

ST HELENA



A BILL FOR AN ORDINANCE

To make provision as to the costs recoverable and fees chargeable in civil litigation, and for related matters.

PART 1 PRELIMINARY

Citation and commencement

1. This Ordinance may be cited as the Civil Litigation (Costs) Ordinance 2025, and comes into force on *[DATE]*.

Interpretation

2. In this Ordinance, unless the context otherwise requires—

“**alternative dispute resolution**” means any method, including those that are judge-led, of resolving a dispute other than through the normal trial process;

“**after the event insurance**” means insurance which is purchased following an event which gives rise to a legal dispute and which covers some or all of the potential costs liabilities on those proceedings;

“client” means a person who has engaged, or is looking to engage, the services of a legal service provider and includes, except where the context otherwise requires, a person who—

- (a) has instructed the legal service provider to provide advocacy or litigation services, or
- (b) is liable to pay the legal service provider’s fees in respect of those services;

“conditional fee agreement” means an agreement between a client and a legal service provider which provides for their fees and expenses, or any part of them, to be payable only in specified circumstances;

“costs” includes all fees, costs, disbursements, expenses, charges and remunerations relating to the provision of legal services;

“costs budget” means a detailed estimate of costs a party expects to incur during legal proceedings, broken down by the phases of the litigation and including both the costs which have already been incurred as well as future costs;

“costs management order” means an order that approves or modifies the parties’ costs budgets and which may set limits on recoverable future costs for each phase of the litigation;

“court” means any competent court exercising civil jurisdiction in St Helena;

“damages based agreement” means an agreement between a legal service provider and a client, whereby the legal service provider’s agreed fee is contingent on the success of the case and is determined as a percentage or share of the compensation received by the client;

“legal assistance fund” means the fund established by Part III of the Legal Aid, Assistance and Services Ordinance 2017;

“legal service provider” means a person who—

- (a) provides legal advice or representation,
- (b) appears on behalf of any person in any court, tribunal or inquiry having jurisdiction in St Helena,
- (c) prepares any instrument or document relating to any property or legal proceedings (including preparation prior to the potential issue of such proceedings), or
- (d) instructs, on behalf of a client, any person to carry out any of the actions set out above in (a)-(c);

“success fee” means an additional fee that is payable, over and above the amount that would be payable if there was no conditional fee agreement, in specified circumstances (usually if the client wins the case).

Application

3. This Ordinance applies—
- (a) in civil claims issued on or after *[COMMENCEMENT DATE]*, to all costs;
 - (b) in civil claims issued before *[COMMENCEMENT DATE]*, to all costs incurred after that date;
 - (c) in civil matters that are not issued, to all costs incurred after *[COMMENCEMENT DATE]*.

PART 2

COSTS – GENERAL PROVISIONS

Level of fees and costs to be set

4. (1) The Governor on the advice of the Executive Council shall, by notice published in the Gazette,—
- (a) set the scale of fees which may be recovered on an inter partes basis by a legal service provider for the provision of any and all legal services, and
 - (b) make provision for the level at which any other costs are recoverable.
- (2) Subject to subsection (3) no legal service provider, including one operating under a conditional fee agreement, may recover costs in excess of those set in accordance with subsection (1).
- (3) Where a legal service provider believes that the exceptional nature or circumstances of a claim are such that it is in the interests of justice that they are able to recover costs at a higher level, they must apply to the court for an order to permit the legal services provider to recover those costs.
- (4) In considering an application made under subsection (3), the court must have regard to all the complexity of the factual and legal issues in the case, the specific local circumstances, and whether it is accordingly reasonable and proportionate to allow a recovery of costs at a higher level.
- (5) A claim may not be considered to be exceptional merely by virtue of being brought in St Helena.

Costs in excess of £50,000

5. (1) A legal service provider must notify all parties, and the court, if they believe their total costs in a claim will exceed £50,000.
- (2) Where proceedings have been issued, a notification made under subsection (1) must be made within 14 days of the legal service provider becoming aware that their total costs may exceed the specified amount.

