LPC BUDDY

Civil Litigation

2023 / 24

THE DEFINITIVE,
DISTINCTION QUALITY
STUDY GUIDE FOR THE LPC

CUT DOWN YOUR READING.
EASE YOUR EXAM STRESS.
GET THE GRADE YOU NEED.

Civil Litigation

Colour Coding Guide	❖ Blue Text – Reference to statutes and case law. ❖ Green Text – Reference to textbook paragraphs[1], workshop tasks[2] and other notes in LPC Buddy. ❖ Orange Text – References to the CPR and Pre-Action Protocols. ❖ Red Text – Court Forms. ❖ Purple Text – Reference to Professional Conduct Rules and Principles.

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[1] Textbook references are to the CLP Legal Practice Guides by CLP Publishing.
[2] References to Workshop tasks are to University of Law workshop tasks (which may be adopted by other LPC institutions). The content and structure of Workshops are subject to change at short notice and so task references should be treated as a general guide only.

1. Case Analysis, Funding, ADR, and the Overriding Objective

Overview of the Litigation Process

- *Civil Litigation, 1.3*

<table>
<tr><td>Overview</td><td>

Litigation in England and Wales is a lengthy process; a Civil trial is best viewed as the end-point of a significant number of intermediate steps, which can take months or even years to complete.
An overview of the process leading up to trial, and post-trial, is below:

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<tr><td>Stage 1 – Pre-Action</td><td>

Initially, the Court will not be involved in the litigation process at all and the parties will correspond on a “pre-action” basis.
Parties who are in dispute will be required to follow steps set out in any applicable Pre-Action Protocol, the most common of which are the exchange of a:

Letter of Claim – Setting out the details of the Claimant’s allegations.
Letter of Response – Setting out the details of the Defendant’s response and, if liability is denied, explaining why.

<table>
<tr><td>Alternative Dispute Resolution (ADR)</td><td>

Parties are encouraged under the Pre-Action Protocols to use litigation as a last resort and therefore should consider the appropriateness of out-of-court “Alternative Dispute Resolution” throughout the progress of the claim, including at the Pre-Action Stage.

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<tr><td>Stage 2 – Commencement of Court Proceedings</td><td>

If the claim cannot be resolved at the pre-action stage, court proceedings will need to be commenced by the claimant. The following steps will occur:

<table>
<tr><td>Issuing the Claim Form</td><td>

Proceedings are commenced by “issuing” a claim form (essentially sending this into court and getting the court to affix its seal), and serving this on the defendant.

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<tr><td>Exchange Statements of Case</td><td>

The Claim Form will be accompanied by Particulars of Claim which set out the details of the claimant’s case.
In response to the Particulars of Claim, the defendant will Acknowledge Service, and file a Defence which responds to each allegation. The defendant may also make a counterclaim.
Collectively, these documents are referred to as “Statements of Case” (along with any subsequent Replies or Rejoinders).

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<tr><td>Allocation</td><td>

When the Statements of Case have been exchanged, the claim will be allocated by the Court to one of three “tracks”:

Small Claims Track: Claims of up to £10,000 and low complexity.
Fast Track: Claims of £10,000 - £25,000 and moderate complexity.
Multi-Track: Claims of more than £25,000, and the most complex.

