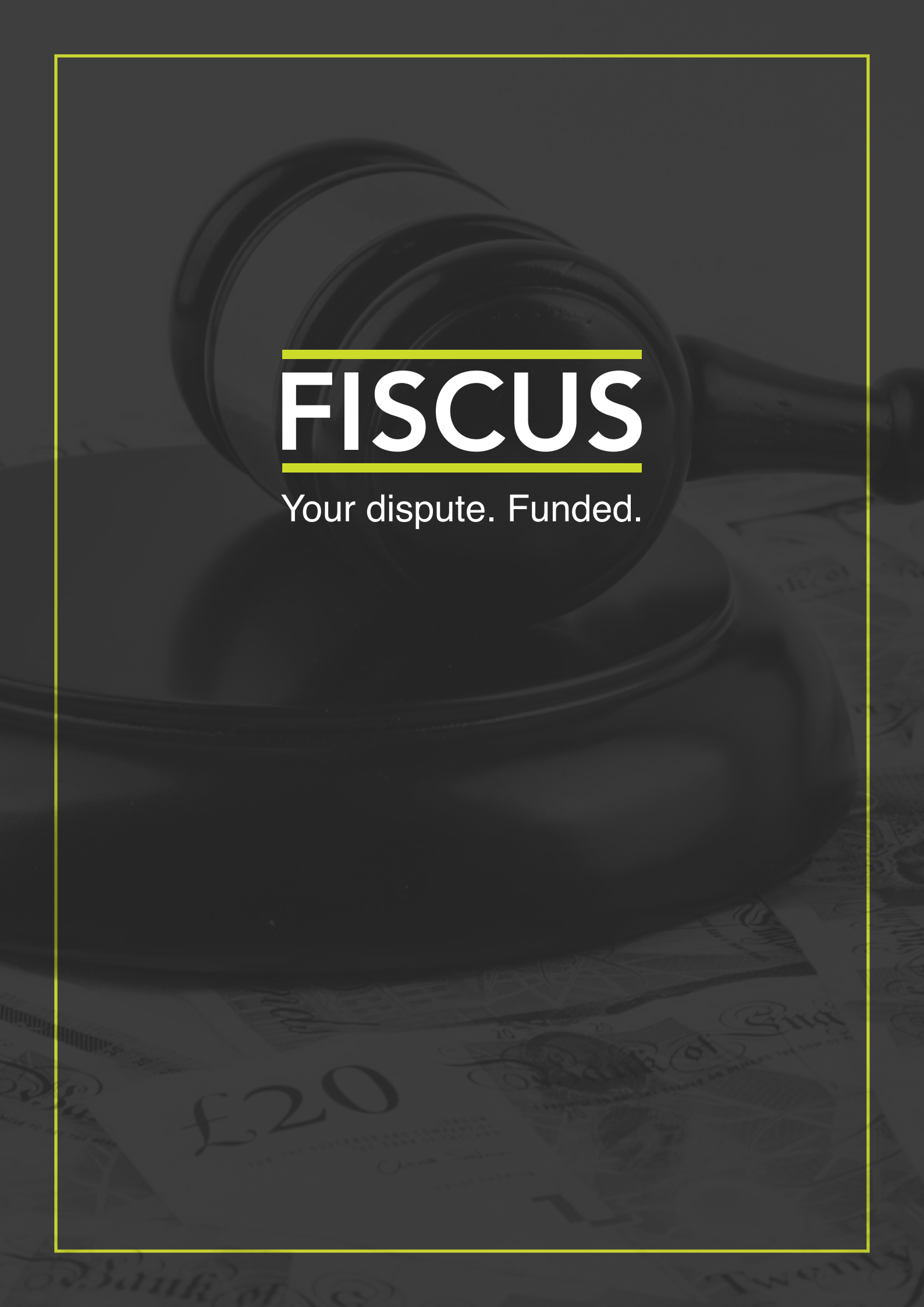

FISCUS
Your dispute. Funded.

Introduction

Gemma Carson
Partner

What is FISCUS?

Businesses no longer need to invest and risk their own capital to fund a legal claim. Fiscus, meaning "money-basket", is our litigation finance and insurance solution which helps our clients to manage the financial risk of litigation and to move those costs off their balance sheet.

We recognise that disputes can divert valuable resource and time away from a business' core objectives, prohibiting growth, expansion and ultimate success. It is natural for businesses to be wary about bringing a claim when a dispute arises, but the wealth of funding options available means that if you have a winnable claim you may no longer need to be deterred from pursuing a good claim.

A rise in the use of litigation funding

Historically, it was illegal for a third party, who had no active involvement in a dispute, to fund it. The law has since changed and the business of investing in litigation claims is growing, with funding arrangements being an accepted and valued means of financing litigation.

The change in law has not been driven by the desire to fuel satellite litigation and a claims culture, but as a result of a wider recognition that access to justice was being limited to those who had significant available funds to fight their corner. It was not just the amount of a party's own legal costs that was shelving good claims, but the diversion of that capital away from the other needs of the business, the risk of losing that capital if the claim was lost, and the risk of receiving a bill for the opponent's costs.

All of these factors have in recent years resulted in businesses abandoning good claims, chalking disputes up to experience and walking away. There will still be situations where litigation is not commercially viable, but where the only barrier is the investment of capital in cost outlay and the financial risk of losing, businesses now have a plethora of funding options available to them, meaning that the claim can proceed at a reduced risk and sometimes risk free.

A good claim is an asset to your business and we can help you to realise it.

The common misconception of litigation insurance and funding

It is a common misconception that litigation finance and insurance is only for those who cannot fund litigation themselves. Whilst it does enable those without funds to bring a claim, it is equally applicable to businesses who have the funds to meet the cost of litigation, but who do not want to divert those resources away from the development of the business. Even large corporations are now financing disputes through third party funding to remove the cost of litigation from their balance sheets. This creates an opportunity to hedge risk.

When might you wish to use litigation funding or insurance?

Some litigants apply for litigation funding to pay their legal costs because without it they would not be able to afford to pursue an action at all. But this is not the only situation in which litigants seek to use litigation funding. Some litigants, despite their ability to fund the litigation on their own account, would rather take the option of the support provided by a litigation funder. This may be because:

- They prefer to share or transfer the risk of pursuing the claim (even though they will have to pay some of the damages to the funder if they are successful).
- Legal budgets are limited and third party funding allows a company with multiple claims to finance more actions than their limited budget would otherwise allow.
- It is commercially convenient to take the cost of funding litigation off the company balance sheet completely.

