Legal Aid, Sentencing and Punishment of Offenders Bill

Memorandum submitted by Carter-Ruck, Solicitors

1. Summary

1.1 The Bill will seriously impede access to the courts for all but wealthy individuals and companies.

1.2 There is much that is good about the current CFA and ATE insurance system. Over the past decade much positive work has been done to iron out problems associated with this system which now provides real access to justice.

1.3 There is wide agreement that the cost of High Court litigation is too high and that further reform is therefore necessary. However, to remove recoverability of success fees and ATE insurance altogether is not the answer as it will force a return to the bad old days where access to the courts was like access to the Ritz Hotel: open to anyone who could afford it.

1.4 In our view the changes currently proposed will largely destroy the real access to justice that the system has brought and fail to replace it with any system that is viable for most citizens of our country.

1.5 **We would recommend that the CFA regime remains with recoverable success fees capped at a maximum of 50% of professional charges and a success fee is permitted between a client and his legal advisers capped at 25% of damages recovered. We also propose that the current proportionality test remains in place and is not altered in the manner currently being implemented by the Ministry of Justice. This would be in line with the recommendations of the three senior Costs Judges (see Appendix B).**

2. Comments on Clause 41:

2.1 This clause if implemented (combined with other proposals such as changes to "proportionality of costs" being taken forward by the Ministry of Justice) would deprive most members of the public from access to legal representation. It is likely to make it uneconomic for lawyers (solicitors and barristers) to act for parties (whether claimant or defendant) in litigation under CFAs, except in very high value monetary claims. This runs a real risk of depriving litigants of their rights of access to the courts under Article 6 of the European Convention on Human Rights (ECHR).

2.2 Despite the core principle of access to justice, clause 41 of the Bill would severely diminish legal representation and, therefore, access to justice to most of those who:

a) are not eligible for legal aid;

b) are not sufficiently wealthy so that they can afford legal fees;

c) do not have the backing of insurance, a trade union or other such body; and/or

d) are not able or willing to conduct litigation themselves,

unless they have a claim for damages of such a size that a reasonable success fee can be paid from the compensation recovered.

2.3 It is likely to become very difficult for litigants to find solicitors (and counsel) who are prepared to act under a CFA where there is no material success fee to compensate for the risk of the litigation being lost. And in the case of defendants, where there is no prospect of recovering any success fee from damages recovered, it is likely to eliminate access to justice under CFAs altogether.

2.4 Carter-Ruck does a substantial amount of CFA work in the media field of law, professional negligence (with particular emphasis on financial mis-selling cases) and in more general commercial cases. If no success fee becomes recoverable, we will need carefully to consider the viability of our CFA scheme, except in high value claims.

2.5 As our client Dr Gerry McCann told the audience at the International Bar Association conference in Madrid on 6 October 2009:

"It is very important that ordinary people like ourselves do have legal representation. I'm not sure we could have gone through this without the CFA. This kind of arrangement should continue in the UK."

2.6 The proposal to allow a lawyer to recover a success fee from their own client combined with an increase in damages of 10% is wholly inadequate. This is best illustrated by the Naomi Campbell v Mirror Group case where the damages recovered by Ms Campbell were £3500. An increase of 10% would result in that case in an additional sum in damages of a mere £350. The introduction of DBAs will assist only in relation to high value claims.

2.7 The changes proposed to the Part 36 regime will also help, but only to a very limited extent (as to which we refer further below).

2.8 In many cases the factual and legal issues will be such that it will be quite unreasonable to expect litigants to present their cases before the Court without legal representation, especially where the defendant has the benefit of expert and specialist legal advice.

2.9 The erosion of access to justice by the proposed clause may well result in the UK being in breach of Article 6 and its obligations to ensure that litigants must have *"a clear, practical and effective opportunity"* to go to Court (*de Geouffre de la Pradelle v France* A 253-B (1992) para 34).

2.10 We therefore believe the Bill will have a serious adverse effect on Human Rights and this is not reflected adequately in the impact assessments.

2.11 We attach (at Appendix B) a paper published by three senior Costs Judges concerning Jackson LJ's proposals**.** Their concluding remarks are that "*we do not agree with the proposals set out in the Report [of Jackson LJ] about success fees. The CFA regime has undergone many changes and improvements since implementation. Having taken a decade for these to have been achieved, now is not the time to make radical changes which give no guarantee that access to justice at reduced costs will be delivered under Jackson where it failed under Woolf.*"

2.12 **Conditional fee agreements have benefited many "ordinary people" who are current or former clients of Carter-Ruck**

2.13 Many of the people who instruct us on CFAs are "ordinary people" who in the absence of a CFA would have no effective means of redress. At Appendix A we have provided four case synopses demonstrating how CFAs work for different causes of action. Some summary examples from the many cases for ordinary people we have conducted over the past few years:

2.14 **In the media context**, for example we have represented on CFAs:

- A Danish radiologist sued by US conglomerate GE Healthcare over allegations concerning one of its products.
- A junior estate agent falsely accused by the Daily Telegraph, Guardian, Independent and Daily Mail of having been arrested in connection with a terror plot to blow up trans-Atlantic airliners.
- An Army officer falsely accused by The Guardian of being responsible for the abuse of prisoners.
- A comprehensive school teacher, falsely accused in an internal Memorandum of inappropriate contact with female pupils.
- Kate and Gerry McCann.
- An unemployed woman falsely accused by a regional newspaper of attempted murder.
- A local councillor (disabled and on incapacity benefits) who suffered serial libel and harassment over several years by a multi-millionaire businessman who accused her of theft and corruption.
- A management consultant whom a local newspaper falsely alleged had been accused of raping a child.