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		❖ There is no "clue in the name" with regards the names of the tracks; a claim that is allocated to the "Fast Track" is not allocated to that track because it is especially urgent. Instead: ➢ The track allocated broadly depends on the **<u>claims' complexity and value.</u>** ➢ Each track adopts a **<u>variety of different rules</u>** across a range of matters (such as, for instance, the amount of recoverable trial costs). ➢ The intermediate steps to trial will **<u>differ slightly depending on the track</u>** the case is allocated to. ➢ The LPC will normally focus on what happens in **<u>higher value, more complex litigation</u>**, and thus focuses on Multi-Track claims.
<u>Stage 3 – Interim Matters</u>	**<u>CCMC / Directions</u>**	❖ When a track has been allocated, the Court will manage the claim and will **<u>give the parties Directions</u>** at an initial hearing, known as the **<u>Case Management Conference</u>** (CMC). ❖ The Directions will include specifying: ➢ The **<u>trial window</u>**; and ➢ The **<u>steps to be taken to prepare for trial</u>** in the intermediate period such as: ▪ **<u>Disclosure and Inspection of Documents;</u>** • The parties list documents in their possession (disclosure) and their opponent will have the right to see non-privileged documents (inspection). ▪ **<u>Exchange of Expert Evidence;</u>** and ▪ **<u>Exchange of Witness Statements</u>** ❖ For Multi-Track Litigation, the Court will also normally undertake **<u>Costs Management</u>** whereby each party files and exchange a Costs Budget (<u>Precedent H</u>), which will be subject to the Court's **<u>review and approval</u>**. If the Court undertakes costs management, the CMC will be known as a "Costs and Case Management Conference", or "CCMC". ❖ The budget will limit the extent of a party's costs that they will be able to recover from their opponent for each "stage" of the litigation.
	<u>Interim Applications</u>	❖ As the litigation continues, the parties may also apply for specific **<u>interim orders</u>** which may be required.

		❖ These may include applications for: ➢ Strike Out; ➢ Summary Judgment; ➢ Security for Costs; ➢ An Interim Payment; ➢ Relief from Sanctions (if there has been non-compliance with a procedural rule).
Stage 4 - Trial	❖ When all of the Directions have been completed, if the parties cannot resolve the dispute by ADR, they will **proceed to trial** where witnesses will be subject to cross-examination and the court will provide **judgment on all issues of liability and quantum.** ❖ On completion of the trial, the court may decide that one party will pay the other's **costs** (the **normal rule is that the loser will pay the winner's legal costs**) and, if so, how much. ❖ The court may make a **Summary Assessment of Costs** (deciding how much should be paid on a "broad brush" basis); this is the normal order for fast-track cases. ❖ Alternatively, the court may refer the matter to **Detailed Assessment** where the Court will scrutinise a party's costs in more detail, generally on a "line by line" basis.	
Stage 5 – Post Trial	❖ **Detailed Assessment** will take place, if ordered. ❖ A party may decide to **appeal** the judgment. ❖ The judgment may need to be **enforced** (if, for instance, the Defendant has failed to pay the judgment sum).	

Civil Case Analysis[1]

❖ *Civil Litigation, 1.4; 2.5; 2.6*

Overview	❖ LPC students are expected to conduct an analysis of a new civil case, based on a bundle of documents (such as witness statements). ❖ Conducting a case analysis requires an assessment of three separate elements: ➢ **Liability**: that is, of the relevant cause of action; ➢ **Viability:** that is, of the commercial risks to the client and the potential strategy, accounting for the client's objectives; and ➢ **Quantum:** that is, of how much the client is likely to recover in the event that they are successful. ❖ The below structure is that which the University of Law teaches its LPC students. You should follow the relevant structure provided by **your LPC provider**. ❖ NB: as a rule of thumb, if you are provided with a structure of how to answer a particular question by your LPC provider, then you **should use that structure**. You will not generally be rewarded for trying to do things differently.

Structure

Overview	❖ Conducting a case analysis consists of three stages: ➢ **Identify who your client is**; ➢ **Identify who the opponent is**; and ➢ Consider "**Liability, Viability, Quantum**". ❖ The first two stages are relatively self-explanatory. Our note below focuses on the final stage.

Liability *Civil Litigation 2.5*	❖ You should analyse the **relevant cause of action** as follows:	
	***Identify* the cause of action.**	❖ At the University of Law, the cause of action will either be: ➢ **Breach of Contract**; or ➢ **Negligence**.
	Explain its constituent elements.	❖ Both causes of action are broken down in the tables below. ❖ You must: ➢ **Establish the legal elements** which must be proved in order for the claim to be successful; and

