



Funding Litigation: the Options

Dispute Management - June 2010

A briefing from our Dispute Management team

Lee Fisher, a partner in Morgan Cole's Dispute Management team, considers alternative methods of funding commercial litigation and the potential impact of the recent Review of Civil Litigation Costs by Lord Justice Jackson.

For many businesses April 2010 represents the start of a new financial year. In the current financial climate it is only the most prudent (or possibly litigious) of businesses which will have included a line in their annual budget entitled "litigation costs". However, even the most risk averse businesses will face a significant dispute at some point in their lifecycle. The cost and risk of litigating those disputes has the potential to threaten the very existence of the business.

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In today's business climate disputes are inevitable: they can range from a customer refusing to pay for goods to a competitor seeking to copy its products. The stark choice faced by a business in this situation has traditionally been to pursue the matter through litigation (or some other form of dispute resolution) or to write off the incident as "bad luck" or put it down to "experience". For many businesses, both options are equally unpalatable: the first incurs the business in significant expense and risk (both in relation to their own costs and a potential exposure to the other side's legal costs if unsuccessful) whilst the second, allowing customers not to pay or competitors to utilise your intellectual property, puts its livelihood at risk.

Over the last decade, reforms within the legal system, originating in personal injury actions, have attempted to redress these problems and provide businesses with the option of sharing or transferring part or all of the risk of litigation and thereby making litigation more accessible. These developments have included Conditional Fee Agreements (CFAs) - where solicitors agree to work on a "no win no fee" or a discounted rate, After the Event (ATE) insurance - which indemnifies a business against any liability for the opponent's costs (and its own expenses) and Litigation Funding - where a third party funds the legal costs in return for a share of the damages. Often CFAs and ATEs work in tandem giving the business protection against both its own and the other side's costs if they are unsuccessful.

The benefit of these to potential claimants is that, apart from litigation funding, they come at little or no risk or cost to the claimant. This is because the additional success fee which the solicitor will charge under the CFA should the case be won, and the Insurance Premium, only become payable if the case is successful, and then can be claimed from the defendants. Within the insurance and media industries, where the costs liabilities arising from defending personal injury and defamation actions have risen significantly, there have been calls for reform on the basis that this represents an unfair burden on the unsuccessful defendant.

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It is partly as a result of these concerns, primarily in personal injury actions, that Lord Justice Jackson was asked by the Master of the Rolls to carry out a review of the costs of civil justice. After 12 months Lord Justice Jackson presented his final report earlier this year. The report contains a number of recommendations for change. A more detailed briefing covering the recommendations in Lord Justice Jackson's review and

its impact on businesses can be found in our briefing [Civil litigation costs review](#).

Whilst the reforms affecting defamation and personal injury actions have hit the headlines there has been little discussion about the effect they will have on SMEs and lower value business disputes where CFAs and ATE was starting to become a real alternative.

In essence Lord Justice Jackson has recommended the abolition of the recovery of success fees and ATE insurance premiums meaning if the Claimant wants to benefit from them he pays the costs associated regardless of the result. Instead he has recommended the introduction of contingency fees where the lawyer takes a percentage of the damages awarded (based on a model which has been working in Ontario for a number of years). The result is that the days of “risk free” and “cost free” litigation may be coming to an end.

The logic behind this is clear - if a claimant wishes to share or transfer part of his risk he should pay for the privilege of doing so. In personal injury and defamation actions the report recommends measures to mitigate the effect on claimants. However there are no such measures for business disputes, other than the suggestion that SMEs should be encouraged to consider before the event (BTE) insurance. This has fuelled fears, particularly amongst those representing SMEs, that in relation to those disputes which threaten the very livelihood of a business, that business simply will not be able to take the risk of litigating and the potential exposure if they lose.

At present the Report is solely a list of recommendations and whether, and if so when, these recommendations are to come into force remains to be seen. Many of the recommendations, including those referred to above, require primary legislation and the lack of comment on them since the new government came to power demonstrates that these are clearly not at the top of the agenda. However it is clear that there is significant judicial, if not political, momentum behind the recommendations in the report and reform of some extent is inevitable in the short to medium term.

In the interim however it is highly unlikely that any reform is likely to be retrospective and reports from insurers and brokers have suggested that many potential claimants in business disputes are taking advantage of the current regime whilst it remains, allowing them to minimise or virtually eliminate the inherent risks of litigation.

Through its CalcuLit™ package Morgan Cole is able to help clients analyse and manage their risks and implement solutions including the use of CFAs, ATEs and Litigation Funding. It is also one of the few firms in the UK with a relationship with a provider of Commercial ATE insurance policies allowing it to underwrite such policies without reference to the insurer, thereby allowing swift and easy access to protection. Further details of the CalcuLit package can be found in our [CalcuLit™ brochure](#).

More information

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