- A junior PR worker whose privacy was grossly infringed when the Evening Standard published a photograph of and named her, wrongly stating that she had been raped.

- A junior naval NCO falsely accused by a regional newspaper of serious sexual assault and exposure.

- A soldier's wife whose photograph was used by the Daily Mirror to illustrate a story about women being unfaithful to their husbands while serving in Iraq.

- A Tamil refugee falsely accused by The Sun and Daily Mail of eating during a hunger strike outside the Houses of Parliament, causing the police to waste a fortune of public money in policing his demonstration.

2.15 Many of our claimant clients in media related cases arrive in our office utterly distraught – often they are in tears – as a result of the actions of the press and the consequences, often devastating, of inaccurate and irresponsible articles about them. Often they are people of relatively limited financial resources and little to no understanding of the law in the area of media law, which is complicated. The overwhelming majority of people who bring libel proceedings against the press are looking primarily for an apology, costs and sometimes, but not always, modest damages.

2.16 **In the commercial/ financial misselling context**, for example we have represented on CFAs some 45 claimants who had lost huge sums as victims of a fraudulent scheme for the misselling of pension products. The defendant, a substantial bank, dragged out the litigation for several years. There is no way our clients could have achieved any compensation without the benefit of a CFA backed with ATE insurance.

2.17 **Conditional fee agreements are available to, and of benefit to, defendants as well as claimants**

2.18 It should also be remembered that CFAs are currently available and offered to defendants as well as to claimants. We represented on a CFA Professor Henrik Thomsen, a Danish radiologist sued by US conglomerate GE Healthcare over allegations concerning one of its products. We also defended Hardeep Singh, a journalist who was sued for libel by His Holiness Sant Baba Jeet Singh Ji Maharaj, again on a CFA basis. If success fees were no longer to be recoverable from the losing party, this is likely to end.

2.19 **Our suggested proposal/compromise:**

2.20 **The CFA regime remains with recoverable success fees capped at a maximum of 50% of professional charges and a success fee is permitted between a client and his legal advisors capped at 25% of damages recovered.**

2.21 **We also propose that the current proportionality test remains in place and is not altered, as currently being implemented by the Ministry of Justice. This would be in line with the recommendations of the three senior Costs Judges (see Appendix B).**

2.22 In support of our suggestion, we refer to the following*:*

a) In the view of the three senior Costs Judges there is no compelling reason why the maximum success fee should remain at 100%. To cap recoverable success fees at say 50% (or a higher figure if this can be incorporated into an expanded CPR 45) in cases that proceed to trial, would make a big inroad into the level of recoverable costs, without dismantling the whole system, but this does not appear even to have been considered by the MoJ.

b) English PEN and Index on Censorship (both well known to be protective of freedom of speech) oppose the principle that CFA success fees be made entirely irrecoverable from the losing party. They do not agree with 100% success fees and advocate a cap on recoverable success fees of 25% where there is a substantial tort.

2.23 Properly to understand the solution proposed above, the following needs to be appreciated:

a) Under the current test of "proportionality" costs recovered by the winner against the loser in litigation (known as "standard basis" costs) are normally 70% to 80% of the costs that the winner's solicitor is entitled to charge his own client (known as "indemnity basis" costs). This difference between standard and indemnity basis costs, of 20% to 30%, is known as the "shortfall" in the winner's costs which the winning party has always had to fund himself;

b) With a recoverable success fee of say 25% the winner's solicitor does not recover 125% of the normal charges he is entitled to charge the winning party. In fact, because of the shortfall in the winner's costs, the total costs, including success fee, recovered from the losing side will be the same as or less than the normal charges the winning party's solicitor is entitled to charge his own client. With a recoverable success fee of say 50% the total costs including success fee recovered from the losing party will be 107% to 120% of the normal charges the winner's solicitor is entitled to charge his client;

c) There needs to continue to be an element of recoverable success fee in order to make it economically viable for lawyers to act for clients on no win no fee agreements in order to provide people with access to justice, especially where the scope of legal aid is being so drastically restricted. An increase in damages of 10% is wholly inadequate to deal with this, as explained above at paragraph 2.6.

d) If the proportionality rules are changed in line with the proposals which the MoJ are currently taking forward the recovery rate of costs between parties to litigation is likely to be far lower than the current 70% to 80%. This will result in defendants using their commercial muscle to drag out litigation, make last minute settlement offers and then argue that costs are disproportionate and therefore irrecoverable.

3. Comments on Clause 42 – Damages-based agreements:

3.1 Generally speaking we think it would be helpful to have the Damages-based agreement option available as a means of funding a legal action alongside other funding methods. However the Bill does not address certain key issues relating to DBAs:

a) Concerning recovery of costs by a party on a DBA the Bill is silent but we agree with the so-called "Ontario model" i.e. that costs recovery should be on the conventional basis and not by reference to the DBA.

b) The Bill is also silent on the maximum percentage the lawyer can be paid. We believe that a maximum fee of say 40% should be permitted. This does not mean that the limit will always be sought and/or agreed to. This will depend on the size of the claim and market forces. The higher the limit, the lower the value of claim for which lawyers are likely to be willing to offer DBAs and the more access to justice will be assisted.

c) The Bill is also silent regarding funding of disbursements. They can be financed by the party, legal advisers and/or third party funders (as with CFAs), with an increased percentage permitted for the additional liability and risk.