[1] Workshop 1, Prep Task

		➢ **Identify the evidence** that is both **available**, and **required to be obtained**, to prove those elements.
	Explain the burden of proof.	❖ In civil litigation, the burden of proof is on the **claimant** to show, on the **balance of probabilities**, that what they are claiming is true. ❖ The "balance of probabilities" means that, to be true, a fact must be "**more likely than not"** (i.e., **50%+**). ❖ Stating this is ***always worth a mark.***
	Consider any Limitation issues.	❖ The Limitation Act 1980 prescribes fixed periods of time for **bringing a claim,** as follows: **Contract**: ❖ 6 years from **the date of the breach** ❖ s5 Limitation Act 1980. **Tort**: ❖ 6 years from the date the claimant **suffers damage**. ❖ s2 Limitation Act 1980 **Latent Damage**: ❖ "Latent damage is where damage is not evident at the date of the cause of action, but arises at a later date. ❖ Where there is latent damage, limitation expires **3 years from the date of the Claimant's knowledge**, if this is later than the date on which loss was suffered. ❖ s14A Limitation Act 1980 ❖ If a claim is brought under contract, the contract may also specify a ***contractual limitation period*** which prevents claims from being brought after a **shorter period of time** than the statutory limitation periods prescribed by the Limitation Act (e.g., 9 months after the cause of action). Check the contract to confirm whether such a clause is included. ❖ If limitation has expired, the client's claim may **be time-barred**, in which case they will be **unable to pursue this.**
Viability *Civil Litigation 2.6*	❖ If there is a legal basis for the claim, we next need to consider whether there are any **practical issues affecting the viability of a claim** against the defendant. ❖ Consider the following:	
	The financial prospects of the defendant.	❖ There is generally little point in litigating if the defendant has **no money to pay a judgment.** Consider: ➢ **Who** is the prospective defendant? ➢ Are they **solvent**? ➢ Are their **assets traceable**? Where are their assets located?

Contract	Tort	Latent Damage
❖ 6 years from **the date of the breach** ❖ s5 Limitation Act 1980.	❖ 6 years from the date the claimant **suffers damage**. ❖ s2 Limitation Act 1980	❖ "Latent damage is where damage is not evident at the date of the cause of action, but arises at a later date. ❖ Where there is latent damage, limitation expires **3 years from the date of the Claimant's knowledge**, if this is later than the date on which loss was suffered. ❖ s14A Limitation Act 1980

		➢ **How much** are the assets worth?
	How the claimant will fund the claim.	❖ We also need to consider whether the **claimant can afford to pay their legal fees.** ❖ Consider **funding options** (e.g., CFA, DBA, LEI / ATE, Public Funding (see guide on *Funding Options*)).
	How much time/ resources will the client have to commit to pursuing the claim?	❖ The client should be aware of the likely **time commitment**, and overall **cost** of pursuing the claim. ❖ Is the claimant **happy to incur such costs**, taking into account the litigation risk? ❖ Are there **alternative, less costly means of securing a remedy available**? Consider **ADR options** (see guide on *ADR Options*).
Quantum *Civil Litigation, 2.5.4*	❖ Finally, we need to analyse the **amount that the claimant is likely to recover**, if they are successful. ❖ You should consider: ➢ **How much** is the client likely to obtain? ➢ What **evidence** do they have of their losses e.g., invoices? ➢ Are there any issues which may **reduce the damages awarded**, such as: ▪ Remoteness; ▪ Mitigation; and ▪ Contributory negligence; ➢ Do we need to **preserve any evidence** to prove the claimant's losses? ▪ Is there any evidence that can't be preserved? If so, we may need to act quickly to test / examine this. ❖ Overall, consider whether the amount recoverable is **worth the client taking on the risk of litigation.**	

Breakdown of the Causes of Action

Overview	❖ During your analysis of **liability** above, we suggested that you: ➢ **Identify the relevant cause of action** for your client's claim; and ➢ **Establish the legal elements** which must be proved in order for the claim to be successful; and

	➢ **Identify any evidence** available, and required to be obtained, to prove those elements. ❖ The below table breaks down the constituent legal elements for the two causes of action that are normally assessed on the University of Law's LPC; breach of contract, and negligence. It is intended to provide a structure for your analysis at the "liability" stage, above.

