Legal Costs **in Dispute Resolution**

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Introduction

In this note we provide information about legal costs in dispute resolution, that we think any Ridgemont client involved in dispute resolution or contemplating it, will find useful from the outset. Knowing these things will mean that a client is better informed and therefore better understand the processes and the risks. Hence it will require less legal advice, make better decisions and save on costs.

We cover some but not all forms of dispute resolution in this note (eg we exclude arbitration because it is less common). We touch only on the main points and more detail will be provided as needs be as part of any Ridgemont advice on a live matter.

By "legal costs" we mean Ridgemont's fees and disbursements (eg courier fees, court fees and expert witness fees), plus any such sums incurred by you direct instead of via us (eg if you instruct the expert), plus any VAT.

What we say about legal costs applies not only to your legal costs, but also of course to your opponent's legal costs.

Significance of legal costs

The significance of legal costs in dispute resolution is that they are often a large sum of money and can accrue quickly, because dispute resolution legal work can be extensive, over a long period of time and escalate right from the start. Costs are also important because a party is exposed to the risk of having to pay both its own costs **and** those of its opponent/s if it is unsuccessful.

Therefore legal costs is something that should be borne in mind right from day one. Some pre-action costs (ie before proceedings are started) can be recovered from an unsuccessful opponent if proceedings are started later on. However it is the decision to commence proceedings, defend them or counterclaim, that opens a party to the formal risk of having to pay an opponent's costs.

Liability for legal costs

A client is always liable to its lawyers to pay their costs under the terms of their contract. It may be though that a client has insurance or obtains a costs order against an opponent, and that means it can recover some of its costs liability that way, but it still retains its liability to pay its lawyers.

Case Management and Proportionality in Litigation

In litigation (ie court proceedings) a Judge will oversee the parties' legal costs and prevent them from recovering unreasonable and/or disproportionate types and levels of costs from an unsuccessful opponent. That is called case management. Therefore Ridgemont works with its clients to help them stay on the right side of case management. In particular, legal costs must not become out of proportion to the sum that a party is pursuing/defending or to the importance of any non-monetary remedy. If costs are at risk of becoming disproportionate, it would usually be better to then spend further money increasing a settlement offer rather than on perpetuating the proceedings. Early on in litigation the parties must create detailed Cost Budgets for all stages of the litigation and a Court must approve them. Once approved it is extremely hard for a party to recover more than the sums in its budget from an opponent if it is successful in the case. The budget is effectively a cap.

Recovery of legal costs in Litigation

Unlike in adjudication, in litigation a party **will** usually recover **some** of its legal costs from its opponent if successful, because the Court has a wide discretion to award costs. It will invariably use that discretion to reflect, in particular, the level/degree of success that a party has had in the proceedings, and how reasonably it has conducted itself. If there are multiple heads of claim a Court may make costs awards individually for each one, or a composite award that reflects success/failure across all the different heads.

Typically a largely / entirely successful claimant can expect to recover around 70% of its costs from its opponent. More than that is rare.

We have touched above on how the Court **case manages** costs to ensure that there is not unreasonable/ disproportionate costs recovery. If a party's costs need to be scrutinised or assessed by the court at the end of the proceedings, because the parties have not been able to agree them, the Court will ordinarily apply what is called the standard basis of assessment to determine how much of those costs is recoverable. However in some situations an alternative basis is used by the court, which is called the indemnity basis. The difference between the two bases is this:

> ***standard basis:*** the court will resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the **paying party.**
>
> ***indemnity basis:*** the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the **receiving party.**

Offers to settle

Any party can make an offer to settle a dispute at any time, either before or during proceedings. The courts encourage the making of such offers, not least because early settlement keeps legal costs lower, it allows the parties to get back to focussing on their businesses, and it saves court time.

A party can make 2 forms of settlement offer: (i) a Part 36 offer or (ii) a Calderbank offer. The former is the more common. The rules relating to such offers are contained in Part 36 of the Civil Procedure Rules. If an offer is made in the form set out in that rule, a party can expect such an offer to have the consequences laid out therein.

The crux of a Part 36 offer is this:

- it can be made by a claimant or a defendant, before or during litigation
- it contains a sum or other relief that the party making the offer says that it offers – or offers to accept – in order to settle the dispute
- if the offer is accepted within the timeframe stated, the beneficiary will also be entitled to its legal costs up to the point of acceptance
- if the offer is rejected and at trial the party making the offer achieves an outcome at least as beneficial to it as the one contained in the offer, it will be entitled to its costs from the expiry of the period for acceptance. This is a significant possible sanction.

If an offer is not a Part 36 offer, it will invariably be a Calderbank offer, because it will not contain the costs features outlined in the 3rd and 4th bullet points above. Therefore such an offer will only take on those same costs consequences or any others, if the court chooses to award them at its discretion. Under Part 36 it is required to.

Offers to settle are mainly a feature of litigation and arbitration, as opposed to adjudication, not least because an adjudicator rarely has the power to award parties their costs (see below).

Legal costs in Adjudication

The rule of thumb in adjudication is that the unsuccessful party will be directed by the Adjudicator to pay his/her reasonable fees and the fees of any Nominating Body. If there is partial success, that liability may be apportioned between the parties by the adjudicator.

It is rare for a party to be able to recover its own legal costs (ie its lawyers' fees and disbursements) from its opponent in an adjudication, because an adjudicator only has the power to make such an award if the conditions set out in S.108A (2)(b) of the Housing Grants, Construction & Regeneration Act 1996 (as amended) ("the Act") are met. That section provides that any contractual provision providing for such a power *"is ineffective unless……it is made in writing after the giving of notice of intention to refer the dispute to adjudication"*

However the parties rarely enter into such agreements.

Mediation

A mediation is a voluntary process that can be conducted at any time and a Court will encourage the parties to conduct one. If the mediation is unsuccessful, the parties will bear their own costs of the mediation and 50% of the mediator's costs and those of the venue. If the mediation is successful and a deal is reached ending the dispute, the costs of the mediation will be swept up into the terms of that deal.

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