4. Comments on Clause 43 -recovery of insurance premiums by way of costs:

4.1 This will also result in massive erosion of access to justice

4.2 There can be no real or effective access to justice if to sue a claimant must either:

a) Effectively put his or her house and/or pension and/or savings and/or financial security at risk (where the outcome of legal proceedings is never certain); or

b) Take out ATE insurance where the costs of the insurance (and unrecovered costs and/or success fees), are likely to render the litigation uneconomic if the case advances a material distance, with only the ATE insurance provider and legal advisers gaining. This would bring the administration of justice and legal profession into disrepute.

4.3 Owing to the expense of ATE insurance, to adopt this proposal would make all but very high value claims uneconomic. This in turn would destroy access to justice in relation to many/most claims. It would also make matters extremely difficult for defendants being sued, particularly where there is a significant inequality of arms.

4.4 **The proposal is not in line with Sir Rupert Jackson's recommendations**

4.5 The abolition of the recovery of ATE was suggested by Sir Rupert as part of a package of reforms which included Qualified One way Costs Shifting yet QOCS is being proposed only in personal injury cases.

4.6 This means that in non personal injury cases the claimant is left in the worst possible situation: without the benefit of QOCS and with no recoverable ATE premiums.

4.7 This will effectively kill off access to justice in the majority of non personal injury claims.

4.8 **The need to protect parties from adverse costs orders**

4.9 Enabling parties to litigation effectively to protect themselves from costs risk is the single most important development that has facilitated access to justice in all sorts of cases. This applies to many categories of cases. For example:

a) Defamation and privacy cases (involving Art 8 ECHR fundamental rights);

b) Professional negligence cases of all types, including financial mis-selling, legal and accounting negligence; and

c) Breach of contract claims.

4.10 In all these cases, claimants normally face a very well resourced (both in terms of finance and expertise) defendant. Absent ATE, or some other provisions to protect them from adverse costs orders, claimants in such cases will be denied access to justice if ATE premiums are not recoverable. This is except in very high value claims and for the very wealthy.

4.11 The position is no less important for defendants who face adverse costs risks (through no choice of their own) from litigation being brought against them. We see no reason in principle why there should not be one way costs shifting in favour of a defendant. The case of Professor Henrik Thomsen (to which we refer above) would be an example of where QOCS might appropriately be applied in favour of a defendant.

4.12 Our suggested proposal/compromise:

4.13 **ATE premiums for this risk should remain recoverable, provided either:**

a) **42 days notice of an intent to take out ATE insurance has been served, thereby to give the opposing party the opportunity to agree not to recover costs or to limit the costs they can recover so as to eliminate/reduce the need for insurance; or**

b) **the risk is removed through the introduction of a <u>legally certain</u> regime of one way costs shifting or other such provisions (note: the regime proposed by Jackson LJ is not legally certain and is a recipe for costly satellite litigation).**

5. <u>Comments on Clause 44 - recovery where body undertakes to meet costs liabilities:</u>

5.1 We do not support this. It assumes that trade unions and other membership organisations are sufficiently wealthy so as to be able to afford the substantial costs risks of litigation. If this provision is implemented the practical effect is that many such organisations will feel unable to provide such benefits. They will, therefore, no longer offer them. Then, if a member wishes to bring or defend a claim, absent a viable ATE insurance system, he will not be able to do so without putting any home he has and/or other savings at risk.

6. <u>Comments on Clause 51 - payment of additional amount to successful claimant – and on offers to settle:</u>

6.1 Such a proposal should encourage the making and acceptance of what are termed "Part 36 Offers", which should in turn aid settlement.

6.2 In paragraph 11, we would suggest "non-monetary claim" is defined to mean "a claim for a benefit other than an amount of money, <u>including without limitation the vindication of the claimant's reputation".</u>

6.3 The current Part 36 regime also works to the disadvantage of claimants in libel proceedings where a claimant makes a reasonable Part 36 offer early on in the action. In such cases defendants, as a practical matter, can escape the costs and interest consequences of their failure to accept the claimant's earlier offer, by accepting it late on in the proceedings, although by then they may well have substantially aggravated the damages and will certainly have increased the costs of the action.

6.4 We suggest that this is addressed so that a defendant can once again only accept Part 36 offers within 21 days of the making of the offer without the leave of the court. Thereafter, if a defendant wishes to accept the Part 36 Offer, the court should have power to order an additional payment of damages and costs to compensate the claimant for the defendant's failure to accept the Part 36 Offer within 21 days of the offer first being made.

9 September 2011

Legal Aid, Sentencing and Punishment of Offenders Bill

Appendix A to memorandum submitted by Carter-Ruck, Solicitors

EXAMPLES OF CASES RUN ON 'NO WIN - NO FEE' BASIS

Case Synopsis: Negligent miss-selling of financial products

A class action by 45 individual claimants against two multi-national Banks for their part in the negligent miss-selling of a pension product that the claimants had purchased. The claim concerned a failed UK pension liberation scheme and offshore trust and administration services and was worth in excess on £20 million.

The case took over four years to reach conclusion and only settled two weeks into the 12-week trial on confidential terms.

The Claimants were represented on 'no win – no fee' agreements by their solicitors and their junior and leading Counsel, coupled with After the Event (ATE) insurance totaling £6.5 million, believed to be a record for a commercial case.