This guide is intended to assist you in understanding:

- how we can help you conduct a cost/benefit analysis for fighting your dispute
- the funding options that may be helpful to you in fighting your dispute;
- the potential costs, liabilities and procedures involved in litigating a dispute.

The impact of disputes on businesses

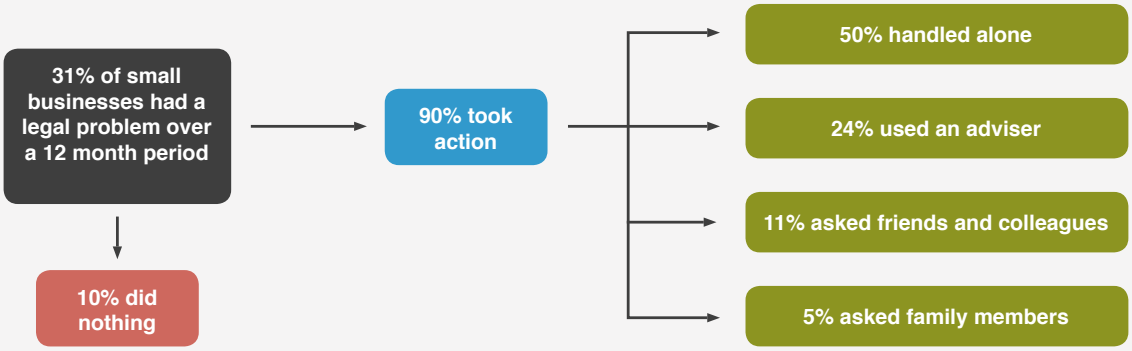
The reluctance of businesses to use lawyers

In February 2018 the legal services board published its third research report focusing on the legal needs of small businesses. It identified that businesses had a wide variety of legal problems.

This means that businesses need access to lawyers who have a wide range of service offerings, being a 'one stop shop' in respect of any dispute that arises. The report showed, however, that less than 1 in 10 businesses had in-house legal support, or had a retainer with a law firm, and when external advice was sought it was more often from their accountants than legal advisers.

Businesses understandably do not want to spend valuable time shopping around for the most appropriate lawyer to deal with their dispute, especially if there is some urgency to take action. It is often easier to contact the adviser they have used before, regardless of whether they have the appropriate expertise to provide the best practical advice. This is demonstrated by the results of the report which show that only 22% of businesses shopped around for their adviser. Simply using the adviser you already know, or seeking advice from a non-lawyer, may not be the best option for your business for the following reasons:

- accountants will not be able to fully advise you on legal matters and are not insured to do so
- existing lawyers may not have the best expertise for your particular dispute
- the legal adviser may not offer a flexible and knowledgeable approach to the full range of funding options available to you
- the legal adviser ideally needs to offer a range of specialism and services so that going forward you can be confident that using the same law firm for all your disputes is the best option



The majority of businesses are not seeking professional legal advice at all in respect of their disputes

The report identified that small businesses tend to have a greater need for external business support than larger businesses, especially where there was not the budget for in-house legal advisers, and yet their research showed that only 24% of businesses that had a legal problem sought help from a professional adviser.

Of the 76% that did not seek professional legal advice, 10% took no action at all, shelving the claim and losing the potential business asset or paying up even if they felt their opponent was not entitled to the money. 16% approached non legal advisers meaning that they may not have received the best advice or guidance regarding their dispute and 50% handled the dispute alone.

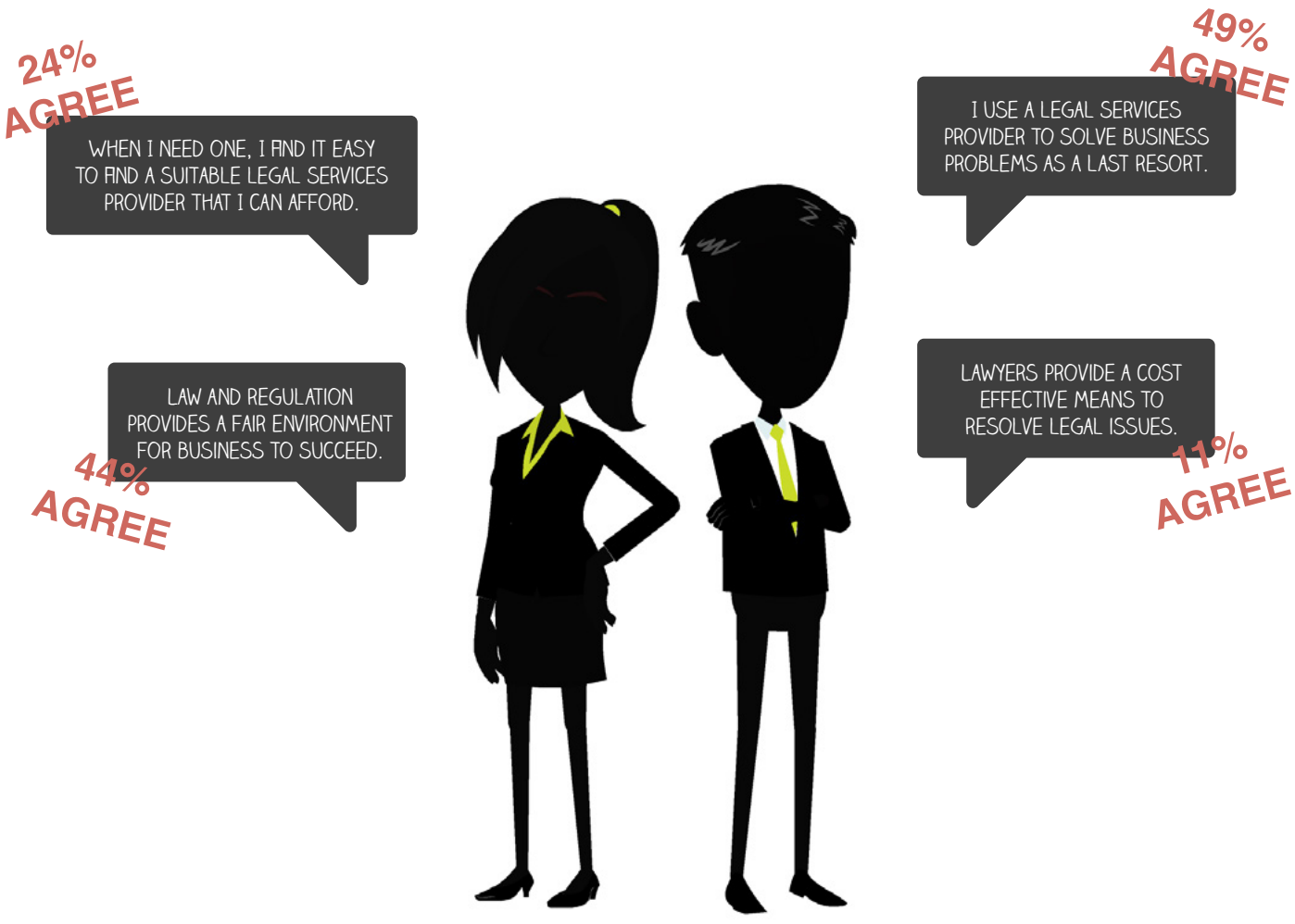
That means that a lot of businesses are retaining the burden and cost of the dispute within their companies, using up valuable time and resources that could be better spent invested in their business.

