



# professional negligence:

## Conditional Fee Agreements (CFAs) Explained

For CFAs not involving personal injury or clinical negligence, entered into from 1 April 2013.

There is no avoiding the fact that court action can be expensive. For many clients, whether they pursue their claim or not is entirely dependant on whether they can fund the case at all. If they cannot fund their case, then they will lose the ability to recover damages that they are otherwise entitled to.

If your claim is:

- Reasonably likely to succeed; and
- There is no other way of funding your case, and
- It is otherwise suitable for funding in this way,

We may decide to take it on under a Conditional Fee Agreement (or CFA).

The benefit to you is that it will assist you to bring a claim and recover damages in a case where you may not otherwise be able to afford it. If you lose your claim or discontinue it then the solicitor's charges that you would otherwise have paid will be nil or will have been paid at a discounted rate.

The benefit to us is that we will charge you a success fee if we win the claim for you and this will allow us to recover more than our usual hourly basic charges.

## What is a CFA?

A CFA is an agreement under which the solicitor either takes the whole risk of the case (a full CFA), or shares the risk with the Claimant (a Discounted Rate CFA). If the Claimant wins his case, the solicitor can recover his fees which include his usual hourly rate of pay plus an additional payment, called a success fee.

## Full CFA

With a full CFA, the Claimant does not pay anything towards his solicitor's charges while the claim is ongoing. If the Claimant loses their claim or discontinues it because its prospects of success are not as good as initially anticipated, the Claimant does not pay any of his solicitors legal fees, (though he may still have to pay for disbursements, if they are incurred).

However, if they win their claim or reach a settlement with their opponent, then they will be liable to pay their solicitor's costs at whatever his normal fee would be, but in addition, the solicitor is entitled to charge an additional fee, called a success fee, which compensates the solicitor for taking a risk with the case. The success fee is assessed by reference to the risk in the case – a high risk case justifies a higher success fee than a low risk case – but in any event cannot be more than 100% of his basic charges.

If the solicitor wins the claim for the client, the client is usually entitled to expect his opponent to pay his reasonable costs. These are calculated by reference to the solicitor's basic charges plus any necessary disbursements.

However, it is important to note that the success fee cannot be recovered from the client's opponent. The client remains responsible for paying this and will normally pay it out of his damages.

### Example 1

A solicitor's basic charges per hour are £200 but he takes a case on a full CFA and assesses the risk as being high. The client says his financial adviser was negligent in providing financial advice and he lost the value of his investments. The solicitor thinks the client has a point but identifies several other reasons why the value of the investments may have been lost which may have nothing to do with negligence by his adviser. The solicitor sets the success fee at 50%. This is equivalent to £300 per hour.

The solicitor issues a claim and eventually the claim settles. The claimant receives an award of damages from his opponent of £50,000.

His solicitor's basic charges are £16,000. The success fee at 50% is £8,000 and there are additional disbursements (barrister's feeds, an expert's fee and court fees) of £10,000 which the client has paid.

The client recovers the basic charges in full from his opponent, along with all of the disbursements, so in damages and costs he pays the sum of £76,000. That sum is allocated as follows:

### **Paid by Opponent:**

Damages	£50,000
Solicitor's basic charges	£16,000
Disbursements	£10,000

<b>Subtotal</b>	<b>£76,000</b>
-----------------	----------------

### **Owed to solicitor:**

Solicitor's basic charges	£16,000
Success fee @50%	£8,000

<b>1. Paid to solicitor:</b>	<b>£24,000</b>
------------------------------	----------------

### **Paid to client:**

Damages less £8,000 retained success fee	£42,000
Disbursements reimbursed	£10,000

<b>2. Paid to client</b>	<b>£52,000</b>
--------------------------	----------------

<b>Totals 1 &amp; 2</b>	<b>£76,000</b>
-------------------------	----------------

## Discounted Rate CFA

With a Discounted Rate CFA, the Claimant pays his solicitor at a discounted rate, which is usually a percentage of his normal hourly rate (called the Basic Charges). If the Claimant loses their claim or discontinues it because its prospects of success are not as good as initially anticipated, the Claimant does not pay any more than basic charges at the discounted rate, (though he may still have to pay for disbursements, if they are incurred).