One Client has commented;

> *"Before we found solicitors willing to act on our behalf on a no win-no fee basis an individual on the other side of the litigation told me that he wasn't bothered about our claim because he knew he could out-resource us.*
>
> *The man in the street needs to have access to the law or else he becomes disenfranchised from society. No win-no fee agreements provide such access to justice and seeing how they work in practice has restored my faith in the law as a force for good to allow ordinary people to protect their rights and which deters corporate bullying of individuals.*
>
> *If we had not had 'no win - no fee' legal representation I would have lost my entire life savings and my home. I would have been declared bankrupt in my late fifties without any form of pension despite having worked and saved all my adult life. In the circumstances it would not have been inconceivable that my marriage would also have ended and it is important to remember how far the fabric of life and society and the lives of innocent parties are affected when access to justice is taken away from the ordinary person."*

Case Synopsis: Breach of Privacy

The Claimant was a glamour model who had appeared in newspapers, magazines and websites and appeared in music videos, television commercials and on reality television shows. In 2007 the News of the World published an article containing the most sensitive and private material about her in hard copy and online. The Newspaper did not tell the Claimant how it obtained her private details nor did it seek her permission or warn her about what it intended to do. As a result of the newspaper breaching her privacy, the Claimant's modelling work dried up and she suffered considerable financial difficulties.

Unsurprisingly, the story was picked up by other newspapers and magazines who republished the Claimant's most sensitive and personal details throughout the media and online as a result of the News of the World's wrongdoing. In addition to stalling her career publication also caused the Claimant considerable distress and indignity. As a consequence of publication the Claimant endured humiliating ridicule and threats of violence from strangers, both on the street and online, including messages posted on her 'myspace' website telling her to watch her back, threatening to throw acid in her face and gloating that she would not get any more work. The Claimant suffered panic attacks and grew afraid to leave her home.

Shortly after proceedings were issued the Newspaper sought to negotiate a settlement and the Claimant agreed to settle her claim for £50,000 in compensation and the payment of her legal costs and disbursements. The settlement, thought to be one of the largest settlements in a privacy action at that stage reflected the gross nature of the Newspaper's breach of privacy.

The Client has commented;

> *'The Newspaper knew very well that it was publishing the most sensitive personal details about my life and that the publication of those details was an unlawful invasion of my privacy. There was no public interest in these details being published. The newspaper published because it assumed that, as a model just starting out in my career, there was no way that I could afford to sue and without the availability of a no win – no fee agreement I wouldn't have been able to.*
>
> *I don't think people realise the psychological impact it has on you to have the most private and confidential facts of your life published to the world in a newspaper and across the Internet. You feel isolated and powerless. As a result of the publication I was mocked and humiliated and no longer able to find work.*
>
> *When the Newspaper realised that I could sue, because I had solicitors and a Barrister acting for me on a 'no win – no fee' basis, and that I*

was prepared to do so, it settled the claim quickly knowing that it was in the wrong. It was only when the Newspaper accepted that fact that I was able to begin rebuilding my life."

Case Synopsis: Libel

In early 2009 the Sri Lankan army attacked Tamil communities in the north of Sri Lanka. These events caused Tamils resident in the United Kingdom to join together in mounting a spontaneous demonstration outside the Houses of Parliament. The demonstration commenced on 7 April 2009 as part of which the Claimant, a Tamil refugee, embarked on a 23-day hunger strike. After the hunger strike concluded, the Claimant was kept in hospital for 5 nights to recover.

On 9 October 2009, the 'Daily Mail' published false and defamatory allegations about the Claimant that he had been secretly eating takeaway burgers throughout his hunger strike and caused the police to waste a fortune in public money. The allegations were repeated by the 'Sun' newspaper on line. Neither Newspaper made any attempt to contact the Claimant before publication to verify the truth of the allegations before deciding to publish them.

The damage caused to the Claimant by publication of the libels was substantial, in part, because the articles alleged that supporting evidence was caught on camera by a police surveillance team and that police surveillance teams had observed the Claimant eating. The Metropolitan Police Superintendent who was in charge of the police operation in Parliament Square subsequently confirmed that the police did not see the Claimant eating and that these allegations were false.

Both Newspapers were invited to apologise and compensate the Claimant for the harm done. Both Newspapers ignored that invitation. The Claimant had no means to vindicate himself and no ability to fund a legal claim against the Newspapers and so the Claimant's solicitors and Barrister agreed to act on a 'no win – no fee' basis and proceedings were issued. Eight months after publication both Newspapers finally agreed to set the record straight and apologise in their Newspapers and by way of a statement in open court as well as payment of substantial damages and his legal costs including disbursements.

On the day that the statement in open court was read out the Claimant said:

"*I am relieved that this matter is now resolved and I can start to rebuild my life again. The past 8 months have been an unbearable strain on my life, to the extent that at times I have even contemplated taking my own life. As a result of the lies that the Newspapers published about*

me, and through no fault of my own, I have lost friends, been shunned by family members and completely ostracised from the Tamil community.

I felt I had a responsibility to all those who had supported me during the hunger strike, and were sullied by association with me, to take legal action against both newspapers to prove that the allegations that were published were false.

Now that both newspapers have declared that the allegations are completely untrue and apologised, I sincerely hope that those people will accept the newspapers' apologies and understand that I have done nothing wrong. My sacrifice during the 23-day hunger strike was real and for the sake of my fellow Tamils who are suffering in Sri Lanka.