It also means that those companies may not have been dealing with the dispute in the most effective way to achieve the best result for the business.

Why do businesses choose not to use a legal adviser?

The report identified that only 11% of the businesses asked felt that lawyers provide a cost effective means to resolve legal issues and of those that had used an adviser, only 20% agreed with that statement. 49% felt that legal advisers should be consulted as a last resort and only 24% considered it easy to find a lawyer they could afford.

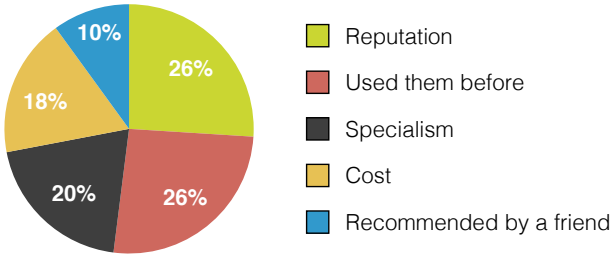
Clearly there will be some disputes which, due to their relatively low value, will never make commercial sense to pursue through litigation, however, those cases are the minority and even where litigation is not commercially viable, dispute resolution lawyers should be able to offer clients alternative options for effective negotiations and practical resolutions.



22%
SHOPPED AROUND
FOR A PROVIDER

50%
of those who shopped around
FOUND IT **EASY TO COMPARE**
PROVIDERS

Top 5 most important factors in choosing a provider



Frequency of problems

20% **Employment**

20% **Trading**

7% **Tax**

6% **Regulation**

5% **Premises**

3% **Business Structure**

3% **Intellectual Property**

2% **Debt**

2% **Other**

Businesses need a ‘one stop shop’ law firm

At Wright Hassall we welcome the opportunity to be your first port of call when disputes arise, for you to ask questions and seek quick, practical and cost effective advice in those circumstances where you need an instant professional sounding board rather than formal legal action.

Early involvement of your legal team can often facilitate a resolution more quickly. This is because we can;

- swiftly identify the strengths and weaknesses of your position
- highlight your legal rights
- propose practical and commercial solutions
- review documents or correspondence before it is sent out

This ‘behind the scenes’ service means that you can protect your position without the other party knowing that you have involved lawyers, which can sometimes inflame a business to business negotiation if the parties are still entering into reasonable correspondence.

Where the dispute does require legal action, we will work with you, adding value to your business and exploring the suitable funding options with you to ensure that our services are cost effective and there is a financial benefit in pursuing your claim.

Wright Hassall can offer:

- annual retainers for general advice meaning you can pick up the phone at any time and receive instant advice
- fixed fees for general advice retainers or monthly/annual budgets
- straight forward practical advice which may help you to find a resolution in one phone call
- if litigation is required, a transparent and detailed cost/benefit analysis of the likely costs of resolving your dispute and the prospects of recovering those costs from your opponent.

The cost/benefit analysis

Deciding how to proceed

Before you can make any decision as to whether you wish to pursue or defend litigation, you will need to know how much the process will cost, when the fees will need to be paid and the options for funding the likely costs. Litigation can be expensive, however there are various ways in which the costs of litigation can be managed, budgeted or funded.

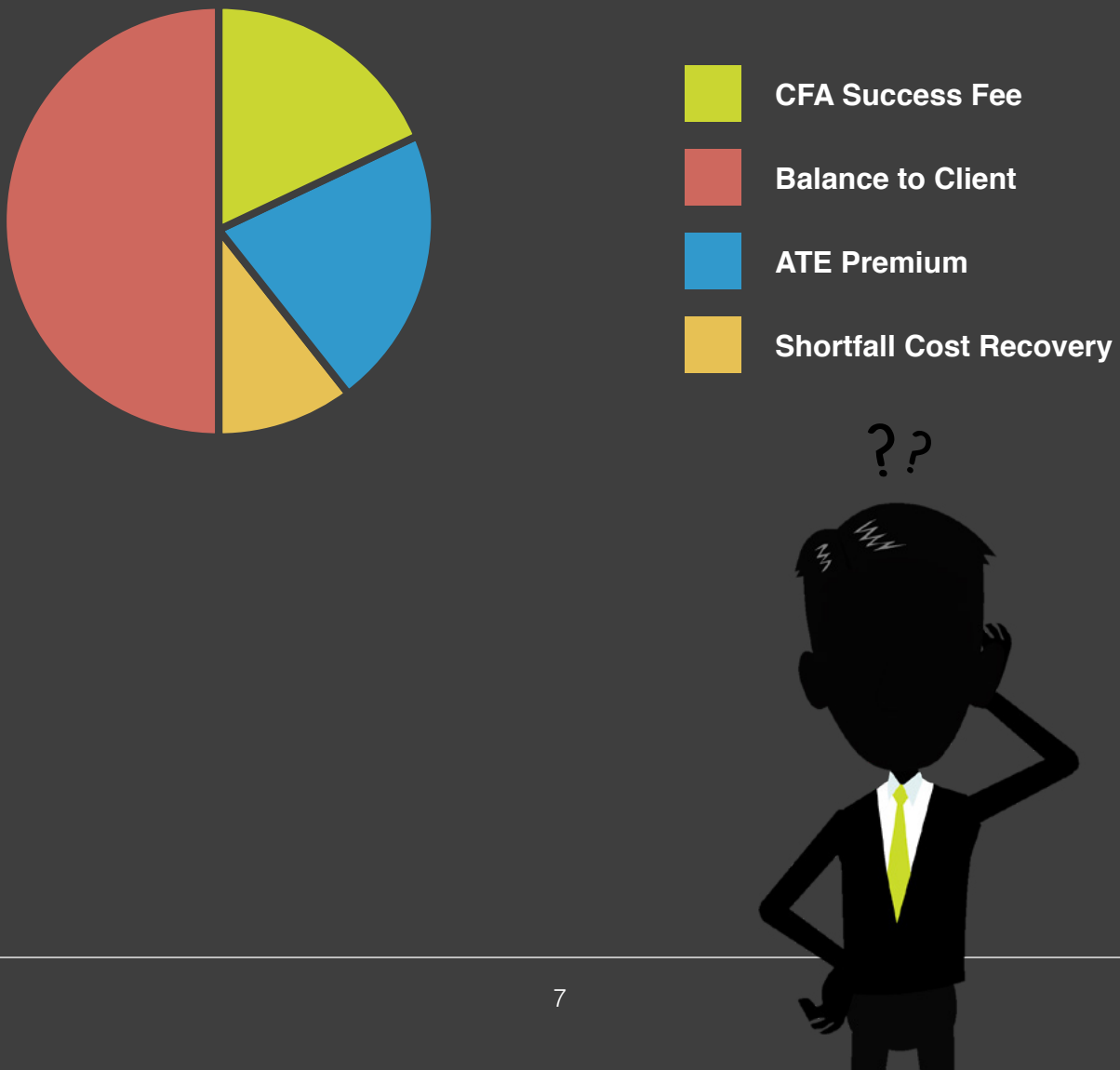
At Wright Hassall we take a flexible approach to funding and are willing to share some of the risk with you in appropriate cases. We have the knowledge and experience to present suitable options to you, including the combining of different funding arrangements to reduce your overall financial risks as much as possible.

