocation to track. The track that a case is allocated to has significant implications in relation to management and recoverability of costs.

- If the amount claimed is less than £10,000 and/or is not of particular complexity it is likely that it will be allocated to the Small Claim Track of the County Court. If that is the case the Court has a limited jurisdiction to award costs and will only do so on very rare occasions. One should approach litigation in the Small Claim Track under the presumption that neither side will be awarded any legal costs (beyond certain modest "fixed costs" set by the Court).
- Higher value claims will either be allocated to the Fast Track, Intermediate Track or Multi-track. Costs are recoverable in principle in those tracks but subject to differing cost management regimes.

2. Conduct

The Court will look at the way the parties have conducted themselves both before and during the proceedings, in particular:

- whether a party has been reasonable in the way that they have pursued their claim or defence;
- whether a party has failed to comply with the Civil Procedure Rules; and/or
- whether a party has adopted a reasonable stance in negotiations.

How is the amount determined?

Court fees paid by a successful party are usually recovered in full (this also applies in the Small Claims Track).

The position in relation to solicitors' costs is more involved. There are two main areas to consider: assessment of costs and cost management.

1. Assessment of costs

There are certain circumstances (chiefly hearings of interim applications and cases disposed of by trials lasting a day or less) in which the Court can "summarily assess" the costs payable. If that is the case, the Judge will be able to go through the costs there and then (which will be set out in a cost schedule) and decide the amount payable.

If summary assessment is not available, the Court will not decide the amount payable there and then but will still be able to determine liability for costs (who pays) and whether costs are to be assessed on the Standard Basis or the Indemnity Basis. The Court can also order payment of an appropriate initial sum on account.

If costs are awarded on the Standard Basis, the party with the benefit of the cost award will have to show that their costs are reasonable and proportionate. The process usually results in recovery of 60 – 70% of total costs incurred.

If costs are awarded on the Indemnity Basis, then it will be for the paying party to show why the costs claims are not reasonable, however it is not necessary for the costs to be shown to be proportionate. That process usually results in recovery of 80 – 90% of total costs incurred.

If the amount of costs payable cannot be agreed, then the party with the benefit of the order can commence detailed assessment proceedings by serving a bill of costs. The other side will serve points of dispute and if an agreement still cannot be reached then a hearing date is requested for a judge to determine the amount of costs payable.

Detailed assessment can be a costly and involved process and will usually involve instructing a costs draftsman.

2. Costs management

In the Fast and Intermediate Tracks, there is also a regime of fixed costs which predetermines costs that are recoverable against the other side for certain specific stages of the case.

In higher value cases, costs will be actively managed by the Courts with the parties having to produce "cost budgets", sharing information about their costs incurred and estimated further costs before the first Case Management Conference (CMC) or Costs and Case Management Conference (CCMC).

The Court will consider, amend and approve the parties' budgets. Parties will only be able to recover the amount approved in the agreed budget, unless there is good reason to depart from it, although if there are unforeseen developments it may be possible to vary cost budgets.

If the winning party has run the litigation in accordance with its costs budget, the Court may simply award costs on that basis, however the Court retains the discretion to assess the costs in any event.

Our fees

A significant part of our role when acting for litigants, is to ensure they have the maximum cost protection. It is an ongoing process during the case and merits careful consideration.

We do not work on a "no win no fee" basis, called conditional fee arrangements (CFAs).

Your liability to pay our fees is as agreed between us and is entirely unrelated to the extent to which you recover costs in the litigation.

You should be aware that, even if you do succeed in your claim and are awarded costs, it is highly likely that there will be some shortfall in respect of our total fees for the reasons explained above.

For further information contact:

Ben Pearson, Partner, Wimbledon Village office
020 8035 0389 ben.pearson@peacock-law.co.uk

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These notes are for general guidance only. The legal position may alter from time to time. You should seek advice on your individual circumstances before making any decisions. We cannot take responsibility for action solely based on these guidelines.