I would like to thank all those who have stuck by me through this nightmare and have not doubted my integrity."

Case Synopsis: Professional Negligence

In late 2000, the Claimant, intending to secure funds for his retirement, invested the proceeds of the sale of his successful estate agency business in an Enterprise Investment Scheme run by a private bank. The funds, a large six-figure sum, were invested in the EIS but the investment was disastrous, leaving the Claimant with very significant losses. The Claimant instructed the Defendant firm of solicitors to make a claim against the bank and the managers of the investment. A claim was prepared, but the Defendant solicitors failed to serve proceedings within the prescribed period.

Not only had the Claimant lost most of his savings, but he had lost the opportunity to sue the bank for those losses. The Claimant had wasted precious funds on the Defendant's legal fees and had insufficient funds to pursue an entirely new, and very much more complicated, claim. Resources to defend that claim were not an issue for the Defendant firm, which was insured.

Solicitors and Counsel agreed to act on a "no win, no fee" basis, coupled with After the Event insurance. The Defendant firm vigorously disputed quantum, which turned on the assessment of the merits of the original claim against the bank, and expert accountants were instructed. Following protracted negotiation, the case finally settled in September 2010 and the Claimant recovered a six-figure sum in damages.

Case Synopsis: Breach of Contract

The Claimant was an advertising salesman who had been employed by the Defendant in the United Kingdom. The Defendant was a publisher of specialist trade publications and organised trade exhibitions across Europe.

By an agreement the Claimant was appointed as a sales agent of the Defendant for various European territories in respect of the Defendant's products. In breach of express terms of the agreement the Defendant failed to pay the Claimant for outstanding commissions that the Claimant had earned.

The Claimant made attempts to negotiate with the Defendant for the payment of the outstanding commissions but those negotiations were unsuccessful. The commission earned by the Claimant was the sole source of revenue for the Claimant and his wife.

The Claimant had no alternative but to sue for breach of contract if he was to recover the sums owed to him but he did not have the financial resources to fund litigation. A fact that would not have been lost on the Defendant.

The Solicitors and Barrister agreed to accept instructions on a 'no win – no fee' basis and proceedings were issued. The case was eventually resolved on the basis that the outstanding sums owed to the Claimant were paid to him along with his legal costs and disbursements.

Response of three Costs Judges of the Senior Courts Costs Office

This is the Response of three Costs Judges of the Senior Courts Costs Office (Master Campbell, Master Haworth and Master Leonard) to the proposals of the Ministry of Justice for reform of Civil Litigation and Costs in England and Wales, set out in Consultation Paper CP13/10 dated November 2010. Unhappily we have been unable to agree with the majority view of the Costs Judges (the Senior Costs Judge (who is a signatory to the Response of Lord Justice Jackson to the proposals), Master O'Hare, Master Gordon-Saker and Master Simons),who support the recommendations made by Lord Justice Jackson in his review of Civil Costs.

This Response uses the following abbreviations:

Consultation Paper CP13/10	"the Paper"
Review of Civil Costs - "Final Report December 2009"	"Jackson" or "the Report"
The Response of Lord Justice Jackson to the Paper	Sir Rupert's Response
Civil Procedure Rules	CPR
Costs Practice Direction	CPD
Rules of the Supreme Court	RSC
ATE premiums which are self insuring insurance policies covering the costs of a paying party ordered against a claimant whose claim is funded by a CFA.	ATE insurance premiums
Conditional Fee Agreement	CFA
Ministry of Justice	MoJ
Qualified One way Costs Shifting	QOCS

The payment under the terms of a costs order by a paying party to a receiving party of a success fee and/or ATE premium.	Recoverability
Senior Courts Costs Office	SCCO
The Conditional Fee Agreement Regulations (2000)	The Regulations
Damages Based Agreement	DBA
The additional sum payable by a paying party to a receiving party under a CFA to reflect the successful outcome of the claim	Success fee

1. Overview

In broad terms, the principal proposals of the Report, supported by the MoJ and the Senior Judiciary, are:

(1) Success fees and ATE premiums should cease to be recoverable from paying parties.

(2) Instead, any success fee payable under a CFA will be capped at 25% and paid by the receiving party out of his or her compensation from the aggregate of general and special damages relating to past loss (viz excluding damages referable to future care or loss) . (The Government suggests that recoverable success fees might remain in Judicial Review, Housing Disrepair and complex personal injury or clinical negligence cases (see Paper paragraph 69 to 70), but this is opposed by Sir Rupert (Response paragraphs 2.7 – 2.10)).

(3) General damages in all cases (including those not funded by CFAs) should be increased by 10%.

(4) ATE premiums should cease to be recoverable from paying parties in cases won by the claimant with costs. (The Paper proposes that ATE premiums should be recoverable insofar as they relate to claimants' disbursements. This is opposed by Sir Rupert (his Response para 3.6) on the basis that claimants who can afford to pay for their disbursements, such as trade unions, should do so, and/or where necessary the Government should provide legal aid for such disbursements (his Response para 3.7(iii))).

(5) Amending CPR Part 36 so that if a claimant makes an offer to settle which the defendant rejects and fails to beat at trial, the claimant will be awarded enhanced damages – by 10% on damages up to £500,000, by £50,000 plus 5% of the excess over £500,000 for awards between £500,000 and £1 million, and £75,000 with no further increase for awards above £1 million (Response 5.3).

