RUSSELL-COOKE | SOLICITORS

Charity Litigation Funding

Charity litigation funding - a problem?

We understand that charity trustees would prefer not to allocate charitable funds to litigation. However sometimes there is no option as trustees are obliged to do what is necessary to defend the interests of their charity, including entering into litigation if so advised. It is therefore necessary to minimise the risks and cost of litigation as far as practicable.

In order to protect themselves costs-wise, charity trustees can apply for a Beddoe order which authorises them to take or defend an action using the charity's funds. However these applications are expensive because the court has to have an idea of whether the action is worth bringing (or defending). Consequently the Beddoe hearing can itself turn into a "mini-trial" of the issues in the dispute. While this may give trustees some comfort in that they have permission to proceed, it does not actually take the action much further forward as the dispute will itself proceed before a different judge.

There are however ways of avoiding an expensive Beddoe application.

Litigation funding

We are able, in certain circumstances, to offer products that firstly prevent the need for charity trustees to fund litigation on an ongoing basis, and secondly protect charity trustees from having to pay the costs of their opponents should the matter be unsuccessful or should the trustees decide to withdraw, even possibly for publicity reasons.

Such a tailor made package consists of a conditional fee agreement (CFA) and after the event insurance (ATE).

Conditional Fee Agreements

A CFA is an agreement between a solicitor and a client whereby the solicitor agrees to work for either a reduced fee or no fee at all.

If the case fails, only the reduced fee is payable (if anything at all).

If the case succeeds ("success" being clearly defined in the agreement) then fees will be paid at the usual rates together with an agreed percentage uplift to reflect the risk Russell-Cooke has taken in potentially receiving no fees.

At present the uplift is recoverable from your opponent. However this is currently under review following the report published by Lord Justice Jackson at the beginning of 2011. If his recommendations are implemented the winning party will no longer be able to recover the uplift from his opponent but will have to bear it himself. If and when these recommendations are implemented they are, however, unlikely to be retrospective.

In addition Lord Justice Jackson has suggested that solicitors will be able to enter into contingency fee type arrangements, ie the solicitors risk their fees in exchange for a share of the recovery for the client.

We are willing to consider acting for charities on a CFA basis. As we carry out a vigorous risk assessment before entering into a CFA you can be sure that you are proceeding with full knowledge of all the possible risks.

After The Event (ATE) insurance

ATE insurance is a policy that can be entered into after a dispute has arisen. The policy may cover the charity's disbursements (funds paid out on behalf of the charity, for example court fees) and the opponents' costs should the charity be unsuccessful.

ATE policies are usually deferred (which means that nothing is paid until the end of the matter) and self-insured (which means nothing is payable at all if the charity loses).

Most ATE insurers also offer staged or stepped premiums which means the sooner the matter resolves by agreement, the lower the premium.

As with the CFA uplift, the ATE premium is in principle recoverable from your opponent although the same recovery issues apply if and when Lord Justice Jackson's proposals are implemented.

Conclusion

The combination of a CFA and an ATE policy is a powerful weapon in litigation.

If both Russell-Cooke and the ATE insurer believe that the case is strong enough to take on the risk, then this should give charity trustees some comfort that their claim has been thoroughly tested and will be vigorously pursued.

In addition there is a substantial tactical advantage for the charity if its opponent is facing the prospect of having to pay both the CFA uplift and ATE premium. The sooner settlement is reached, the lower the fees, the lower the uplift and the lower the premium. This obviously encourages early resolution.

For a discussion on funding options please contact:

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