1. Breach of Contract

Element to Establish	**Facts to Prove**	**Available Evidence**	**Evidence Needed**
That a Contract Existed.	❖ The claimant must first show that [the claimant] and [defendant] entered into a [oral/written] **contract** and the **date of this**. ❖ E.g., *Joe Bloggs and Heron Ltd entered into a written contract dated 12th September 2023.*	❖ **A copy of the contract** if written. ❖ **Telephone attendance notes/witness statements** which go to the formation of the contract particularly if the contract is oral.	❖ Any **further evidence mentioned in the client's proof** of evidence. ❖ Any **witness statements** that we do not currently have.
Express Terms	❖ The claimant must prove that, under the terms of the contract, [the claimant] agreed to [the subject of the contract] by [date] in consideration of [the defendant's obligations e.g., payment]. ❖ *E.g., Under the terms of the contract, Joe Bloggs agreed to supply and deliver a gas cooker to Heron Ltd on or before 30th September 2023.*	❖ **A copy of the contract**, if written, showing the existence of the terms. ❖ **Telephone attendance notes/witness statements** which go to the terms of the contract, particularly if the contract is oral.	❖ Any **further relevant evidence that the terms were included** ❖ E.g., if the contract is oral, did a **third party overhear the client** on the phone?
Implied Terms	❖ The claimant may need to show that the contract **contained terms that were implied by statute**, in which case you should **list the terms.** ❖ *E.g., the contract contained terms implied by the Supply of Goods and Service Act 1982 that the:*	❖ The **relevant statute** and a **copy of the contract** demonstrating that the contract is of a **kind into which these terms are implied.**	❖ Any further relevant evidence that the **terms were included.** ❖ E.g., if the contract is oral, did a **third party overhear the client** on the phone?

Element to Establish	Facts to Prove	Available Evidence	Evidence Needed
	➢ *Cooker would be of satisfactory quality (s4(2)).* ➢ *Cooker would correspond with its description (s3(2)).* ➢ *Supplier would carry out the service with reasonable care and skill (s13).*	E.g., the Supply of Goods and Services Act applies to contracts for the sale of goods where the property being transferred is "in the course of business". ❖ **Telephone attendance notes/witness statements**, particularly if the contract is oral.	
Breach	❖ Describe **how the terms in question were broken.** ❖ *E.g., "the cooker caught fire the first time it was used. The cooker that was supplied was therefore not of "satisfactory quality".*	❖ **Photographs**, and **witness testimony** of what went wrong.	❖ Any further evidence **mentioned in the witness statements**.
Causation	❖ Explain how the breach **led to the loss which was suffered**: ❖ *E.g., "the fire caused damage to the restaurant kitchen and the restaurant had to close for repairs for two weeks, leading to loss of profits".*	❖ Repair **quotations/ invoices** – do they indicate damage by fire? ❖ **Order cancellations**? ❖ Evidence indicating **damage to reputation** (e.g., newspaper articles). ❖ **Witness statements** from affected customers?	❖ **Expert reports?**
Quantum	❖ Explain **what the loss is** and **how it was calculated.** ❖ *E.g., "The damage to the kitchen was worth £5,000. The loss of profits came to £10,000".*	❖ Repair **quotations/ invoices.**	❖ **Accounts** indicating how much normal profit takings might be. ❖ **Witness statements** which also go to that

Element to Establish	Facts to Prove	Available Evidence	Evidence Needed
			point (e.g., from the company's accountant or bank manager).