(6) Qualified one-way costs shifting. A losing defendant would continue to pay a winning claimants' costs, but a losing claimant would only pay a winning defendants' costs where, and to the extent that, in all the circumstances, it is reasonable for him or her to do so (the Paper para 130).

(7) Supplementary Legal Aid Scheme
Setting up a scheme in which a percentage of any damages recovered are recouped and used to supplement the legal aid costs in other cases, in particular to fund disbursements.

(8) Proportionality
"Proportionality" to be defined via amendment to the CPR and CPD. Upon completion of the assessment of the receiving party's bill, if the court considers that the total figure allowed is still "not proportionate", the assessed costs would be adjusted further to the point that the total sum becomes "proportionate". (The Report (para 5.15 page 38)

(9) Damages based agreements

Both solicitors and barristers should be permitted to enter into contingency fee agreements whereby the lawyers receive no fees, unless the claimant wins, in which case a proportion of the damages recovered are used to meet the claimants lawyers' fees.

(10) Litigants in person

An increase in the prescribed rate for LIPs from £9.25 per hour to £20 per hour. The Government proposes £16.50 (Paper para 250).

(12) The Paper contains a section outlining various of the Report's Recommendations which are not being implemented, or where work is already underway in respect of their implementation. We have no comments to make upon any recommendations not covered in the Consultation.

2. Conditional Fee Agreements and Success Fee (the Paper Section 2.1)

The Paper makes a number of statements upon which we would wish to comment- references to paragraphs are to the relevant paragraph in the Paper.

(1) Under paragraph 49:-

"it was intended that both the client and the losing opponent should be able to challenge the success fee (and ATE insurance premium) through costs assessment by the courts. However, in practice, this is thought to be rare due to the time and expense involved. The potential outcome is that in a large number of cases where CFAs are permitted, a maximum of 100% may be regularly claimed".

This statement is incorrect. Whilst it is right that the maximum of 100% was regularly claimed upon the introduction of the CFA regime in April 2000, most CFAs currently in use provide for "staged" success fees that start low and end high. In particular,

CPR Part 45 provides for fixed success fees in road traffic accident claims, employer's liability claims and employer's liability disease claims. Apart from claims to which CPR 45 applies, their levels are frequently challenged by paying parties at detailed assessments conducted before Costs Judges and Regional Costs Judges, often effectively.

(2) Under paragraph 50:-

> *"under the current arrangements, claimants on CFAs generally have no interest in costs being incurred on their behalf, because win or lose they do not have to pay anything towards those costs".*

This is a sweeping statement which is repeated in several places in the Paper. It is not correct in all cases. From the moment that a defendant makes an offer to settle, a claimant is placed on risk as to costs upon the expiry of the last date upon which he could have accepted the offer. It follows that where a defendant makes an early offer which the claimant fails to beat at trial, the claimant will receive his costs only up to the last date upon which he could have accepted the offer, and he will be required to pay the entirety of the defendant's costs thereafter and possibly those of his own solicitor depending upon the terms of the CFA. For that reason, where an offer has been made, a claimant has a significant interest in the costs being incurred since, depending upon the result, he may be obliged to meet them out of his damages, even if he wins.

(3) Under paragraph 55 :-

> *"The recoverability regime is, in Sir Rupert's view, unfocussed. There is no eligibility test: any person of whatever means is entitled to enter into a CFA and take out ATE insurance so long as there is a willing solicitor and insurer … Sir Rupert argues that it is absurd that insurance companies – who could well afford to pay solicitors on a traditional hourly rate basis – should use CFAs to fund such litigation themselves".*

We agree, but this is not a reason to discard the existing recoverable CFA regime as the MoJ urges should happen. On the contrary, the solution is to restrict CFAs to individuals, as was the case when legal aid was available to fund personal injury claims (see paragraph 5(2) below).

(4) Under paragraph 58

> *"… In the recoverability regime … the costs and burden imposed on the losing party is excessive and sometimes amounts to a denial of justice. The fear of costs can have a "chilling effect" which can drive opposing parties to settle cases, even though they may have good prospects of success. This is particularly evident in defamation cases."*

We disagree. The predecessor of the "recoverability regime" was the legal aid system which contained the same unfairness about which the Report and Paper complain. Under this system, defendants would frequently settle claims that had good prospects of the defence succeeding to avoid what was colloquially called "legal aid blackmail" whereby, if the defendant defended the case successfully at trial, any costs order in his favour could not be enforced without the leave of the court: this became known as "the football pools order" since it was worth nothing unless the claimant were to make his fortune through a win on the football pools or via some other financial windfall.

As to the "chilling effect", were newspapers to make use of Part 36 offers and/or avoid settling cases close to trial, the recoverable success fees would be significantly less than 100% -see *Campbell v MGN* (no 2) (2005) UKHL 61 and *Peacock v MGN* (2010) EWHC 90174 (Costs) as examples where newspapers failed to make realistic offers to settle and ended up paying 100% success fees with considerable indignation : in fact, in *Campbell,* had any offer above £3,500 been made early in the action, the newspaper would have saved hundreds of thousands of pounds in

costs that it had to pay out and would have received its costs from the last date upon which its offer could have been accepted.