- (3) Where proceedings have not been issued and a legal service provider believes that their total costs may exceed the specified amount, they must notify the court of this belief when issuing proceedings.
- (4) Where a notification is made under this section, a costs and case management conference must be held to hear any applications in relation to costs budgeting.
- (5) The notifying party may not recover any costs incurred after making the notification except with the permission of the court, the court being satisfied that such costs are reasonable in the circumstances.

Cost budgets and costs management orders

- 6. (1) This section applies to civil proceedings where costs may be recoverable and where permission has been granted under section 4(3) for a legal service provider to recover costs in excess of the rates set in accordance with section 4(1).
- (2) Unless the court otherwise orders, all parties must file and exchange costs budgets not later than 21 days before the first costs and case management conference.
- (3) In the event that a party files and exchanges a costs budget under subsection (2), all other parties must file an agreed costs budget discussion report no later than 7 days before the first costs and case management conference.
- (4) Unless the court otherwise orders, any party which fails to file a costs budget despite being required to do so will be treated as having filed a costs budget comprising only the applicable court fees.
- (5) In addition to exercising its other powers, the court may manage, by order, the costs to be incurred (the budgeted costs) by any party in the proceedings.
- (6) Where costs budgets have been filed and exchanged, the court must make a costs management order unless it is satisfied that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective without such an order being made.
- (7) When reviewing costs budgets under subsection (6), the court will not undertake a detailed assessment in advance, but is required to assess whether the costs budgets fall within the range of reasonable and proportionate costs sufficient to secure a just outcome taking into account the specific circumstances of St Helena and, in particular, the level of rates set in accordance with section 4(1).
- (8) A costs management order made under subsection (6) must—
 - (a) record the extent to which the budgeted costs are agreed between the parties,

- (b) in respect of the cost budgets which are not agreed, record the court's approval after making appropriate modifications if required, and
 - (c) record the extent, if any, to which costs already incurred are agreed or not.
- (9) Where a costs management order has been made under subsection (6), the court will thereafter manage, supervise and control the parties' costs budgets in respect of actual or potentially recoverable costs.
- (10) The court, in its discretion, may—
 - (a) record on the face of any costs management order any comments it has about the incurred costs which are to be taken into account in any subsequent assessment proceedings, and
 - (b) set a timetable or give other directions for future reviews of costs budgets.
- (11) After a party's costs budget has been approved or agreed, the party must re-file and re-serve the costs budget including—
 - (a) the re-cast figures, and
 - (b) any order made under subsection (6).

Amendment of a costs budget

- 7. (1) A legal service provider who believes that a significant change of circumstances relating to the litigated matter means that the costs budget is no longer appropriate must notify the court and all parties as soon as reasonably possible of the change of circumstances.
- (2) Upon receipt of a notification under subsection (1) the court may exercise any of its case management powers it deems appropriate, having considered—
 - (a) any submissions from the parties,
 - (b) the nature and extent of the change of circumstances,
 - (c) the effect it will have on the costs budget,
 - (d) whether an amendment to the costs budget is an appropriate response to the change of circumstances, and
 - (e) whether any other orders, including but not limited to a stay of proceedings, would assist the parties in responding to the change of circumstances without unnecessarily increasing their costs.

Court's discretion as to costs

- 8. (1) Without prejudice to the court's general powers in relation to costs, the court has discretion as to—
 - (a) whether costs are payable by one party to another,
 - (b) the amount of those costs, including whether they should be restricted by reference to the availability of public funding, and
 - (c) when they are to be paid.

- (2) If the court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order.
- (3) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—
 - (i) the conduct of all the parties,
 - (ii) whether a party has succeeded on part of its case, even if that party has not been wholly successful, and
 - (iii) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 of the Civil Procedure Rules (England and Wales) apply.
- (4) The conduct of the parties includes—
 - (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;
 - (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
 - (c) the manner in which a party has pursued or defended its case or a particular allegation or issue;
 - (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated the claim;
 - (e) whether a party unreasonably failed to engage in alternative dispute resolution.