We strive for a no-nonsense approach, offering transparent and clear information on the likely costs of resolving your dispute at the outset.

Finding the right funding solution - conducting a Cost Benefit Analysis for you

When considering the funding options available, we will conduct a cost/benefit analysis for you to work out what the likely costs and liabilities will be so that you can make a commercial decision as to whether the overall financial benefit it still one which is worth pursuing, once the expenses of litigating are paid for.

The balance of monies to you, after the dispute has been concluded either through settlement or final hearing, needs to be worthwhile.



A practical example of the difference that funding can make to litigating a dispute

Details of the dispute:

- A client with an annual turnover of £1.5m has a contract dispute worth £750,000.
- The company is rapidly expanding and needs all available capital to invest in expansion.
- Litigation is a distraction from business as usual and the directors don't want to invest money in it
- The directors are also concerned about the potential liability for costs if the dispute is litigated
- The solicitors have estimated £350,000 in respect of their owns costs
- It is likely that the opponent's costs will be a similar level (£350,000)

Outcome 1

The directors decide to proceed on a private paying basis. The costs/benefit analysis table below shows the likely financial outcomes if the claim is won or lost. The analysis assumes an award of £750,000 + £250,000 towards own costs if the claim is won (total £1 million). In this example, you receive £650,000 out of the total £1 million recovery after paying for your own irrecoverable costs and expenses if you win.

If, however, the claim is lost, meaning that nothing is received in respect of your claim and you are ordered to pay your opponent's costs in addition to your own, the picture is not attractive. The risk of losing exposes you to £600,000 in costs alone.

WIN	LOOSE
Total Sum Awarded (£1 million)	No Damages Awarded
Less WH irrecoverable costs (£100,000) (your liability)	Less WH Costs (£350,000)
Less £250,000 in respect of the costs recovered (payable to your solicitor)	Less Adverse Costs (£250,000)
TOTAL: £650,000	**TOTAL: -£600,000**

WIN	LOOSE
Total Sum Awarded (£1 million)	No Damages Awarded
Less WH Costs irrecoverable (£100,000)	
Less costs payable to WH as recovered from opponent (£250,000)	No solicitor's costs payable
Less Success Fee (£50,000)	No success fee payable
Less ATE Premium (£100,000)	Premium is self-insuring
TOTAL: £500,000	**TOTAL: £0,000**

Outcome 2

The directors could, however, take advantage of funding to pursue their claim so that they can use the business' available cash to expand the business and have the litigation funded.

By putting in place the appropriate funding, the directors can reduce their financial liability should the claim fail. In the example below, where a Conditional Fee Agreement and After the Event Insurance is used, the financial risk of losing is entirely taken away. Whilst this reduces the amount ultimately received if the case is won, it is the price of protection should you lose. Businesses would often prefer to buy off the risk of losing by accepting a lesser amount on success. The cost of buying off that risk in this example is £150,000, significantly less than the potential financial exposure of £600,000 in outcome 1 where no funding is utilised. The directors can still use their available money to expand the business and have the litigation funded. The alternative is that the claim is not pursued because the financial risk of losing is too great and could be damaging to the business.

The funding options

The different types of funding

The types of funding that may be available and suitable for you will be dependent upon several factors:

- the merits of your claim;
- the remedy you are seeking;
- the value of your claim and whether you are bringing or defending a claim; and
- your view on investing capital into the litigation.

The potential different types of funding options that may be available to you are:

Paying for:	Your own costs And disbursements	Your opponent's costs
Paying out of your own funds	Hourly Rates / Fixed Fee	Yes
Existing (or Before The Event) Insurance	Yes	Yes
Membership organisations and associations	Yes	Yes
After The Event Insurance	Disbursements only	Yes
Litigation Funding Loans	Yes	No
Conditional Fee Agreement	Yes	No
Damages Based Agreement	Yes	No
Third Party Funding	Yes	Yes (if After The Event Insurance is included or purchased)

A detailed explanation of each type of funding follows:

Normal Hourly Rates

Under this type of agreement, you will pay an hourly rate for the work. The amount that you will pay for your fees will be the same whether you win or lose. In addition, you will also be responsible for paying your expenses or disbursements.

If you are successful, you may be able to recover from your opponent proportionate amounts of the fees, expenses and disbursements that you have paid. If you are unsuccessful, then in addition to your own costs, you may have to pay some of the fees and disbursements incurred by your opponent.

Fixed Fees

In low value and/ or straightforward cases, we may be able to offer fixed fees for the whole or stages of the litigation. In addition, you will also be responsible for paying your disbursements.

If you are successful, you may be able to recover from your opponent proportionate amounts of the fees and disbursements that you have paid. If you are unsuccessful, then in addition to your own costs, you may have to pay some of the fees and disbursements incurred by your opponent.

Conditional Fee Agreements ("CFA")

These types of agreement are often referred to as 'no win, no fee' agreements, however this is somewhat misleading as this type of arrangement usually only covers your liability for your solicitors' fees and not the other likely expenses or disbursements to be incurred such as court fees, barrister and expert fees.