2. Negligence

Element to Establish	Facts to Prove	Available Evidence	Evidence Needed
Duty of Care	❖ The claimant must show that a duty of care existed. ❖ Is there an **established duty** (e.g., doctor/patient; solicitor/client; road user/road user)? ❖ Was there an assumed duty of care under the principles of *Caparo Industries PLC v Dickman* [1990] UKHL 2 and *Hedley Byrne and Co Ltd v Heller and Partners Ltd* [1963] UKHL 4? I.e.: ➢ Was the harm **reasonably foreseeable?** ➢ Was there a relationship of **proximity**? ➢ Is it **fair, just and reasonable** to impose a duty of care? ❖ *"E.g., The claimant, Joe Bloggs, instructed a property surveyor, John Smith, pursuant to a contract dated 1 January. Mr Smith, under the principles in Hedley Byrne and Co Ltd v Heller and Partners Ltd* [1963] UKHL 4 *assumed a duty of care in tort to act with reasonable care and skill whilst discharging his duties under the contract".*	❖ The **retainer / contract** between the parties. ❖ **Documentary evidence of the relationship** between the two parties if it is not an established duty.	
Breach of Duty	❖ Explain what the defendant did to breach its duty of care.	❖ Any **evidence of the breach** including **witness statements** and **documentary evidence**.	❖ Any **further evidence** which might be **referred**

Element to Establish	Facts to Prove	Available Evidence	Evidence Needed
	❖ E.g., the defendant was a solicitor and they failed to properly advise the claimant. ❖ *E.g., "The claimant purchased a property in the belief it included a right of way. The defendant failed to mention in his report that there was, in actuality, no right of way over the property".*	❖ E.g., if an expert report failed to mention a right of way, **the report itself** will evidence this.	**to in the witness statements**.
Causation	❖ Explain how the breach **caused a loss.** ❖ *E.g., "Mr Bloggs purchased the Property in reliance on Mr Smith's report, and has, as a result, suffered loss due to being unable to use the property in the manner intended due to the absence of the right of way".*	❖ **Witness statements.** ❖ For example, a statement from the claimant that confirms that the claimant bought a property in reliance on the defendant's expert report. ❖ **Copy of the contract** to evidence the purchase.	
Loss	❖ Explain what the **extent of the loss was** and that this was **reasonably foreseeable.** ❖ *E.g., "Mr Smith's failure has resulted in Mr Bloggs overpaying for an asset which is worth less than the value that Mr Bloggs expected. Mr Smith has, further or in the alternative, caused Mr Bloggs to lose an opportunity to negotiate a reduced purchase price".*	❖ **Witness statements.** ❖ For example, a statement that the claimant **would not have paid as much as he did** for the property if he knew it did not have a right of way. ❖ Any further evidence that **corroborates this.** ❖ For example, a copy of the Transfer / Contract to show how much was paid; contemporaneous correspondence showing that the claimant considered the right of way to be important.	❖ **Expert evidence**? ❖ For example, a valuation report.

Funding Options[1]

- *Civil Litigation, 2.4*

Overview	❖ Litigation is expensive, and particularly complex cases can drag on for years. ❖ An important consideration, therefore, for the client at the outset of a claim, is how they will **fund this**. ❖ The available options are as follows: **Available options.** — 1. Private funding. 2. Conditional Fee Agreements (CFAs) 3. Damages Based Agreements (DBAs) 4. Legal Expenses Insurance 5. Third-Party Funding 6. Public Funding (i.e., Legal Aid)

Private funding.	❖ **Private funding is where** the client **pays the solicitor directly** for their services. ❖ There are two main ways that a private retainer can be funded:	
	Hourly Rates	❖ This will only be available to clients who have **sufficient means** to do so, bearing in mind they will be billed incrementally throughout the life of the matter. ❖ The hourly rate should be **stated as being *exclusive* of VAT**, as the solicitor's fees will be deemed to be ***inclusive of VAT*** unless the contrary is stated (s19(2) VAT Act 1994). ❖ Disbursements (payments to third parties) and expenses are **charged separately**.
	Fixed Fees	❖ If a solicitor specifies a fixed fee for a service, they **must complete the work for this fee** (they will be "***obliged to complete the work***, *to the ordinary standard of care*, ***even if it has become unremunerative***" (*Inventors Friend Ltd v Leathes Prior (a firm)* [2011] EWHC 711)). ❖ Therefore, if a solicitor agrees to a fixed fee, this **must be set accurately** by the firm.
Conditional Fee Agreements (CFAs)[2]	❖ Conditional fee agreements (CFAs) are colloquially referred to as "no win, no fee" agreements. ❖ They are defined by s58(2)(a) of the Courts and Legal Services Act 1990 as: ➢ *"An agreement with a person providing advocacy or litigation services…* ➢ *…which provides for his* ***fees and expenses, or any part of them****, to be* ***payable only in specified circumstances****".*	