(5) Under paragraph 59: –

> *"CFAs lead to cherry picking by lawyers. Sir Rupert believes that the recoverability regime presents an opportunity for lawyers to increase their earnings substantially by "cherry picking", that is selecting the cases which are almost guaranteed to succeed. "… they generally conduct winning cases on CFAs, they reject or drop at an early stage less promising cases and thus generate extremely healthy profits."*

This is a problem which Sir Rupert has accurately described as demeaning the legal profession in the eyes of the public. It was also identified by Mackay J in *McCarthy v Essex Rivers NHS Trust* 13 November 2009 (QB) (unreported). However, it is not a reason to abolish recoverability. On the contrary, the answer (as happened in *McCarthy*) is to reduce the level of the recoverable success fee ; the transfer of the responsibility for payment of success fees away from tortfeasors and onto Claimants (as recommended in the Report), is not necessary for this problem to be resolved. Appropriate alternative "cures" are considered in paragraph 5 below.

(6) Under paragraph 60.4:-

> *"In practice, the recoverability regime has not led to effective regulation of success fee uplifts. In cases which go to trial, recoverable success fees of 100% appear to be unexceptional. One of the reasons for this is that it is not possible for Costs Judges effectively to control success fees retrospectively."*

This is incorrect. Whilst it is right that Costs Judges cannot apply a hindsight test in deciding the correct level of success fee where this is challenged, they must nonetheless have regard to the facts and circumstances as they reasonably appeared to the solicitor when the CFA was entered into (see CPD s. 11.7). It follows that the court is empowered to reduce success fees on detailed assessment and will

do so if it considers that the facts and circumstances as then known to the solicitor, did not justify the figure claimed. Particular difficulties which face Costs judges in this respect are considered in paragraph 2(8) below.

(7) Under paragraph 60.3 :–

> *"In theory CFAs are thought to discourage weak claims as lawyers carry the risk of not being paid if the case is lost. However, defendants in some types of proceedings argue that claimant's lawyers use CFAs to prolong the litigation process by taking the case to trial in order to secure 100% success fees."*

No evidence is advanced to support this statement. Our experience is the reverse. In numerous cases, it is the Defendant who enables the claimant to "secure" the 100% success fee by failing to make an effective Part 36 offer, or by settling the case late, after the work necessary to bring the matter to trial has been done. Many defendants, having run the litigation adversarily to the door of the court, then complain when they are faced with a bill which seeks a success fee of 100%. There is no justification for such complaints where the running of the case to trial has been deliberate or where it has happened through incompetence.

(8) Our *view why problems exist with CFAs and success fees*

In summary, we agree with some, but disagree with most of the reasons advanced by the MoJ for the perceived flaws in the recoverability regime. In our view, the following are the principal reasons why the regime has not fulfilled the hopes of successive Governments following its introduction in April 2000 and has become

discredited :

(i) The misconceived rationale that successful claims must finance unsuccessful claims which dictates that the success fee can be claimed at up to 100% (limited to that figure by Article 4 Conditional Fee Agreements Order (2000)).

Simplistically, this proposition works on the basis that if a solicitor takes on two cases, each with a 50% chance of winning, one case will be won and the other lost. Therefore, the success fee recovered in the winning case will meet the costs the solicitor has incurred in the losing case. To calculate the appropriate success fees, the Courts have endorsed the use of the "ready reckoner" which is a formula devised by the contributors to the Law Society's publication "Conditional Fee Agreements Survival Guide" 2nd Edition 2001. The formula works as follows: F is the chance of failure to win the claim; S the chance of success. F is divided by S, and the resulting figure multiplied by 100, which gives a success fee. Accordingly, if F is 50% and S 50%, when divided and multiplied by 100, the success fee is 100%.

Both the Report (Chapter 20), the Paper (paragraph 50 et. seq.) and Sir Rupert's Response (paragraph 2.2) recognise that the concept of using success fees in winning cases to subsidise fees notionally "lost" in unsuccessful cases is fundamentally flawed. However, neither has suggested that the ready reckoner should be modified even though this perpetuates the flawed system. It is curious to the point being absurd that a case with 50/50 prospects of winning should command a success fee of 100%, but one with 60% prospects only 66.66% . This has lead to lawyers claiming 100% in many cases where the risks have not justified a success fee at anything like this level simply to avoid the dramatic "drop" that would occur had they put the prospects of winning slightly higher. More is said about this point in the following paragraphs.

(ii) The wording of the Costs Practice Direction is inappropriate ;

Section 11.7 says this:

> "When the Court is considering the factors to be taken into account in assessing an additional liability [success fee] it will have regard to the facts and circumstances as they reasonably appear to the solicitor or counsel when the funding arrangement [CFA] was entered into."

CPD Section 11.8 continues:

> "(1) In deciding whether a percentage increase [success fee] is reasonable, relevant factors to be taken into account may include:
>
> (a) the risk that the circumstances in which the costs, fees and expenses would be payable might or might not occur; …"

It follows that in deciding whether a success fee is reasonable, the court cannot use hindsight, but must instead have regard to the circumstances prevailing when the CFA was entered into and assess the level of risk that then existed that the solicitor might go unpaid because the case might fail.