CFAs cover your own solicitor's costs, either in full or in part. Whether or not you pay all or some your solicitor's costs is dependent and contingent upon the outcome of the case (see table below).

One of the benefits of this type of arrangement is that it transfers some of the risk of pursuing litigation to your solicitors. Under this type of agreement, in exchange for the solicitors agreeing that they will not seek recovery of some or all of their fees if a case is unsuccessful, you agree to pay the solicitors a success fee in addition to their normal fees if the case is successful. The success fee is calculated as a percentage of the normal fees and cannot be more than 100%.

The table shows that the lower you want to make the risk of paying your own solicitors fees if you lose, the more you will end up paying if you win, however, the additional amount you pay on winning is a mechanism for buying off some of the financial risk of losing.

It is important to note that if you are unsuccessful, then in addition to your own expenses and disbursements, plus any sums due to your solicitors under the CFA, you may have to pay some of the fees and disbursements incurred by your opponent.

Subject to a full review and analysis of your case and the prospect of success, we potentially offer a myriad of CFAs including Discounted Conditional Fee Agreements, Capped Conditional Fee Agreements and 'No Win, No Fee' Agreements.

Success Fees

Historically, solicitors could offer clients a 'no win no fee' agreement in respect of their legal fees, meaning that if the case was lost, the client would pay nothing, but if the case was won, the losing party would pay the solicitor's usual costs plus the success fee. The success fee was often 100% of the solicitor's usual fees. This worked for the client, because the majority of the fees, including the success fee, were paid by the losing party provided they had received prior warning that the solicitor was acting under a conditional fee arrangement which included a success fee. On 1 April 2013, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 removed the ability to recover a solicitor's success fee and After-the-Event Insurance Premiums from the losing party. This means that clients now have to meet the cost of any success fee or insurance premium themselves, and so it is vital that a cost benefit analysis is carried out to make sure that any funding arrangement put in place is financially worthwhile for you.

Type of CFA	% conditional upon success/success fee	Amount to pay if you lose (assuming costs of £100,000)	Amount to pay if you win (assuming costs of £100,000)
Partial CFA Example 1	30% (paying only 70% of the base costs if you lose)	£70,000	£130,000
Partial CFA Example 2	50% (paying only 50% of the base costs if you lose)	£50,000	£150,000
Full CFA	100%	£0	£200,000

Damage Based Agreements ("DBA")

This type of agreement is similar to a CFA, however instead of your solicitors charging you on a time spent basis, the solicitors' fees for the work conducted in pursuing the litigation is charged as a percentage of the damages recovered. The percentage is agreed at the time the parties enter into the agreement and can be no more than 50%. In addition to any sums due under the DBA, you will also be responsible for paying your expenses or disbursements (barrister's fees will, in certain circumstances, be included under the terms of the DBA).

If you are unsuccessful, then in addition to your own expenses and disbursements, you may have to pay some of the fees and disbursements incurred by your opponent.

Subject to a full review and analysis of your case and the prospect of success, we may offer this form of funding.

Existing Insurance

If you are considering pursuing or defending a claim, it is worth checking any existing insurance policies that you may have. Commonly, legal expense insurance is often included as an additional benefit on insurance policies and premium banking packages. You may also have purchased a specific product to cover certain risks which may provide cover for legal fees for the litigation you are contemplating. This applies to individuals and businesses.

If you have existing insurance, there are usually time limits for making a claim for your legal costs and so it is important to discuss any potential existing insurance cover with us at the earliest opportunity and provide us with copies of the relevant policies. If you do not comply with the requirements of the insurer, you may lose the benefit of any cover that is available to you. If you are not sure whether you have this cover, you should make enquiries with your insurance broker and/or insurers as to whether you have any such cover and if so, you should inform us immediately.

Whether your existing insurer will agree to provide cover for this particular dispute will depend upon the insurer's review of the case. We cannot guarantee that the insurer will agree to provide cover for any particular dispute or that the extent of the cover available will be sufficient to cover all of the potential legal costs.

If you do not ask us to review your existing policies or contact any potential insurer, we will presume that you have checked your policies and you are satisfied that there is no possibility of legal expenses insurance being available to you.

If the level of cover is unlikely to be sufficient to cover your own fees and disbursements as well as your opponent's fees and disbursements, it may be possible to 'top up' your existing insurance by buying additional insurance (see below).

Buying Insurance

If you have no existing insurance cover that can help fund the dispute, it may be possible to buy 'After-the-Event Insurance' ('ATE Insurance'). This is insurance that can be taken out after the dispute has arisen.

A summary of the benefit of ATE Insurance:

- It can be purchased after the dispute has arisen,
- The premium can in some cases be deferred until conclusion of your case
- The premium can in some cases be self-insuring if you lose
- It is a method of buying off the risk of payment of costs to your opponent and your own disbursements in return for payment of a premium by you
- It can be used alongside other funding arrangements to reduce your exposure for all types of litigation cost

ATE insurance is a type of legal expenses insurance policy that provides cover for the legal costs incurred in the pursuit or defence of litigation and arbitration. It is distinct from pre-purchased before the event (BTE) insurance policies which are commonly provided in conjunction with, for example, business or house insurance, and which have strict incident reporting deadlines and a requirement that the incident post-dates inception of the policy.

Reducing exposure with ATE

ATE insurance can be purchased for nearly all areas of litigation, with the exception of matrimonial or criminal law, to cover some of the expenses of litigation, such as the risk of paying your opponents' legal fees and disbursements, plus your own disbursements should you be unsuccessful in the litigation. In this way, ATE covers any exposure not covered by a CFA. Own costs cover can be obtained but this is less common.

Generally, the premium paid for an ATE insurance policy is not recoverable from your opponent if the litigation is successful (there are exceptions for some personal injury, clinical negligence, and defamation disputes). However, payment of the premium for an ATE insurance policy is often deferred until the conclusion of the litigation and the premium is often self-insured which means that it is not payable if the litigation is unsuccessful.

ATE insurance is generally available for:

- claimants and defendants;
- claims for more than £10,000, provided the premium is proportionate to the value of the claim
- Litigation in the English courts and domestic arbitrations and tribunal work. It cannot cover matters in other jurisdictions because of regulatory or licence requirements.

ATE Insurance is unlikely to be provided where the case involves novel legal issues. If it is offered, the premiums are likely to be very high given the additional risk to the insurer.

