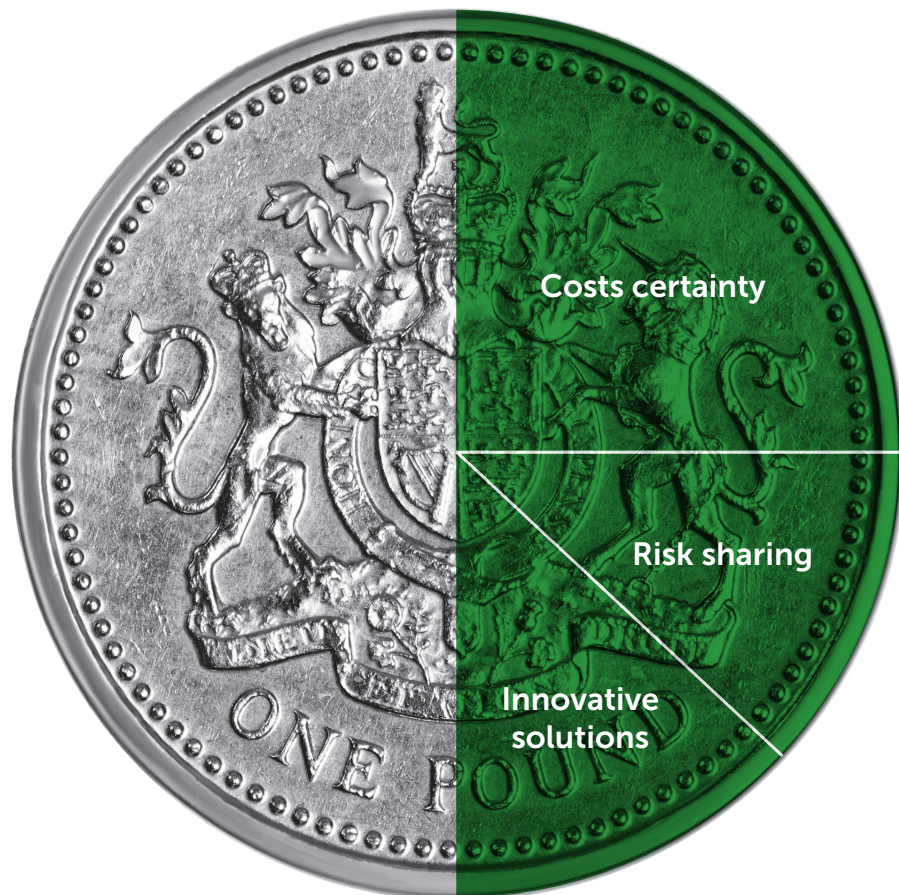


## Managing the costs of litigation

Alternative fee arrangements  
and third party funding options



# Introduction

At **Eversheds Sutherland** we recognise that the costs of litigation (and disputes more generally) can be a headache for many of our clients. Unlike commercial projects or transactional work, litigation is often uncertain in terms of duration, direction and outcome. This means that even the most carefully scoped estimates can sometimes be subject to change. The potential legal costs of protracted litigation can occasionally be a deterrent to bringing or defending legal proceedings even where there is a good chance of succeeding.

## What our clients want

Our clients tell us that they want:

- greater certainty and predictability in respect of litigation costs
- innovative solutions which go beyond discounted hourly rates
- fees linked to service delivery rather than just hours on the clock
- a sharing of risk and reward, so their lawyers have “skin in the game”
- a better understanding of how they can mitigate against potential liability for an opponent’s costs
- solutions that ensure litigation costs don’t become a blocker for other projects or capital expenditure

## Guiding you through the options

In this guide we tackle these issues head on. We examine some of the alternative fee arrangements and funding models that we regularly agree with clients. The various different approaches enable us to work in true partnership with our clients. We are always happy to explore a range of options to find a solution that works for you.

Our direct relationships with a range of ATE insurers and third party litigation funders mean we can, in appropriate cases, enable you to pursue claims without any liability for the legal costs of the case. Alternatively, we are often prepared to discount our fees significantly pending the outcome of the case so that our interests are aligned with your commercial objectives.