However, if they win their claim or reach a settlement with their opponent, then they will be liable to pay the balance of their solicitor's costs at whatever his normal basic rate would be. In addition, the solicitor is entitled to charge a success fee, which compensates the solicitor for taking a risk with the case. The success fee is charged on the basic rate (not the discounted rate) and is assessed by reference to the risk in the case – a high risk case justifies a higher success fee than a low risk case – but in any event cannot be more than 100% of the solicitor's basic charges.

If the solicitor wins the claim for the client, then, as before, the client is usually entitled to expect his opponent to pay his reasonable costs. These are calculated by reference to the solicitor's basic charges plus any necessary disbursements.

However, it is important to note that the success fee cannot be recovered from the client's opponent. The client remains responsible for paying this and will normally pay it out of his damages.

### Example 2

A solicitor's basic charges per hour are £200 but he takes a case on a Discounted rate CFA and assesses the risk as being high. The client says her surveyor failed to spot cavity wall tie failure and she has incurred costs of £30,000 in fixing this. The solicitor thinks the case is good but there are risk factors that he has to take into account. The solicitor sets the success fee at 30%. This is equivalent to £260 per hour, but under the Discounted rate CFA, the Client pays £100 per hour.

The solicitor issues a claim and eventually the claim settles. The claimant receives an award of damages from her opponent of £20,000.

Her solicitor's basic charges are £8,000 but under the Discounted rate CFA, the client has already paid £4,000. The success fee at 30% is £2,400 and there are additional disbursements (barrister's fees, an expert's fee and court fees) of £3,000 which the client has paid.

The client recovers the basic charges in full from his opponent, along with all of the disbursements, so in damages and costs he pays the sum of £76,000. That sum is allocated as follows:

**Paid by Opponent:**

Damages	£20,000
Solicitor's basic charges	£8,000
Disbursements	£3,000

<b>Subtotal</b>	<b>£31,000</b>
-----------------	----------------

**Owed to solicitor:**

Solicitor's basic charges	£4,000
Success fee @30% of total basic charges	£2,400

<b>1. Paid to solicitor:</b>	<b>£6,400</b>
------------------------------	---------------

**Paid to client:**

Damages less £8,000 retained success fee	£17,600
Reimbursement of Discounted Rate CFA charges paid by client	£4,000
Disbursements reimbursed	£3,000

<b>2. Paid to client</b>	<b>£24,600</b>
--------------------------	----------------

<b>Totals 1 &amp; 2</b>	<b>£31,000</b>
-------------------------	----------------

## **What about Barrister's fees - will they act on a CFA?**

It is entirely a matter for an individual barrister as to whether they accept a case on a CFA or not. The most important factor to consider when choosing a barrister is their expertise, but we have good relationships with highly reputable sets of barristers chambers so where we are prepared to take a risk on a case, it is more likely that our chosen barrister will take the same view.

## **What about your opponent's costs?**

The normal rule in court action is that the loser pays the winner's reasonable legal costs in bringing or defending the claim. There is, therefore a risk that if you proceed with your claim and then have to discontinue or if you lose at trial, your opponent will be entitled to recover, from you, its legal costs of defending the claim.

However, it is important to distinguish between costs incurred pre-action (that is, before a claim is issued at court to formally start the claim), and costs incurred once the claim has been issued.

As a general rule, pre-action costs are not recoverable as between opponents but in many cases, to avoid a claim being issued, a defendant will make a offer to settle some or all of the claimant's pre-action legal costs as part of its settlement proposals. Early settlement may well be attractive to a Claimant.

However, where it is necessary to issue a claim, reasonable pre-action costs become costs that are 'incidental' to the claim and, provided they are not disproportionate, are recoverable from your opponent at the basic rate.

## **Can I insure against this potential liability?**

Insurance to accompany a CFA is called After the Event insurance ('ATE'). ATE insurance covers the risk that you may lose your claim and be ordered to pay your opponent's costs. In return for payment of the ATE premium, the insurer will pay your opponent's costs.

Whilst some insurers are willing to provide insurance for claims that do not involve personal injury or clinical negligence, they are thin on the ground and those few that are available can be prohibitively expensive.

ATE premiums are not a disbursement that can be recovered from your opponent so it is a cost that you will have to bear.

Provided you are happy for us to do so, we will seek ATE cover on your behalf so that you consider whether the ATE premium costs outweigh the risks of proceeding without insurance and make a considered decision.