Whilst we are not insurance brokers, we can assist you with making an application to an insurance broker and/or ATE insurer and advise you upon the suitability of the terms of any insurance policy for the dispute. We cannot guarantee that an application for insurance will be successful, that the extent of the cover available will be sufficient to cover all of the legal costs, or that payment for the premium will be deferred and/or self-insuring.

In order to consider whether insurance may be offered, an insurer will usually require a detailed case summary and the opinion of a barrister that your prospects of success are greater than 60%. You will need to pay for our services in preparing the application and obtaining an opinion from a barrister. The costs of doing so will not be recoverable from your opponent.

If an ATE insurance policy is purchased, it is important to comply with the terms of the policy which will include providing reports to the insurer on the progress of the case, any offers that are made during the litigation and the prospects of the litigation.

ATE Insurance bespoke to Wright Hassall

At Wright Hassall we have a bespoke insurance policy with third party insurers. This means that we can quickly incept insurance for certain types of cases without having to incur the time and cost of processing insurance applications and results in faster progression of your case in the knowledge that you have some costs protection in place.

The cases which are suitable for our bespoke policies are those which fall into specific work areas and are in the early stages of dispute resolution and Wright Hassall has reasonably determined that prospects of success are equal to or above the criteria required for the policy.

The insurance cover available under our bespoke policy can be increased during the course of the policy for an additional premium. This enables clients to balance the cost of the insurance premium with the level of cover they require, buying off the exposure to risk as they go along, rather than paying a larger initial premium just in case a larger amount of cover is required.

Another benefit of our bespoke policies is that, if necessary, the insurer can pay out the issue fee on your behalf so that this is not an expense you have to pay out before starting your claim, in return for an increased premium.

Third Party Funding

Litigation funding is where a third party, with no connection to the litigation, agrees to finance all or part of the legal costs of the litigation in return for a fee payable from the proceeds recovered by you in your claim. The fee is not normally payable if your claim is unsuccessful and therefore this funding does not operate as a loan. If the litigation is lost a third party funder will lose their investment and no sums will be repayable.

A third party funder can range from a small funder with limited investment capital to large international funders. Third party funders are unconnected parties to the litigation and are investing in the litigation by funding the legal fees incurred in pursuing the litigation in exchange for a fee. Third party funders' fees are typically calculated as a multiple of the cash invested or a percentage of monies recovered.

This may be a suitable option if:

- You would prefer to focus business capital and cash flow on the progress of your company
- There is a commercial benefit to you in moving the cost of litigation off your balance sheet
- You are willing to reduce the amount that you may recover in the litigation by way of payment to a third party funder rather than investing funds throughout the duration of the matter.
- You are unable to afford to pay the costs and disbursements at present but will be in a position to pay off the litigation loan once your matter has resolved.

In assessing any potential investment in litigation a third party funder will have regard to the value of any claim, the prospects of the claim resulting in a successful outcome and the prospects of recovering any monies awarded as a result of the litigation.

It is common for the third party funder to require the inception of an ATE policy to reduce its potential exposure if the litigation is unsuccessful.
Litigation funding may be used in conjunction with:

- After the event (ATE) insurance;
- A conditional fee agreement (CFA) under which the solicitor assumes risk for some, or all, of the client's legal fees if the client should lose;

Is there a minimum and maximum amount the funders will fund?

The minimum acceptable size of a case is usually a function of the costs:damages ratio the funder relies on. For instance, some funders advertise that they only consider cases where costs are anticipated to be no more than 1:6 to damages, whilst others focus on the higher value claims with a minimum of 1:10. Practically, it is often not commercial to apply for funding for cases with a value of less than £250,000.

Litigation Funding Loan

You can explore the possibility of obtaining a specialist litigation loan to fund your costs and/ or disbursements as they are being incurred. This may be a suitable option if you are unable to afford to pay the costs and disbursements at present but will be in a position to pay off the litigation loan once your matter has resolved.

Loans are provided as a facility which allows you to draw-down what you need and when you need it, that is, when the costs and disbursements need to be paid. Interest is usually charged only on the amount you draw-down and not on the full loan. Hence, you only pay interest on the amount you use. These loans are usually repayable whether or not you are successful in the litigation. Litigation loan providers may also require security for the loan. Sometimes litigation loan providers offer an insurance policy, at an additional cost, to repay the loan if you are not successful. Some litigation loan providers offer loans that do not have to be serviced during the course of the case, i.e. there are no monthly payments.

We are an approved firm for Novitas Loans, one of many litigation loan providers who provide litigation loans for some contentious probate and clinical negligence claims. We are not recommending Novitas Loans and we have no influence over their decision to lend nor can we give you advice on this product. However, if you are interested, we can provide you with their literature for your consideration, as one of the options available.

Mainstream Financing

You can explore the possibility of borrowing monies to fund your own costs and disbursements as they are being incurred and your opponents' costs should your claim be unsuccessful.

This is a matter for you and is not something that we will advise you on.

Membership Organisations and Associations

If you are a member of an organisation, trade union or similar association, you may have legal expenses insurance or other funding assistance as a benefit of your membership which may assist you to pay the costs of this matter and/or with your opponent's costs if unsuccessful.

If you have this benefit, there are usually time limits for making a claim for cover or funding and so it is important to discuss this with us at the earliest opportunity. If you do not comply with the requirements of the organisation, you may lose the benefit of any cover or funding that is available to you.

If you are not sure, you should make enquiries with your membership organisation as to whether you have any such cover or assistance and if so, you should inform us immediately.

Whether any insurance or other funding assistance is available to you for this particular dispute will depend upon the organisation's review of the case and/or your eligibility. We cannot guarantee that the insurer will agree to provide cover for this particular dispute or that the extent of the cover available will be sufficient to cover all of the legal costs.

If you do not ask us to make enquiries about the availability of a membership benefit, we will presume that you have checked your membership benefits and you are satisfied that there is no possibility of legal expenses insurance or other funding assistance being available to you.

What costs will I face if I need to pursue a dispute?

Liability for payment of costs

You are liable to pay your costs of the pursuit or defence of a claim or action against you. Subject to any Conditional Fee Agreement arrangement with Wright Hassall, you will be liable to pay some or all of these costs whether or not you are ultimately successful with your claim or defence.

The categories of costs

Costs can be broken down into 5 categories:

- The cost of the time spent by your solicitors in acting for you and on your behalf. This cost is often referred to as Base or Time Costs;
- The cost of payments to third parties such as experts (if expert evidence is required); the Court (for payment of mandatory Court fees) and obtaining reports and information (for example documents held at the Land Registry or Companies House). The global term used for payments to third parties is Disbursements; and
- The cost of payments for travel, photocopying, bank charges and other sundries. The global term used for these types of payment is Expenses
- In addition, you may choose to incur additional cost, by entering into a form of funding arrangement, to fund or reduce the risk of paying all or some of the charges described above (such as an insurance premium or third party funding).
- the costs incurred by your opponent in defending or pursuing a claim, which you may agree or be ordered to pay in part or in whole if you lose the entire case or certain aspects of the dispute.