## How to use this guide

From our experience of guiding clients through the various costs and funding models we understand the issues that you will want to consider. Having clarity around these issues will leave you better placed to identify the right options for you. When reading this guide keep the following questions in mind:

- What is the most important driver for you?
  - complete cost certainty
  - more predictable legal spend
  - sharing of risk
  - keeping litigation costs off balance sheet
- Would you be interested in exploring pricing options which define ‘success’ more widely than ‘win:lose’, incorporating, for example, commercial objectives?
- Are you comfortable with forfeiting a proportion of your potential recovery in return for reducing your exposure to legal costs?
- How do you feel about financially incentivising your lawyers to stick to a budget or achieve other agreed key performance indicators (KPIs)?

Whatever your commercial needs, we can find the right pricing or funding solution for your situation. We will continue to work with our clients to deliver an approach to litigation costs that works for you.



**Paul Worth**

*Practice Group Head*

+44 (0)207 919 0686

[paulworth@eversheds-sutherland.com](mailto:paulworth@eversheds-sutherland.com)

# Fixed fee

## What is it?

At the outset of a matter, the client and the law firm agree a fixed fee quote to cover the cost of the legal work, rather than hourly billing. The client bears the risk that the matter will be concluded for less than the agreed fixed fee. In return the law firm accepts all the risk of any potential legal over-spend caused by unforeseen circumstances or changes in resourcing. Fixed fees can apply to portfolios of work as well as individual cases. For larger cases, fixed fees are generally better suited to phases of the case, rather than one fixed fee covering the dispute from start to finish. It can be very difficult in practice to predict the longevity of a dispute, with the result that a fixed fee for a large piece of litigation is rarely attractive to either party.

## When can I use it?

A fixed fee arrangement is suitable for claimants and defendants who want absolute costs certainty, allowing fixed budgeting for legal costs. They generally work best for large portfolios of smaller litigation matters where work can be commoditised and outcomes/processes are relatively predictable or follow a common lifecycle. Fixed fees also work well for phase based billing, where the scope of each phase can be fixed immediately prior to commencement of work (when the scope of the work can be better assessed than at the outset of a matter).

## Benefit for you?

- eliminates risk of any budgetary overrun, giving complete predictability of legal costs, provided that the scope of work remains unchanged

# Blended rate

## What is it?

A single hourly rate applied to all work on a matter, regardless of the seniority of the lawyer working on the matter. Alternatively, a single hourly rate applied to all fee earners of a certain level, regardless of their national or international location.

## When can I use it?

Suitable for any matter where a more predictable legal spend is desirable. Available to claimants and defendants. Particularly well suited to less complex disputes but can be considered for any case.

Blended rates do not have to be a stand alone model, and can be used in conjunction with a success fee or hold back which can help promote efficiency and achieve separately agreed success measures.

## Benefit for you?

- more predictable legal spend which will not fluctuate according to allocation of work between lawyers of different levels of seniority
- reduced administrative cost associated with oversight
- potential overall reduction on legal spend

## Case study: Annual retainer for multiple cases

We act for a large banking group, handling their consumer finance and retail bank litigation under an annual retainer. The retainer enables the bank to outsource as few or as many cases to us as it wishes, whilst retaining certainty as to the litigation costs. The pricing of the retainer is totally unconnected to hourly rates or the time we spend on the cases, being driven simply by the volume and complexity of the cases handled every year.

The benefit of the retainer model is simplicity and certainty. It avoids detailed cost reviews and monitoring for the bank, which can be time-consuming. We also help the bank to manage its litigation risk and to identify developing trends more effectively, providing high quality management information on a range of KPIs.



# Hold back or “client satisfaction fees”

## What is it?

A pricing model which links the payment of a proportion of our fees to the quality of our service delivery.

Under a typical arrangement, fees are structured using hourly billing, fixed fees or blended rates. Those fees are then discounted, for example by 10-20%. In the event that pre-agreed KPIs are met, we will recover the discounted element of the fee (and potentially earn an uplift), making the fee performance related. This puts service delivery, rather than case outcome, at the heart of the pricing model.

## When can I use it?

Client satisfaction fees are highly flexible and can be structured to suit almost any matter in one format or another. They are particularly well suited to higher value disputes or long term relationships.

