



How to fund a judicial review claim when public funding is not available

1. Introduction

The cost of bringing a judicial review claim is considerable: in the region of £10,000 to £20,000 for a straightforward case, higher for a more complex matter. If the claimant is unsuccessful, they are likely to be liable for the defendant's costs as well as their own. They are therefore looking at a legal bill of upwards of £30,000 if they lose, and they must be prepared for this eventuality, bearing in mind the unpredictability of judicial review proceedings and costs orders.

This information leaflet looks briefly at the various options of funding the claim and protecting the client in the event of an adverse costs order. Please refer to the first leaflet in this series for information about funding a judicial review using CLS funds (legal aid).

2. Instructing solicitors privately

If the client has sufficient means (see above for a rough estimate of likely costs in a judicial review), they can of course instruct their solicitors on a normal private basis. The important issues for the client are the likely costs of their own representation (which will need to be funded as the case progresses), the likely costs of the other side if they lose, and also the potential for "no order for costs" if settlement is reached, but in such a way that the claimant cannot recover their costs.

It may in fact be more appropriate for the client to instruct solicitors under a conditional fee agreement (possibly with after the event insurance, see below at section 3), rather than on a normal private client basis. Clients should also check whether they in fact have "before the event" insurance cover: see section 4 below.

3. Conditional fee agreements and after the event insurance

Conditional fee agreements (or CFAs, also referred to as "no win, no fee" agreements) are in theory available as a means of funding judicial review proceedings, although they are still relatively rare.

Established under the Access to Justice Act 1999, CFAs were introduced to enable people to bring personal injury and other claims more easily on a private client basis. The basic principle is that the client is not liable for their own legal costs if they lose their case, and the other side's costs are covered by insurance bought at the start of the case. The insurance is bought "after the event" that is the subject matter of the claim (e.g. the accident or decision that is being judicially reviewed). If the claimant is successful, the defendant is normally ordered to pay their costs and this includes

the “success fee” set out in the CFA, effectively a percentage uplift to cover the risk the solicitor has taken of not getting paid, and to cover the costs of the cases which are lost under CFAs.

The inherent – and obvious – difficulty with judicial review proceedings is that they are far more difficult to predict in terms of success and risk than say a road traffic accident. There is also a high likelihood of a settlement which leads to no order for costs which could effectively mean that the claimant’s solicitors are not paid even though a satisfactory settlement had been reached. Whilst other types of claims can be assessed looking at a series of set factors (e.g. witnesses to the accident, causation of injuries etc), and a formula applied to the prospects of success to arrive at an appropriate success fee, judicial review does not lend itself to such a formulaic approach.

It is therefore up to the individual solicitor and their firm or organisation to assess the strengths and weaknesses of the case, and then decide whether a CFA should be entered into, and if so, what the success fee should be. This should all be recorded on the file as, at the end of the case, if the bill is to be assessed, this will include the success fee and whether it was set at an appropriate level. Both basic costs and the success fee can be reduced on assessment. (The assessment will also look at whether the insurance premium paid was reasonable as this can also be recovered from the other side – see below.)

Standard CFA documentation is available on the Law Society’s website at www.lawsociety.org.uk. This includes guidance, the relevant rules and a model CFA and client leaflet. These should be treated with caution for a judicial review claim, as they are drafted with a personal injury or clinical negligence claim in mind.

Once a solicitor has agreed to enter into a CFA in relation to a judicial review claim, they must then consider and advise the client on “after the event” insurance (ATE cover) to protect the client if they lose their case and are ordered to pay the other side’s costs. ATE cover is widely available for cases in which CFAs are common (such as personal injury and clinical negligence). It is not widely available in relation to judicial review proceedings. Where it is available, it is very expensive, and can seem disproportionately expensive for the cover that is provided (e.g. a premium of £10,000 for cover of only £30,000). As referred to above, if the premium paid has been too high, this can also be reduced on assessment and therefore not recovered in full from the other side even where the claimant has been successful.