Does the loser pay the winner's costs?

The general principle in litigation for claims or defence of claims that are valued or notionally valued at more than £10,000 is that the loser pays the winner's reasonable costs of the claim. For cases (other than those involving personal or clinical injury) that are valued at less than £10,000, the amount of costs that can be recovered is limited and fixed by the Court rules.

The court's control of costs/who has the final say on costs?

The Court has the final say on who pays the costs and the amount of those costs. The Court has the power to award payment of:

- All
- Some; or
- no costs.

The Court has a wide discretion and will consider a number of factors when deciding who pays costs and the amounts that should be paid, to include but not limited to, the behaviour and conduct of the parties both during and prior to proceedings being commenced and offers made by the parties. There are also some categories of costs which cannot be recovered at all (see below).

When costs liabilities arise

- Interim applications to the court
- Discontinuance of a claim or counterclaim
- Final hearing/trial

Interim Applications

In the course of pursuing or defending your claim, it may be necessary to make applications to the Court. The costs incurred in pursuing or defending any application and the timing of the payment of those costs are normally dealt with as a separate issue to the cost of the whole of the proceedings at the hearing of any application. The same general principles stated above normally apply to an application. However there are specific applications where the general rule is disapplied and the costs of both parties in the making of any application will always be borne by the applicant. Wright Hassall will advise specifically on the liability for costs in any application when an application is considered to be necessary or has been made against you.

Discontinuance

If you choose to discontinue Court proceedings, then unless the Court orders others, you will be

liable for the costs which your opponent has incurred on or before the date on which you serve the notice of discontinuance subject to the rules on the Standard and Indemnity Basis as detailed above.

If you are defending a claim and your opponent discontinues Court proceedings, then you will be entitled to your costs which were incurred on or before the date on which the notice of discontinuance was served subject to the rules on the Standard and Indemnity Basis as detailed below.

Trial

If Court proceedings are issued and you are successful in the pursuit or defence of a claim, the Court will normally make an Order that your opponent pay your reasonable costs to be assessed if not agreed. This is known as a Costs Order on the standard basis. In certain circumstances, the Court can make an Order that your opponent pay your costs on the indemnity basis. The standard and indemnity basis are dealt with in further detail below.

What if my claim settles before trial?

In any attempt to settle a claim prior to the issue of Court proceedings (whether pursued or defended), Wright Hassall will discuss with you the issue and level of costs incurred at that time and incorporate the recovery or potential liability to pay costs in our advice to you as to the value of any settlement.

What costs are recoverable?

In order for costs to be recovered from your opponent they have to satisfy the following test. The work must have been:

a. Necessary and reasonable for the conduct of the claim or defence
b. elevant to the matters in issue;
c. attributable to the other party's' conduct and perhaps most importantly proportionate to the issues and amounts in dispute.

Sometimes investigations are carried out or steps taken in litigation which are reasonable and necessary, but are deemed by the court to have not satisfied the above test

The costs which are not recoverable from your opponent

- Funding costs
- Solicitor/Client costs

Funding costs

Costs incurred in the course of advising upon and arranging funding and as a result of a funding product or arrangement such as a success fee under the terms of a Conditional Fee Agreement, insurance premiums, third party charges and interest are not recoverable from your opponent. The costs associated with funding will be payable by you whether you are successful or unsuccessful.

Solicitor/Client costs

Costs that are not associated with progressing the legal issues and evidence of a claim and incurred as a result of client care and service will not be recoverable from your opponent. It is inevitable that solicitor/client costs will be incurred during the pursuit or defence of a claim, however it is important that you provide your instructions to Wright Hassall when requested and consider any written advice from us carefully in order to minimise incurring costs that will not form the costs that are recoverable from your opponent.

Costs which are disproportionate to the value in dispute (if assessed on the standard basis)
The overriding position is that the Court is concerned as to the level of costs incurred in litigation and has moved from a historic position that the winner of any litigation would normally receive the majority of the costs that it had incurred in pursuing or defending a claim. The Court now imposes a test of proportionality when considering the amount of costs that should be payable by the losing party when an Order is made on the standard basis.

Proportionality

The effect of the test of proportionality is that the amount of costs that have been incurred, even if they were both necessary for the pursuit or defence of the claim and reasonable in amount, will not necessarily make those costs recoverable

from the losing party. The Court will award an amount of costs that are proportionate to the complexity of the case, the issues in dispute and the amounts at stake. This test applies for both base/time costs and disbursements.

This means that careful consideration needs to be given to the relevant issues in any claim and how any claim is to be pursued or defended. Careful consideration will also need to be given to the choice of a barrister or an expert and regard must be given to the value of the dispute, the expertise required and the fees to be charged.

The Procedure of Recovering Costs

When an Order for payment of costs is made by agreement of the parties or by the Court, the proceedings for the claim will be concluded and the procedure for recovering costs will commence.

Whilst the costs will have been incurred as a result of the claim, the procedure for recovering costs is dealt with as a separate issue if they have not been included in any global settlement. This can involve further Court proceedings to obtain a Court Order for payment of costs and/or to determine the amount to be paid by way of costs if attempts to resolve the issue of the payment of costs and the amount of costs to be paid by agreement are unsuccessful.

The Court will award an amount of costs that are proportionate to the complexity of the case, the issues in dispute and the amounts at stake. This test applies for both base/time costs and disbursements.

Court proceedings in respect of the issue of costs are known as assessment of costs. Prior to commencing Court proceedings for the assessment of costs, it will be necessary for a Bill of Costs to be drawn by a Costs Draftsman. A Bill of Costs is the formal prescribed Court format for detailing the costs incurred during the claim that are being claimed by the party who has been successful.

In all cases Wright Hassall will attempt to negotiate a settlement of the issue of costs without the need to prepare a formal bill of costs and/or commence Court proceedings for the assessment of costs.

Interim payments on account of costs

If an Order for costs is made in your favour or against you, you and/or your opponent can seek an interim payment on account of costs. An interim payment is a payment of some of the costs that is made by the party ordered to pay costs pending an assessment of the full amount to be paid.