## Benefit for you?

- a creatively structured commitment to service delivery from your lawyers. The amount you pay reflects how happy you are with the conduct of the case. You discuss up front the aspects of service delivery that are most important to you
- unlike traditional conditional fee agreements, the costs are not linked to the outcome of the case but the quality of the service. Hybrid models can be explored however, so that commercial outcome **and** service delivery both drive the legal costs you eventually pay
- a true partnership with your lawyers, sharing risk and reward, with the knowledge that they have ‘skin in the game’
- traditional billing discussions are replaced by, or at least overlaid with, discussions around value and service. Most clients tell us they like this
- arrangements can be tailored to reflect your priorities and/or preferred method for assessing service delivery

## Case study: Hold back with performance bonus

We act for a global trade association, providing legal services (including litigation) across 90+ countries including the Middle East and Africa. The client pays 90% of the costs, with 10% being held back according to performance. Anywhere between 0% to 10% of the withheld costs can be paid by the client, based on the performance of the whole team, regardless of location, following a six monthly review. An additional 10% uplift is available should performance criteria be exceeded, meaning that the client will pay between 90% and 110% of the base costs.

In the four half-yearly reviews which have taken place so far, we have consistently exceeded expectations. The model has helped to transform behaviours and ultimately drive quality and efficiency in the provision of our services.



# Fee estimate with collar

## What is it?

A risk sharing model which provides greater cost certainty than a traditional fee estimate, but with more flexibility than a fixed fee.

The 'collar' refers to a percentage costs range around the estimate, usually 10%. So a £200k estimate with a 10% collar would mean a range of £180k to £220k. If our final costs are within the collar/range, we charge the original estimate, namely £200k.

The exact treatment of any costs which fall above or below the collar would be subject to negotiation. Typically we would offer a further discount on any costs above the collar.

## When can I use it?

Collared fee arrangements can be tailored to fit most circumstances but work best for large disputes where you want greater certainty for each phase of the case.

## Benefit for you?

- reduced risk of budget over-run when compared to standard hourly billing or traditional fee estimates
- less certainty than fixed costs, but likely to be available in more unpredictable disputes where fixed phased billing might be deemed unsuitable

# Conditional fee agreement ("CFA")

## What is it?

An agreement which provides for the payment of fees, in part or in whole, depending on the outcome of the dispute. A success fee mechanism operates to share both risk and reward.

A CFA can operate on a traditional "no win no fee" model, or on a reduced fee basis.

Eversheds Sutherland generally prefers to operate on a reduced fee basis where we charge you a discounted rate throughout the case, with a possible success fee depending on the outcome. For example, in a case where our estimated fees were £200k, Eversheds Sutherland might agree a 25% CFA so that we effectively discounted our costs to £150k pending the outcome of the dispute. If the outcome of the case was unfavourable, there would be nothing more to pay. If the claim was resolved in line with, or in excess of, the expected outcome then a success fee would be payable. The success fee could see us recover some, all or more than the 25% discount, depending on the outcome of the case.

Recent changes to the law means that success fees are no longer recoverable from the other side – so you need to be comfortable with accepting a reduction in your recovery (for claimants) or savings (for defendants) in order to pay the success fee element.

There is always a risk of losing any case. Although under a CFA this would lead to lower/no costs, you may be ordered to pay your opponent's legal costs. These would not be covered by the CFA. It is possible to mitigate this risk through the use of ATE insurance.

## When can I use it?

We will consider CFAs for both claimants and defendants, although it is usually easier to define success for a claimant. They can be used in any type of litigation matter provided that there is a good prospect of success and success can be defined in terms of monetary or value savings.

## Benefit for you?

- working in partnership with your lawyers to share risk
- reduced overall expenditure (or nothing to pay) if successful outcome is not achieved
- your lawyers are incentivised to achieve the mutually defined success criteria
- encourages early case assessment and shared assessment of merits and potential outcomes



# After the event insurance ("ATE")

## What is it?

An insurance policy purchased during the course of litigation to guard against payment of the other side's costs at the conclusion. Often, but not exclusively, purchased when a CFA has been obtained. Premiums are often staged, and can be calculated in a number of ways with the most common being a percentage of the cover taken, or can increase proportionately to the risk.

Following changes to the law in 2013, an ATE premium is no longer recoverable from the other side, in court proceedings, if your claim is successful.

Premiums can be high, averaging around 40-50% of the cover sought – but are often phased across the life cycle of the litigation so if the case settles early, the premium paid may be relatively modest.

## When can I use it?

ATE is available in most cases, but premiums can be high. It is only relevant if you are worried about your ability to pay your opponent's costs if you lose the case.

ATE can also be used as a substitute for putting up security for costs, although case law is divided as to its suitability for this purpose.