PART 3

CONDITIONAL FEE AGREEMENTS

Unenforceability of conditional fee agreements

- 9.** Except as provided for in this Ordinance, conditional fee agreements are unenforceable.

Circumstances where a conditional fee agreement may be used

- 10.** (1) An enforceable conditional fee agreement may be made in proceedings where—
 - (a) the claim includes a claim for personal injury,
 - (b) the instruction of an expert or experts is necessary for the pursuit of the claim,
 - (c) the litigant has applied to the Legal Assistance Fund and had their application refused, and
 - (d) the defendant to the claim is either protected by indemnity insurance or is the Attorney General.
- (2) A conditional fee agreement made under this section may be enforceable if it—
 - (a) does not amount to a damages based agreement,
 - (b) does not provide for a success fee, and
 - (c) complies with sections 11 – 15 of this Ordinance.

Requirements for contents of conditional fee agreements

- 11.** (1) A conditional fee agreement must specify—
- (a) the particular proceedings or parts of them to which it relates (including whether it relates to any appeal, counterclaim or proceedings to enforce a judgement or order),
 - (b) the circumstances in which the legal service provider's costs, or part of them, are payable, and
 - (c) what payment, if any, is due—
 - (i) if those circumstances only partly occur;
 - (ii) irrespective of whether those circumstances occur;
 - (iii) on the termination of the agreement for any reason; and
 - (iv) the amounts which are payable in all the circumstances and cases specified or the method to be used to calculate them and, in particular, whether the amounts are limited by reference to the damages which may be recovered on behalf of the client.
- (2) A conditional fee agreement to which section 12 applies must contain a statement that the agreement complies with requirements of that section.

Information to be given before a conditional fee agreement is made

- 12.** (1) Before a conditional fee agreement is made the legal service provider must—
- (a) inform the client, in writing, about the matters set out in subsection (2), and
 - (b) if the client requires any further explanation, advice or other information about any of those matters, provide such further explanation, advice or other information about them as the client may reasonably require.
- (2) Those matters are—
- (a) the effects of the agreement;
 - (b) the circumstances in which the client may be liable to pay the costs of the legal service provider in accordance with the agreement;
 - (c) the circumstances in which the client may seek assessment of costs of the legal service provider and the procedure for doing so;
 - (d) whether the legal service provider considers that the client's risk of incurring liability for costs in respect of the proceedings to which the agreement relates is insured against under an existing contract of insurance;
 - (e) whether other methods of financing those costs are available, and, if so, how they apply to the client and the proceedings in question;
 - (f) the client's right to withdraw from the agreement in accordance with section 16;
 - (g) the appropriateness, or otherwise, of attempting to pursue alternative dispute resolution in relation to some or all elements of the claim;

- (h) whether the legal service provider considers that any particular method or methods of financing any or all of those costs is appropriate and, if the legal service provider considers that a contract of insurance is appropriate or recommends a particular such contract—
 - (i) their reasons for doing so, and
 - (ii) whether they have an interest in doing so.
- (3) This section does not apply in the case of an agreement between a legal service provider and an additional legal service provider.

After the event insurance

- 13.
 - (1) If a party or legal service provider believes the exceptional nature or circumstances of a claim are such that after the event insurance is appropriate and necessary notwithstanding qualified one way costs shifting, they must seek the court's permission to include such a clause in the conditional fee agreement.
 - (2) Except where permission is granted by the court under subsection (1), an after the event insurance policy is unenforceable.
 - (3) Permission under subsection (1) can be sought by way of freestanding application before substantive proceedings are issued.

Form of agreement

- 14. A conditional fee agreement must be—
 - (a) in writing, and
 - (b) signed by the client and the legal service provider.

