



Dispute funding in England from 2013 – the implications of the Jackson reforms

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Significant reform to civil litigation costs and funding will come into force in April 2013. This follows on from the report of Lord Justice Jackson who was appointed by the government to consider the whole issue of civil litigation costs. The results of these reforms are bound to alter the face of commercial litigation to a considerable extent and, in particular, important amendments have been made to the manner in which Conditional Fee Agreements ('CFAs') and After The Event insurance ('ATE') will operate if entered into after 1st April 2013.

This note explains the advantages and disadvantages of CFAs and ATE in their current form and highlights the implications of the Jackson reforms on the funding of commercial litigation.

What are CFAs?

In simple terms, a CFA is an agreement between a lawyer and a client to share the risk of litigation by tying the outcome of the case to the legal fees payable to the lawyer. This means that payment of whole or part of the lawyer's fees is contingent upon the success of the client's case and, in the event of success, an uplift is paid on the lawyer's standard rates.

As with ATE, it is necessary to disclose the existence of CFAs as soon as the funding arrangement has been entered into.

Advantages of CFAs

- As costs are linked to the outcome of the case there is potential for reduced, or even no, costs to be payable by you if the case is unsuccessful.
- Further, there is improved certainty on costs on the basis that you know if you lose the case you will only have to pay the reduced fee and disbursements as provided for in the CFA.
- Disclosure of a CFA to your opponent may encourage earlier settlement as the other party's potential liabilities will increase in accordance with the level of the success fee.
- In most cases, the success fee will be payable by the losing side, therefore, any damages awarded will not be consumed by the success fee.
- Your lawyers have a stake in the litigation and, as such, are incentivised to achieve a successful outcome.

Disadvantages of CFAs

- As a CFA gives a lawyer a financial interest in the case, your lawyer will have greater control over the overall strategy and resolution of the litigation.
- Unless you purchase ATE to cover your opponent's costs you still risk being liable to pay these costs if the litigation is unsuccessful.

What is ATE?

ATE is a form of legal expenses cover which insures against the legal costs incurred in the pursuit or defence of litigation and is purchased after a legal dispute arises. The policy is usually taken out to protect against the risk of having to pay the opponent's costs in the event the litigation is unsuccessful.

Advantages of ATE

- Often the levels of ATE premiums are staged so that these rise as the case progresses. Where the premiums are staged in such a manner, this puts pressure on your opponent to settle at an earlier stage before the premium increases.
- You will not be intimidated by the projected high level of your opponent's costs as, in the event of the case being unsuccessful, the insurer will meet these liabilities.
- Your opponent will be aware that the merits of the case have been independently assessed by the insurer who has determined that the litigation has a good chance of success.
- Also, having ATE signals to the other party that you are serious about fully pursuing the litigation having already minimised your exposure to your opponent's costs.

Disadvantages of ATE

- The cost of the insurance premium itself is also a consideration although the extent of the liability will be apparent as soon as you receive the insurer's quote. Although ATE policies can be obtained at any stage, they may be more difficult and expensive if obtained later in the case.
- Most insurers will conduct a separate assessment of your case in order to determine whether the litigation has a good chance of success. The cost of the

assessment will initially be paid by you, however, this will usually then be absorbed by the premium if ATE is provided.

What features of CFAs and ATE will be lost after April 2013?

From April 2013, a key feature of both CFAs and ATE will be abolished, namely:

- success fees for CFAs entered into on or after 1st April 2013 will no longer be recoverable from the other party; and
- the premium of any ATE policy taken out on or after 1st April 2013 will not be recoverable even if your case is successful.

In essence, the practical result of these reforms is that CFAs and ATE will still be available but with one substantial (and maybe fatal) difference – the success fee and premium will not form part of any of the claim of costs payable by a losing party. The reforms are not retroactive however, and so the success fees and premiums of ATE policies entered into before 1st April will be recoverable, even if proceedings are issued after 1st April.

Hence, we would urge any parties contemplating bringing proceedings to contact their lawyer to discuss funding as soon as possible before the reforms narrow the options available to them.

If you require advice on any of the matters raised in this paper, please get in touch with any of our lawyers listed below or your usual Shepherd and Wedderburn contact.



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