[1] Workshop 1, Prep Task, Question 3
[2] Workshop 1, Task 2

Civil Litigation; 2.4.2 – 2.4.3

- Although referred to as "no win, no fee" agreements, this monicker is not strictly accurate; it is more accurate to say that, if the client does not win, they will not have to pay ***their own solicitor's fees***, but they may still have to pay:
  - **Disbursements** (such as counsel's fees, and fees for expert witnesses), and
  - Their **opponent's costs** if these are awarded by the court.

- They are, therefore, in overview, a funding agreement between a firm and its client whereby the client **will pay a *different* amount, depending on the outcome of the case.**

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<td rowspan="2">Consequences</td>
<td>If the client loses:</td>
<td>❖ The client will not have to pay their own solicitor's legal costs.

❖ However, they will have to pay:

➢ Any of their opponent's costs (adverse costs) that the court orders them to pay; and

➢ Disbursements;
▪ Whilst the legislation does allow for disbursements to be excluded, most CFAs for commercial disputes require the client to pay all disbursements in any event.</td>
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<td>If the client wins:</td>
<td>❖ The client will normally have to pay:
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<td>Their own solicitor's costs.</td>
<td>❖ A proportion of these costs may be paid for by the opponent if the court orders them to pay the claimant's costs.

❖ However, an opponent will rarely be required to pay 100% of the client's costs.</td>
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<td>Their disbursements.</td>
<td>❖ As above, these are normally payable in any event.</td>
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<td>An additional fee to reflect the success of the case (a "success fee").</td>
<td>❖ The success fee can be up to a maximum of:
➢ 100% of the solicitor's normal charges (s5, Conditional Fee Agreements Order 2013 (SI 2013/689)); or

➢ In a personal injury matter, 25% of the general</td>
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				damages awarded, whichever is lower. ❖ The success fee is **unrecoverable** from the opponent ([s44, the Legal Aid, Sentencing and Punishment of Offenders Act 2012]()).

Example	❖ Oliver, a solicitor, agrees with his client, Isabella, to act for her on a property dispute under a conditional fee agreement with a success fee of 50%. ❖ Oliver's charging rate is £250 per hour (the effect of the success fee is that this rate will effectively be £375 per hour if Isabella wins). ❖ Isabella wins her claim and is awarded damages of £30,000. Oliver sends her a total bill of £4,000 + £1,000 disbursements, + a £2,000 success fee. ❖ The court orders Isabella's opponent to pay Isabella's costs and disbursements, assessed at £3,200. This means that: ➢ Oliver's bill will be met, in part, by Isabella's opponent (£3,200). ➢ Isabella must pay Oliver the additional £800 to satisfy her own costs, as well as £1,000 in respect of her disbursements. ➢ Isabella must also pay the £2,000 success fee as this cannot be recovered from the opponent. ➢ Isabella is therefore required to pay Oliver a total of £3,800 (against what would otherwise have been a total bill of £7,000). ❖ If, by contrast, Isabella had lost. She would: ➢ Not have had to pay Oliver's £4,000 bill; but ➢ Would still have had to pay for her disbursements (£1,000); and ➢ Would have had to pay her opponent's costs and disbursements.

