

ACTING PRO BONO?

APPLY FOR A PRO BONO COSTS ORDER
AND MAXIMISE YOUR IMPACT.

THE
ACCESS
TO JUSTICE
FOUNDATION



GUIDANCE FOR SOLICITORS

This document provides guidance for solicitors seeking to obtain a pro bono costs order. We have tried to ensure it is accurate at the time of production but should not be relied upon as legal advice.

The prospect of an adverse cost order is a strong incentive for litigating parties to conduct themselves reasonably. Prior to the introduction of pro bono costs orders, a party represented on a pro bono basis could not obtain an adverse costs award against the other side. This led to an imbalance between the parties, with the self-funded (often more affluent) party having the significant advantage of litigating without the normal costs risk and therefore without the incentive to conduct itself reasonably. Pro bono costs orders were introduced in 2008 to tackle the inequality and, simultaneously, to create a source of vital funding for the provision of free legal services.

PRO BONO COSTS ORDERS

Pro bono costs orders are orders for costs in respect of work done by legal representatives of a party to proceedings acting on a pro bono basis.

Orders are made in favour of the Access to Justice Foundation, the “prescribed charity” established for the purpose of receiving pro bono costs awards and distributing the funds to agencies and projects that provide free legal advice to those unable to afford it.

SECURING A PRO BONO COSTS ORDER

Applications for pro bono costs orders are made in the same way as ordinary costs orders. Accordingly, applications (other than those made under the fixed costs regime) must be accompanied by a statement of costs. To ensure that any statements of costs can be completed to the required standard, fee-earners working on relevant matters must include full narratives with their time entries from the outset.

It should be kept in mind that applications can be made in respect of interim applications as well as at trial.

A template schedule of costs and suggested wording for the application of a pro bono costs order can be found on the Access to Justice Foundation website [here](#).

AVAILABILITY OF PRO BONO COSTS ORDERS

Pro bono costs orders *may* be made by the following courts and tribunals:

- Civil courts (i.e. the County Court, the High Court, Family Court, Civil division of Court of Appeal).
- Some tribunals (i.e. First-tier Tribunal, Upper Tribunal, Employment Tribunal, Employment Appeal Tribunal, Competition Appeal Tribunal).
- Supreme Court (where the appeal is from above courts/tribunals).

A settlement agreement or consent order can also include the other side paying pro bono costs to the Access to Justice Foundation. Claimants accepting a Part 36 offer can also apply for a pro bono costs order.

A pro bono costs award may only be made if the court or tribunal would have had the power to make an ordinary costs award had the party paid for its representation, and the normal costs rules apply. Accordingly:

- Pro bono costs recovery in small claims track will be restricted to court fees and specified expenses, unless the other side has acted unreasonably.
- The fixed recoverable costs regime will apply as normal in fast and intermediate track cases.
- Costs budgeting rules will apply as normal in claims with a value of less than £10 million.
- Pro bono costs recovery will only be available in some tribunals (e.g., not in the Social Security and Child Support Tribunals).
- Even in the tribunals in which cost recovery is available in principle, costs will usually only be awarded if the other side has acted unreasonably.
- Pro bono costs recovery will not usually be available for third party interventions.

Costs applications may be made where the pro bono representation has been part of the proceedings only. They may also be made where other legal representatives of the client are not acting free of charge (e.g., where counsel is acting under a conditional fee agreement).

TIPS FOR SOLICITORS AT THE START OF A MATTER IN WHICH PRO BONO COSTS MIGHT APPLY

- Ensure all fee earners are aware that pro bono costs might be sought so they can record narratives accordingly, and consider the costs in any settlement negotiations.
- Reach out to your costs lawyers (internally and externally) to check what else you need to put in place (for example, some firms use 'phrases' within a matter for cost budgeting).
- Consider notifying the other side of your intention to seek pro bono costs.

BENEFITS OF PRO BONO COSTS

While the costs awarded are always payable to the Access to Justice Foundation, pro bono costs orders (and the threat of them) can also benefit pro bono clients:

- If your firm has incurred disbursements on your client's behalf such as court fees, these can be included in the application for pro bono costs and you may then request repayment of those expenses from the Access to Justice Foundation.¹

¹ This could also be dealt with by way of a conditional fee agreement between firm and client in respect of court fees and other disbursements.

- If the other side knows or suspects that the client is being represented on a pro bono basis, advising them of the client's intention to seek a pro bono costs order if successful will ensure that the other side has an incentive to behave reasonably.
- The threat of costs can be an effective tool to encourage settlement, most obviously by way of a well-judged Part 36 Offer. If the other side does not accept the offer and is subsequently matched or beaten at trial, it will likely be liable for both increased costs and (if the defendant) increased damages.
- If the client secures a damages award in its favour and a pro bono costs award in the Access to Justice Foundation's favour, the Foundation will collaborate with the client of any enforcement proceedings that may be required and may provide assistance with asset tracing and/or enforcement. The Access to Justice Foundation will always recognise your client's prior claim to any funds recovered.
- As the client has been put to the trouble of either bringing or defending proceedings, they may want the other side to be penalised in costs, even if they will not get any direct benefit from the application.
- Having been the recipient of pro bono representation your client may welcome the opportunity to help to ensure the future availability of free legal services.

YOUR ULTIMATE RESPONSIBILITY TO YOUR CLIENT

Should the pursuit of a pro bono costs order not be in the interests of your client, your client's interests must take precedence. A conflict may, for example, arise in the context of settlement discussions, where the pursuit of costs would decrease the payment made to the client. The Access to Justice Foundation recognises that attempts to secure pro bono costs must never impact the outcome achieved for your client.

INFORMATION FOR CLIENTS

Clients should be advised of the benefits of pro bono costs orders as a matter of course. This may most easily be done in the letter of engagement, e.g.:

Our pro bono service means that you will not be charged for our costs (save for any disbursements and expenses specifically referred to elsewhere in this Letter of Engagement). However, in civil court proceedings in England and Wales, the losing party may be ordered to pay a proportion of the winning party's costs. Section 194 of the Legal Services Act 2007 allows for 'pro bono costs' in contentious pro bono matters to be claimed from the losing party (that is, the costs that could have been claimed if you had been paying). These costs are paid to a national pro bono 'prescribed charity', the Access to Justice Foundation. Accordingly, should you successfully recover pro bono costs from another party, those funds will be paid to the Access to Justice Foundation.

COST CAPPING AND PRO BONO COSTS IN JUDICIAL REVIEWS

Claiming pro bono costs in the context of a judicial review should not impact a pro bono client's application for a costs capping order. 'Reciprocal' in the context of costs capping does not mean 'the same'. Accordingly, pro bono clients may seek to limit their adverse costs exposure to a low fixed sum if they lose, while capping pro bono costs at a higher fixed sum or at GLD rates if they are successful.²

² See [The Anti-Trafficking and Labour Exploitation Unit & Another v The Secretary of State for Justice \[2022\] EWHC 1962 \(Admin\)](#)

FURTHER INFORMATION

Further information regarding pro bono costs orders can be found on the Access to Justice Foundation's website, <https://atjf.org.uk/pro-bono-costs-orders>.

Any follow up questions should be directed to the Access to Justice Foundation (costs@atjf.org.uk).