Amendment of agreement

- 15. Where a conditional fee agreement is amended to cover further proceedings or parts of them—
 - (a) sections 11 and 14 apply to the amended agreement as if it were a fresh agreement made at the time of the amendment, and
 - (b) the obligations under section 12 apply in relation to the amendments in so far as they affect the matters mentioned in that section.

Cancellation period

- 16.
 - (1) The cancellation period ends at the end of 14 days after the day on which the Conditional Fee Agreement is entered into.
 - (2) If the legal service provider does not provide the client all of the information required under section 12 including the right to cancel the agreement, the

cancellation period ends at the end of 14 days after the day on which the client receives that information.

- (3) The client may cancel a Conditional Fee Agreement at any time in the cancellation period without giving any reason, and, subject to subsection (6), without incurring any liability.
- (4) To cancel a Conditional Fee Agreement, the client must make a clear statement to the legal service provider of their decision to cancel the agreement.
- (5) The legal service provider may only carry out work that incurs costs for the client during the cancellation period if—
 - (a) the client has been notified, in writing, of their liability for any costs incurred during the cancellation period, and
 - (b) the client has given their permission for such work to take place.
- (6) The client will be liable for any reasonable costs incurred in accordance with subsection (5).

Requirement to notify all parties of a Conditional Fee Agreement

- 17. (1) A legal service provider who has entered into a Conditional Fee Agreement must, after the end of the cancellation period, notify all parties to the claim of the existence of the Agreement within 21 days (“the initial notification period”).
- (2) When a person becomes a party after the initial notification period, such person must be notified within 21 days of becoming a party.
- (3) Where the claim has yet to be issued, a legal service provider who has entered into a Conditional Fee Agreement must also notify all persons who are in contemplation as potential parties to any proceedings which might later be issued.

PART 4 QUALIFIED ONE-WAY COSTS SHIFTING

Qualified one-way costs shifting: scope and interpretation.

- 18. This Part applies to proceedings, including those where a conditional fee agreement is in place, which include a claim for damages—
 - (a) for personal injuries,
 - (b) under the Fatal Accidents Act 1976¹, or
 - (c) which arises out of death or personal injury and survives for the benefit of an estate by virtue any applicable legislation.

¹ 1976 c.30

Effect of qualified one-way costs shifting

- 19.** (1) Subject to sections 20 and 21, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders (including deemed orders) for, or agreements to pay or settle a claim for, damages, costs and interest made in favour of the claimant.
- (2) Orders for costs made against a claimant may only be enforced after all proceedings, including any appeals, have been concluded and the costs have been assessed or agreed.
- (3) Where enforcement is permitted against any order for costs made in favour of the claimant, subsection (4) applies.
- (4) Where a party entitled to costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and either—
- (a) set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance, or
 - (b) delay the issue of a certificate for the costs to which the party is entitled until the party has paid the amount which that party is liable to pay.
- (5) An order for costs which is enforced only to the extent permitted by subsection (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.

Exceptions to qualified one-way costs shifting where permission not required

- 20.** Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that—
- (a) the claimant has disclosed no reasonable grounds for bringing the proceedings,
 - (b) the proceedings are an abuse of the court's processes, or
 - (c) the conduct of the claimant or a person acting on the claimant's behalf and with the claimant's knowledge of such conduct is likely to obstruct the just disposal of the proceedings.

Exceptions to qualified one-way costs shifting where permission required

- 21.** (1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.

- (2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where—
- (a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependent within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses), or
 - (b) a claim is made for the benefit of the claimant other than a claim to which this Part applies.
- (3) Where subsection (2)(a) applies, the court may make an order for costs against a person, other than the claimant, for whose financial benefit the whole or part of the claim was made.

PART 5 MISCELLANEOUS

Power to make Regulations

- 22.** The Governor on the advice of the Executive Council may make regulations for the purpose of giving effect to the provisions of this Ordinance.

EXPLANATORY NOTE

(This note is not part of the Ordinance)

This Ordinance makes provision for the costs that are recoverable and the fees that may be charged in relation to civil litigation.