Formalities	❖ A CFA is enforceable only if it meets the requirements of [s58 and s58A Courts and Legal Services Act 1990](). This provides that a CFA: ➢ May be entered into in relation to **any civil litigation matter**, *except* family proceedings; ➢ Must **be in writing**; and ➢ Must state the percentage of the **success fee.**

	Risk Assessment	❖ **CFAs present financial risks for solicitors** (if the client loses, they will not get paid). ❖ Accordingly, firms **must conduct a risk assessment** to determine whether to enter into a CFA, and the level of success fee they should set. ❖ Factors to be assessed include: ➢ The **merits** of the case (i.e., the prospect of the client succeeding on liability); ➢ The likely **sum of damages**; ➢ The **time** it will take for the case to reach trial; ➢ The number of **hours** the solicitor is likely to have to spend on the case.
	Professional Conduct – Success Fees	❖ If the client proposes a success fee that is **well in excess** of that which the solicitor would otherwise set, **the solicitor should not simply accept** this: ❖ The following provisions of the Codes of Conduct are relevant: ➢ Principle 2 – You must act in a manner which **upholds public trust** and confidence in the solicitors' profession. ➢ Principle 4 – You must act with **honesty**. ➢ Principle 5 – You must act with **integrity**. ➢ Principle 7 – You must act in the **best interests** of the client. ➢ Para 1.2 Code for Solicitors / Code for Firms – you must not abuse your position by taking **unfair advantage** of a client. ➢ Para 8.7 Code for Solicitors / Para 7.1(c) Code for Firms – you must ensure that clients receive the **best possible information** about how their matter will be pursued.
Damages Based Agreements (DBAs)[3] *Civil Litigation, 2.4.4*	❖ Damages-based agreements (DBAs) are funding agreements where, if the client succeeds and recovers damages, their solicitor will be entitled to an amount **equal to an agreed percentage of those damages.** ❖ For example, if the client recovers £100,000 and the DBA is set at 10%, then the client pays the solicitor £10,000. ❖ This amount is known as the "contingency fee", and will cover **solicitor's costs + VAT + counsel's fees**. It will **not** cover any **disbursements** which will be owed on top of this sum. ❖ Any costs that are payable by the opponent will **offset this fee.** ❖ If the client loses the case, the solicitor **will not receive a fee.** **Example** – ❖ You act for a client in litigation. They are funded by a DBA set at 20%.	

[3] Workshop 1, Task 2

		❖ The client wins and the court orders the defendant to pay the client £250,000 in damages + £40,000 costs. ❖ During the litigation, counsel was instructed at the cost of £15,000, and expenses were incurred of £4,500. ❖ We are therefore due a payment of: ➢ £50,000 to cover costs, VAT and counsel's fees; ➢ £4,500 to cover the disbursement ➢ £54,500 total. ❖ The defendant will pay £40,000 towards this, leaving £14,500 outstanding which must be paid by the client. ❖ The client will therefore receive £235,500 total. ❖ The solicitor will be responsible for paying counsel's fees, which will leave the firm with £35,000 for his fees + VAT.
	Formalities	❖ To be valid, the DBA must **meet the requirements of** s58AA(4) of the Courts and Legal Services Act 1990. It must:

Be in writing.	
Not provide for a payment above the "prescribed amount".	❖ The solicitor's **costs**, + **VAT** + **counsel's fees** can be a **maximum of 50% of the damages** award (Reg 4(3), Damages-Based Agreements Regulations 2013). ❖ This cap **does not include** any **disbursements** other than counsel's fees. ❖ A lower cap is set: ➢ In personal injury cases, of 25% of general damages received for pain, suffering, and loss of amenity and damages for pecuniary (financial) loss. ➢ In employment cases, of 35%.
Comply with such other terms and conditions as are prescribed by the	❖ The DBA must **specify**: ➢ The claim or proceedings, or parts of them, **to which the DBA relates**. ➢ The **circumstances** in which the representative's payment, expenses and costs, or part of them, are **payable**.

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<tr><td></td><td>Damages-Based Agreements Regulations 2013</td><td>➢ The reason for setting the amount of the payment at the level agreed.</td></tr>
<tr><td></td><td><u>Be made only after the solicitor has provided “prescribed information”.</u></td><td>❖ “Prescribed information” regulations currently cover only employment matters.</td></tr>
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<td><u>Legal Expenses Insurance</u>

Civil Litigation, 2.4.5</td>
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❖ Legal expenses insurance (LEI) is a form of insurance that is designed to cover the insured person against the <u>potential costs of litigation brought by or against them</u>.