ATE cover is occasionally a requirement of a third party funder.

## Benefit for you?

- manages risk of paying the other side's legal costs
- can be used as security for costs rather than being forced to tie up capital in court
- a mature market with plenty of choice

# Damages based agreement ("DBA")

## What is it?

A US-style contingency agreement which is now available in England and Wales. A DBA provides for payment of the law firm's fees only on recovery of damages, and is expressed as a percentage of the amount recovered. The percentage can be up to 50% of the damages for commercial claims. Costs can still be recovered from the other side on the normal basis.

You need to be comfortable with forfeiting up to 50% of your recovery in legal costs. A reduced fee CFA or third party funding may be a better option if you are seeking to reduce your exposure in return for a slice of the recoveries.

## When can I use it?

A DBA means that the costs payable are linked directly to the recovery of damages, so is only available to claimants. A DBA is a high risk funding arrangement for a law firm because they have to win the case and enforce the judgement/recover the damages before they are eligible to be paid. The economics of forfeiting a large percentage of any recovery is also unattractive for many clients. For that reason we will only consider working under a DBA where the circumstances are right – for us and for you. This would generally mean high value claims against blue chip or insured defendants, but such cases also lend themselves well to other types of funding arrangements.

## Benefit for you?

- there is no liability to pay our fees unless we not only win the case, but actually secure recovery
- even then our fees will be at an agreed percentage which ensures you receive at least 50% net damages
- no fees to pay up front or as the matter progresses, so does not affect your working capital
- knowledge that your lawyer has 'skin in the game'

# Third party funding ("TPF")

## What is it?

TPF involves a specialist litigation funder paying a claimant's legal costs in return for a share of the damages if the claim succeeds. Funders support law firms and businesses by funding all or part of the costs including disbursements. Many provide adverse costs indemnities as part of their package. In return, the funder will receive a share of the recoveries from the litigation, based on a percentage of damages or a multiple of the amount invested.

For guidance purposes, funders typically seek to recover up to 3-4 times the sum they invest, although an increasing number of innovative funding products are reaching the market. The likely recovery to costs ratio needs to be high (many funders are looking for potential damages to be ten times the potential costs/funding). The recovery pot will need to be sufficiently large to leave you with meaningful damages after paying the funder.

The amount the funder seeks to recover will often increase as the claim progresses towards trial, which can provide an incentive for early settlement. Similarly, the funder can withdraw from cases if prospects of success change significantly (although most reputable funders would do so only in extreme situations).

We have good relationships with a number of litigation funders and can always explore funding solutions with them informally without obligation.

The funding element is not recoverable from the other side in litigation so is an expense which will have to be carried by you at the conclusion. This may not necessarily be the case in Arbitration matters so forum shopping might be a consideration.

## When can I use it?

TPF is available where the value of the claim is high enough for the economics to work for all parties, the merits of the case are strong, and the defendant is likely to be able to satisfy any judgment or award. You must also be prepared to share a percentage of the damages of the recovery with the funder as their return on investment. In return, you have no exposure for your own legal costs if the claim is unsuccessful. TPF allows you to keep the cost of litigation off your books or to pursue claims where limited funds might otherwise have prevented you from proceeding.

Historically the value of a claim needed to be at least £5m for the figures to stack up, but there are now a range of funding models available to suit lower value claims.

## Benefit for you?

- risk is shared with the funder, no cost to you if the claim is unsuccessful
- legal fees are taken completely off the balance sheet. This can be important for some clients where legal budgets are tight

# Your next steps

This guide provides a high level overview of some of the most common pricing and funding models that we have agreed with our clients. It is by no means exhaustive. We hope that it has provided food for thought. We would be pleased to test your responses to help shape your approach to your next dispute.

Finding the right pricing model is not always straightforward. It involves striking the right balance for each individual client and matter. For some, that means minimising risk/exposure, for others it is about deferred cashflow. Some models lend themselves better to large portfolios while others work equally well for one-off disputes. Whatever your commercial objectives and whatever the size and shape of your dispute, we will work with you at the outset of a case to agree a budget and an approach to litigation costs that meets your needs. Having a clear fee arrangement in place at the outset then allows us to focus on the litigation itself, in order to deliver the best possible outcome for you.

All of our lawyers are familiar with the various alternative fee arrangements described in this guide and will work with you to consider better ways of structuring your litigation costs to help you achieve your goals.