



Virtuoso Legal

Intellectual Property Specialists

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“Intellectual Property lies at the centre of the modern company's economic success or failure”

Lester Thurow : Economist

Trade marks & Brands

Patents & Inventions

Copyright

Designs

Database rights

Data Protection

Licensing and Franchising

Intellectual Property agreements

New Media Agreements such as directors and authors rights

Transactional Intellectual Property

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Regulated by the Solicitors Regulation Authority
SRA number: 466530



Costs of Litigation

The costs of litigation can be significant and are a fundamental issue to consider before pursuing litigation or defending court proceedings.

It must be decided at an early stage how the litigation will be financed. The main options for funding litigation are: -

The client may personally fund the work. If this is the case then some money will usually be asked for on account and staged payments agreed;

There may be another source of funds, such as an insurance policy or a trade union;

The Community Legal Service may fund the action, however the requirements are quite strict and some types of work are excluded, particularly Intellectual Property claims.

A conditional fee agreement may be entered into.

After receiving instructions on a new matter a solicitor will send the client an engagement letter with terms and conditions. Some solicitors put their terms and conditions in their client care letter and other solicitors create a relatively brief letter and append a separate terms and conditions document. Within the terms will be a section on fees.

In litigation matters fees for work are calculated on the basis of actual time spent in the conduct of a client's case. In a complex piece of litigation it would be typical to expect a solicitor's bill to include time spent on interviewing, collecting evidence, researching the law, perusing documents, conducting negotiations with the opponent and travelling to and attending court for interim applications. It is not necessary for a Solicitor to undertake all of the work, often lower levels of personnel, for example a Trainee Solicitor or Paralegal will perform some of the work at a cheaper charge out rate to the client. Further guidance on Solicitor's hourly rates which varies depending on the region can be found at www.hmcourts-service.gov.uk (Appendix 2 - Guideline Figures for the summary assessment of costs 2008).

In England and Wales the basic rule in relation to costs in litigation is that the winner's costs are paid by the

loser. However, this is within the discretion of the court and when making costs awards all circumstances of the case will be taken into account, including each party's conduct. The loser of the case will be liable for his opponent's costs as well as his own. Insurance can be taken out to cover the risk of paying the other party's costs but is likely to be very expensive unless linked to a conditional fee agreement. Where a party is able to recover its costs, it is still unlikely that the full amount of costs incurred in the proceedings will be recovered and there may be no guarantee that the loser is able to pay.

If the losing party disputes the costs incurred by the successful party he can apply to a costs judge who will assess the winner's costs. The costs judge may adopt the 'standard' or 'indemnity' basis for assessment.

A solicitor's bill will be made up of three distinct elements, which are:

Profit costs - Solicitor's fees for his time and expertise.

Disbursements - These are payments made on the client's behalf such as court fees, counsel's fees or expert fees.

VAT - This is chargeable on the whole of the profit costs and disbursements but not court fees.

If the case requires specialist legal advice it is usual practice to instruct a barrister (counsel). Furthermore, it should be noted that, especially in substantial hearings, it may be more economical if the advocacy is conducted by counsel rather than a solicitor. The fees will vary widely but much will depend on the level of counsel and counsel's experience and seniority. Counsel may be instructed to write an opinion, draft a statement of case, make an interim application to court or appear at trial.

A barrister will usually charge a fee also known as a 'brief fee' for each separate piece of work. Brief fees are negotiated between the solicitor and the barrister's clerk or chambers manager. When a barrister is instructed to represent a client at trial the brief fee will include all the preparation work to go to trial and the first day in court. Once the brief has been physically delivered the agreed fee becomes payable regardless of whether the case settles or not. For each day of the hearing thereafter there will be a refresher fee. The refresher fee generally also includes overnight preparation.



Cost issues will arise constantly throughout litigation, particularly as the costs accumulate. However, there are ways in which a case can be brought to an end before trial. A huge majority of cases do in fact settle before trial. Under the rules in Part 36 of the CPR, a party may bring a particular kind of pressure to bear on the other to settle a case on agreed terms. There may be serious costs consequences for a party who does not give reasonable consideration to an offer to compromise and settle a case.

Please note that this note is for general costs guidance only and does not constitute legal advice. Contact Virtuoso Legal on 0844 800 8871 to speak to an IP specialist and obtain costs information specific to your case.