❖ It can help to cover a variety of legal fees, including:
➢ Solicitors’ fees;
➢ Court fees;
➢ Expenses for expert witnesses; and
➢ Opponents’ costs (if the insured person is ordered to pay them).

❖ There are two distinct “types” of legal expenses insurance:
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<tr><td><u>Before the event insurance.</u></td><td>❖ Before the event insurance, or BTE, is a policy taken out <u>in advance of any legal disputes.</u>

❖ BTE aims to protect policyholders against the potential <u>future</u> costs of legal disputes. The insurer will indemnify the client’s legal fees <u>up to a fixed amount</u> (the limit of indemnity), providing their claim falls within the terms of the policy.

❖ BTE is often included <u>within other insurance policies</u> such as household or car insurance.

❖ A solicitor should normally <u>invite the client to bring such a policy to the initial interview</u> so that they can deduce whether the client may benefit from it (Sarwar v Alam [2001] EWCA Civ 1401).

❖ If the client can benefit from BTE insurance, there will be no need for them to enter into a CFA.</td></tr>
<tr><td><u>After-the-event insurance.</u></td><td>❖ After-the-event insurance, or ATE (sometimes referred to as AEI) is a policy taken out <u>after a legal dispute has arisen</u> to cover potential future liabilities associated with that dispute.

❖ This type of insurance is usually designed to cover the policyholder if they <u>lose the case</u> and are <u>ordered to pay the other party's legal costs</u>.</td></tr>
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❖ The disadvantages of ATE are that:
➢ It will only be offered where an insurer is <u>confident in the success of the case</u> (normally requiring at least a 60% chance of success).
➢ The <u>premiums tend to be expensive.</u>
➢ The client will have to bear the <u>up-front cost of the premium,</u> as well as any <u>necessary disbursements</u>.
➢ That premium is not <u>recoverable from an opponent</u> (<u>s58C, Courts and Legal Services Act 1990</u>; inserted by <u>s46, Legal Aid, Sentencing and Punishment of Offenders Act 2012</u>).
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<td><u>Third-party funding.</u>

<u>Civil Litigation, 2.4.6</u></td>
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❖ Third-party funding is where an <u>independent third party</u> agrees to pay the client's legal costs. This is also known as <u>litigation funding</u>.

❖ The source of this funding may be from the following:
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<td><u>A trade union.</u></td>
<td>❖ If the client is a member of a trade union, the <u>union may fund the client's fees</u> for certain cases (particularly employer's liability claims where the member has suffered an <u>injury at work</u>).</td>
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<td><u>A litigation funding company.</u></td>
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❖ Specialist funding companies exist that may agree to fund the costs of litigation in return for a fee payable from the money received by the litigant at the end of the case.

❖ Funders do not normally take on cases where the litigant would be <u>left with less than 50%</u> of the amount recovered after the deduction of their fees.

❖ The funder will consider whether the case has a <u>good chance of success</u> (normally 60%+ is required).

❖ Exactly what fees are covered, and how the fee is calculated, will <u>depend on the terms of the funding agreement.</u>
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<td><u>Legal Aid</u>

<u>Civil Litigation, 2.4.7</u></td>
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❖ Legal Aid is only available in <u>very limited circumstances</u> in civil litigation. In overview:
➢ The <u>type of case</u> must be one that is listed in <u>Schedule 1 of the Legal Aid, Sentencing, and Punishment of Offenders Act 2012</u>; and

➢ The <u>merits of the case</u> must satisfy the requirements of <u>the Civil Legal Aid (Merits Criteria) Regulations 2013</u>; and

➢ The applicant must pass a <u>financial eligibility test.</u>

❖ It is <u>not usually available</u> for cases which could be financed by <u>CFA</u>.

❖ The following matters are ineligible for public funding:
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	➢ Negligence for personal injury, death or damage to property (including intellectual property). ➢ Matters arising out of the carrying on of a business. ❖ Nevertheless, public funding **<u>must be considered</u>** by the solicitor from the outset or there is a risk of **<u>negligence</u>** (*David Truex, Solicitor (a firm) v Kitchin* [2007] EWCA Civ 618).