ATE insurance for judicial review proceedings is expensive, largely because the proceedings are expensive and unpredictable. Premiums also tend to increase disproportionately once proceedings are issued. It is therefore vital to investigate ATE cover as soon as possible when proceedings are contemplated, as the premium may jump massively once the claim has started.

Some insurers offer products where the premium need not be paid up front, but can be deferred. Cover is also sometimes only for stages in the proceedings, or authority is required from the insurers to proceed to the next stage, and reports must be provided to the insurer before the cover is extended. It can also be expensive to buy “top up” cover, if the costs of the case increase and the initial cover is not sufficient.

If no insurance is available, there is nothing to prevent a client pursuing a claim funded under a CFA without insurance, and risking the costs liability that would arise if they lose.

The Claimant's solicitor must ensure they inform the Defendant that the case is funded under a CFA, including when any CFA is entered into with counsel.

4. Before the event insurance

A client may also have "before the event" insurance (also known as "BTE", or legal expenses insurance) and the solicitor should always check whether this is available and discuss it with the client before entering into any other funding arrangement, as it may in fact fund the entire action (i.e. both own solicitor and other side's costs) without costing the client anything. A failure to use available BTE insurance may invalidate a CFA, and should be declared in any application for legal aid.

Unfortunately, most BTE policies specifically exclude judicial review proceedings and therefore this is unlikely to be a viable option. However, if it is available, the following points should be borne in mind.

BTE insurance is usually part of another insurance policy, such as contents or building insurance, car insurance or can be part of a credit card agreement. It is usually restricted in its cover, both in terms of the amount of costs it covers, but also what type of claims it can be used to bring. There is also often a time limit on when it can be used, and although this is unlikely to raise difficulties in a potential judicial review claim, it is important to check the policy immediately to avoid being out of time to use the cover (e.g. failure to notify the insurers within three months of the date of the incident which has led to the claim).

The other main restriction or difficulty with BTE cover is that many insurers attempt to force clients to use their panel solicitors. This can present difficulties for the client if they have approached a solicitor of their choice and want to instruct them under their BTE policy. This can mean that the insurers will try to stop them, and make them go elsewhere.

5. Protective costs orders

There may be instances in which none of the above is available or appropriate, and a protective costs order (PCO) may be the only way in which the claimant can bring the claim; or it may be necessary to consider applying for a PCO in combination with one of the options outlined above.

Protective costs orders are only available in relatively limited circumstances, based on the rules set out in the *Corner House* case¹, which have now been reviewed and arguably extended in a number of subsequent decisions.

The principle behind protective costs orders is that where a claimant is bringing a claim for which they cannot meet the other side's costs if they lose, they should be protected from the possibility of an adverse costs order by the court, if the court considers the case to be of sufficient public importance and that it is in the public interest to have the issue litigated. This enables the claimant

¹ R (Corner House Research) v Secretary of State for Trade & Industry (Public Law Project, interested party) [2005] EWCA Civ 192. For a more detailed analysis of the key issues, including the criteria to be met, see the article "[Protective costs orders in judicial review proceedings](#)" on our website.

to pursue the case safe in the knowledge that even if they lose there will either be no order for costs against them, or any adverse costs order will be capped (i.e. the court sets a limit on the costs that the defendant can recover from the unsuccessful claimant).

The process – which is best used at the start of the case but can in theory be used at any stage – involves the claimant applying for a protective costs order, setting out how they meet the relevant criteria. The court will consider this at the permission stage of a judicial review, usually on the papers. The costs risk of the application itself is limited as the *Corner House* judgment gave guideline figures as to the appropriate level of costs that the defendant could recover if the claimant loses their application: £1,000 for a paper application. The application can be renewed at an oral hearing, but obviously this exposes the claimant to an increased costs risk, although again this was limited by the guideline figures given in *Corner House*: £2,500 for an oral hearing.

The PCO of course only provides costs protection in relation to the other side's costs. The claimant must still fund their own representation, the most likely options being pro bono representation or a CFA, although there is nothing to stop the claimant paying their own solicitors privately (which they have some degree of control over), but still applying for a PCO to protect them in relation to the other side's costs.

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