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Procedure Which conditional fee agreement? (CFA or DBA) and what ATE means?

You have asked whether Scornik Gerstein LLP could act for you in this matter under a success result or No-Win No-Fee agreement. This letter sets out the differences between CFA (Conditional Fee Agreement) and DBA (Damages Base Agreement) so that you can compare both options.

It also explains what ATE (After the Event) insurance is.

Preamble

The current regulations allow us to undertake client's instructions on a result basis, this is, we would only get paid upon successful outcome of the matter.

There are 2 possibilities, a CFA or a DBA and both are made of 2 elements: conditional fee and success fee.

The conditional fee is the professional fee incurred during the normal course of your instructions and calculated using our hourly rates (currently £200, £225, £250, £270, £350 and/or £500).

The success fee is an additional fee to which we would be entitled in recognition of the fact that we are taking the risk of not being paid for our work if the case is unsuccessful and that we will have to wait to be paid at a later stage as opposed to when we Incur In the work (i.e. only when the matter concludes).

Terms of retainer under a CFA

We can act for you on the basis that a specified percentage of our fees are to be added to our conditional fees upon success of your claim. A CFA provides for a success fee based on a percentage of the conditional fees not exceeding 100% of such conditional fees. If you win, we will seek payment of our conditional fees from your opponent but you should pay the success fee (this can come from the proceeds of the monies recovered from your opponent either at court or out of court).

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Terms of retainer under Damages-Based Agreements ("DBAs")

DBAs became lawful on 1 April 2013 thanks to the Jackson reforms and more particularly the Damages-Based Agreements Regulations 2013. A DBA is a contingency fee arrangement whereby the lawyers can take a percentage of the damages (up to a maximum of 25% in personal injury cases, 35% in employment cases and 50% in most other cases).

The DBA provides for a success fee not based on our hourly rates but on a percentage calculated upon the amount recovered from your opponent either at court or out of court.

Common consequences to both DBA & CFA

We will bill you for the expenses in which we incur on your behalf, such as court fees and expert fees, and internal charges, such as photocopying as we incur in such expenses. These expenses are known as disbursements. Usually counsel's fees are treated as a disbursement, but counsel sometimes agrees to act under a CFA or DBA too.

The balance of the fees which would be payable if we win (to be set out in our retainer) are the conditional and success fee. Both the conditional and the success fee only become payable if and when you win the case. "Winning" means that the end result of your claim is that the opponent either agrees or is ordered to pay you.

If you win, you will usually be able to recover all or the majority of your costs (conditional fees & disbursements) from your opponent as the losing party, save of the success fee as above indicated. The entitlement will be dealt with by court order at the end of an assessment of costs or in a settlement agreement, although it is unlikely to be the full amount billed by us, so you will still be liable to pay us the difference. You will also remain liable to pay us the success fee, which cannot be recovered from your opponent.

If you lose the case, you will not have to pay us the conditional fees or the success fee but you will still be liable for any disbursements incurred. However, as the losing party, you will probably have to pay some of your opponent's costs. Again, your opponent's entitlement will be dealt with either by court order at the end of an assessment of costs or in a settlement agreement, although it is unlikely to be the full amount billed to your opponent by its solicitors.

If we decide the case is suitable for a CFA or DBA, the cost of preparing the CFA or DBA documentation will be payable under our retainer. Once we have entered into a CFA or DBA with you, the terms of our retainer will continue to apply except insofar as they are varied by the CFA or DBA.

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Which is best? CFA or DBA?

Under the mandatory principles found in the Solicitors Regulation Authority handbook a solicitor must act in the best interests of each client. When it comes to fee arrangements the solicitor must only enter into fee agreements with his clients that are legal and which he considers suitable for the client's needs and take account of the client's best interests. It is therefore not open to a solicitor to recommend a funding arrangement that is likely to be the most profitable to the firm unless it is also suitable for the client's needs and is in accordance with the client's best interests. The solicitor cannot just recommend the funding arrangement likely to be the most profitable for his firm.

Cases that settle for substantial sums early will provide generous reward for the solicitor who is taking up to 50% of the settlement sum. Early settlement means that only relatively small sums will have been incurred by way of costs. The solicitor is the winner but the client may query whether he has done quite so well out of it. Some clients will of course be perfectly happy with a big quick win but others may query the sums received by the lawyers.

Whilst under CFAs there could also have been the temptation to settle for less than the true worth of the claim in order to avoid the possibility of a loss and no payment at least with a CFA the more work that was done the more the solicitors would be paid and the greater the amount recovered by way of uplift. Under a DBA the longer the case goes on the lower the reward for work or effort ratio becomes.

ATE Insurance

As mentioned above, if this claim does not settle and court proceedings are issued and you lose the case, you will probably be liable to pay your opponent's costs, to be assessed if not agreed. You will also be liable to us for any disbursements which we have made on your behalf. Insurance policies exist to cover such potential liabilities. A policy taker must check whether he has any existing insurance policies which might offer cover for litigation costs in the matter.

If no existing legal insurance covers can be found, there is the possibility of obtaining "after the event insurance" (ATE insurance) to cover the client's potential liability for his own costs and / or opponent's costs. If an ATE insurance policy is taken by the client, the client will have to pay the insurance company an insurance premium. This premium will not be recoverable from the opponent, even if case of victory.

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