In all cases where there is an agreement between the parties that that your opponent pay your costs of the claim, Wright Hassall will, where appropriate, make a request for an interim payment of costs to your opponent. If you are successful at trial, Wright Hassall will, where appropriate, request that the Court make an Order that your opponent make an interim payment on account of costs.

There is no strict rule as to the amount that should be paid by way of interim payment. There is case law that supports a request for an interim payment of costs of 2/3 of the amounts claimed by way of costs. In cases where a cost budget has been prepared, there is case law that supports a request for an interim payment of 90% - 100% of the costs that are detailed in the costs budget.

Prior to the commencement of assessment proceedings and in cases where the claim settled before a trial, whilst a request for an interim payment on account can be made, your opponent cannot be forced to make an interim payment. Following commencement of assessment proceedings, an application to Court can be made for an interim payment on account of costs.

Provisional Assessment

In cases where the total amount of costs is less than £75,000 and the amount of costs to be paid cannot be agreed, it will be necessary to commence Court proceedings for a provisional assessment of the costs for the Court to determine the amounts due to be paid to you or by you by way of costs.

In a provisional assessment of costs, the Court assesses the costs on paper and without the need for a Court hearing in the majority of cases. A Bill of Costs is prepared and following written arguments from the parties as to why costs should or should not be paid in the amounts said to be payable or at all, the Court determines the amounts that are payable if the parties cannot reach an agreement. If either party does not agree with the Court's provisional assessment, a hearing can be requested; advice in respect of this would be provided if this situation arises.

Detailed Assessment

In cases where the total amount of costs is more than £75,000 and the amounts of costs to be paid cannot be agreed, it will be necessary to commence Court proceedings for a detailed assessment of the costs.

In a detailed assessment of costs, the Court assesses and determines the amount of costs that are payable at a hearing following the preparation of a Bill of Costs and written arguments from the parties as to why costs should or should not be paid in the amounts said to be payable or at all if the parties cannot reach an agreement.

The timing of the steps to be taken in both provisional and detailed assessment proceedings are set by the Court rules and a failure to comply with the Court rules may result in sanctions affecting the recovery of all or some of the costs that are being claimed or interest on those costs.

During the course of both proceedings for the provisional and detailed assessment of the costs, the parties are encouraged to attempt to settle the issue of the payment of costs by negotiating and making offers to avoid the requirement for the Court to determine the issue on paper or at a hearing.

The standard and indemnity basis

What do I stand to recover or pay if Order is made on the Standard Basis?

Costs Orders on the Standard Basis must be proportionate to the matters in issue. If there is any doubt as to the costs, it will be resolved in favour of the losing party ordered to pay the costs.

What do I stand to recover or pay if an Order is made on the Indemnity Basis?

Costs Orders made on the Indemnity Basis do not need to be proportionate to the matters in issue. If there is any doubt as to the costs, they will be resolved in favour of the party receiving the costs.

The costs of recovering or disputing costs

Further costs will be incurred in attempting to recover costs from your opponent or in your opponent attempting to recover costs from you following an agreement or an Order to pay costs.

If there is a requirement to prepare a Bill of Costs and commence assessment proceedings, it will also be necessary to incur disbursements for the instruction of a Costs Draftsman and Court fees. If you are the party paying costs and a Bill of Costs is served upon you, there will also be a requirement to incur disbursements for the instruction of a Costs Draftsman to prepare the Point of Dispute in response to the Bill of Costs.

Prior to the commencement of Court assessment proceedings there is no automatic right to recover the costs incurred in recovering or disputing the amounts to be paid for costs. Once Court assessment proceedings have commenced, the

general rule that the loser pays the winner's fees applies.

In provisional assessment proceedings, the Court limits the amount of costs of assessment that can be recovered to £1,500 plus VAT and Court fees. If you are paying an opponent's costs, then this will be the maximum that you can be ordered to pay. If an opponent is paying your costs, then this will be the maximum that they can be ordered to pay, however, Wright Hassall's costs of dealing with the provisional assessment may exceed the amount which can be recovered from your opponent and you will therefore be responsible for any shortfall.

Interest

A party is entitled to claim interest on the amount of costs agreed or awarded by the Court from the date of the Order awarding costs.

The Court has complete discretion in respect of an award of interest and the amount of interest to be paid.

Paying Costs

If you are ordered to pay costs to another party during the course of proceedings or at the conclusion of proceedings, the timing of the payment of costs is usually contained within the Order.

The party who has obtained the Order may take steps to enforce the Order against you if you do not pay within the deadline set in the Order. Further, if a County Court judgement is not paid in full within 30 days of the judgment the judgment will be registered against you or your business on the Register of County Court judgments and this is likely to have a direct impact upon your personal or business credit rating which can result in you being unable to obtain credit.

Cost Budgeting

The Court takes an active role in the management of the costs to be incurred in pursuing or defending a claim and will set the amount of costs that both parties can incur in the course of litigation on a phase by phase basis. The Court imposes a requirement on all parties, excluding litigants in person, to prepare a cost budget in a standard format in all cases where the claim is valued at more than £25,000.

The Court encourages parties to agree cost budgets and there are strict rules that apply to the exchange of cost budgets between the parties and the timing of filing cost budgets with the Court. If these are not complied with, there are sanctions imposed by the Court which may mean that you are unable to recover the costs you have incurred from your opponent.

The court will set the amount of costs that both parties can incur in the course of litigation.

Wright Hassall will prepare a cost budget on your behalf from the information that you have provided to us and our knowledge and expertise of dealing with the claim and share this with you. It is vital that you share all information with us so that we can prepare an accurate cost budget on your behalf.

The cost budget will not include costs that are not recoverable from your opponent such as solicitor/client costs (detailed above). The cost budget is therefore not a representation of the amount of costs that you may ultimately be liable to pay is you are successful. The cost budget is a representation of the costs that can be recovered from your opponent if you are successful. Equally, your opponent's cost budget represents the costs that you may ultimately be liable to pay if you are unsuccessful.

Once a cost budget is set by the Court, it is possible to make an application to amend the cost budget if eventualities that were not foreseen arise which will incur further costs over and above those set by the Court. Whilst this is possible, an application to the Court does not guarantee that the Court will amend a costs budget and the prospects and reasons for any application succeeding will need to be considered before it is made.

Your dispute. Funded.

If your claim is winnable and there is a commercial financial benefit to you, we will propose a funding arrangement.

Our dispute resolution team is one of the largest outside London and acts for leading global organisations, regularly managing heavyweight litigation. We provide smart solutions at all stages of the dispute resolution process. Your costs and funding specialists in the team are detailed below.

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