Expressed in simple terms, this means that the reasonableness of the success fee depends upon what the lawyer knows about the merits of the claim when the CFA is signed. If the lawyer knows nothing of the case save the briefest details given by the client at the outset because he chooses not to ask, he will be unsure as to whether the case is more likely to be won than lost; such a case would have "uncertain prospects" in which case a success fee of 100% has been held to be appropriate (see paragraph 16 judgment of Jack J in *Oliver v Whipps Cross University Hospital NHS Trust* [2009] EWHC 1104 (QB)). This success fee endures until the end of the claim and throughout the detailed assessment process (applying the majority decision of May and Hallett LJJ, *Crane v Cannons Leisure Centre* [2007] EWCA Civ 1352, Maurice Kay LJ dissenting) even though, had the lawyer enquired into the merits of the case before signing the CFA, he might have learned (for example) that an admission of liability had already been made, in which case there would have been no risk that "the circumstances in which the costs, fees and expenses would be payable … might not occur." It follows for the lawyer, that

there is everything to be gained and nothing to be lost in signing the CFA and fixing the success fee at the earliest possible moment, on the basis that the less that is known about the merits of the case , the better will be the prospects of being allowed a 100% success fee.

The exploitation of the CFA regime in this way has led to the allowance of excessive success fees (often 100%) in many cases in which even a cursory examination of the merits at the outset would have revealed a minimal prospect of the case being unsuccessful. This has been compounded by the fact that the Court has no power to reduce the success fee for the detailed assessment proceedings once its level has been ruled on for the claim, even though CPR 47.18 entitles the winning party to his costs of that process and there is no risk of his going unpaid. (We support Sir Rupert's view that no success fees should be allowed in detailed assessment proceedings for this reason in which case *Crane* would need to be reversed).

(iii) CFAs that contain an exit clause permitting the lawyers to end the agreement

We have yet to see a CFA that does not contain a clause which permits the agreement to be terminated in the event that the lawyer considers that it is unlikely that the client will win. As Mackay J recognised in *McCarthy v Essex Rivers Hospital Authority NHS Trust* (13 November 2009) (QB) (unreported), (he did not follow Jack J's decision in *Oliver* although he could have done so), such a clause enables the lawyer to pick out and discard from the basket of cases he is handling, those which are believed to have less than a 50% prospect of success, leaving him with an enhanced basket of claims likely to succeed. For that reason, the rationale for recoverable success fees, that winning cases must pay for losing cases, is fundamentally flawed. As recognised by Sir Rupert Jackson, a lawyer will jettison losing cases and retain only those that will, in all likelihood, be successful. He will therefore generate success fees that do not compensate him for losing cases, since any case that is remotely risky will long since have been cast adrift. Instead , he will have a book of "winners" which provide for success fees of 100% because the client will have signed the CFA before the lawyer has made any investigation of merits,

which, had he done so, might have revealed that the claim had every chance of success.

(iv). The fact that CFAs "are open to everyone" (see speech of Lord Hoffman in *Campbell v MGN Ltd* [2005] UKHL 61 at paragraph 27).

Unlike legal aid, which the recoverable scheme replaced, CFAs are available to any litigant, be they individuals, limited companies, bodies corporate or trade unions. At one point, it was open to paying parties on detailed assessment to argue that after a solicitor had advised his client about alternative means of funding, and that client had opted for a CFA when he had the ability to fund the litigation from his own resources, there should be a sanction (such as the disallowance of the success fee) to reflect the extra costs that had been incurred as a result of the decision to use a CFA. The effectiveness of that argument collapsed following the decision in *Campbell*, when the House of Lords held that CFAs were "open to everyone". It follows that wealthy entities, who can afford to fund litigation themselves, ~~have~~ instead used~~d~~ CFAs in cases which have the potential to (and often do) double the defendants' costs burdens through the addition of the success fee. Moreover, given the nature of "no win, no fee" agreement, such entities can do so without having to make any contribution whatsoever to the costs, whilst at the same time (in successful cases) recovering a success fee either for themselves (if a trade union) or for their solicitors in the process. The misplaced availability of CFAs to "everyone" is a major reason why costs under the CFA regime are excessive.

(v) Permitting 100% success fees to be recovered

It is not clear to us why 100%, rather than a significantly lower figure, is the maximum success fee permitted. One explanation previously advanced is that where a defendant fights a case to trial, he plainly believes that the defence will succeed, so the prospects of the claimant losing must be equal to the chance of winning; accordingly, under the "ready reckoner", the success fee should be 100%.

This gives rise to absurd and disproportionate results. Where the costs are £100, the outcome is *de minimis* because the success fee will be £100. But in a large case, where the costs are £1 million, the success fee alone will be an additional £1 million. Such a success fee is plainly out of all proportion, but it is what the CFA regime permits as currently structured. Either reducing the maximum fee permitted under Article 4 CFA Order 2000 to, say, 50%, or by introducing a form of tapering to apply to success fees in large cases, would cut significantly their overall level. However, this has not been explored. On the contrary, "Sir Rupert does not propose that figure [100%] be altered" (see Paper paragraph 68).

(vi) Inept handling of claims by defendants

The Costs Judges deal with many bills in which the costs have been significantly but avoidably increased by the conduct of Defendants. In some cases, the litigation is conducted with hostility, thereby requiring claimants to address each and every point. In others, defendants delay, thereby causing unnecessary additional costs. In others still, settlements are left to the last minute, thereby often triggering the third stage of a three stage success fee (always 100%) whereas had the defendants opened the negotiations earlier, the figure would have been significantly less. Where this happens, the fact that success fees are claimed at 100% is not a reason to criticise the recoverability regime. On the contrary, culpability lies with the defendants who, nonetheless, are always the first to complain on detailed assessment about having to pay success fees at levels which they contend are unfair, disproportionate and impede their access to justice. In reality, the fault lies with defendants such as these and not with the recoverability regime as a whole.

(9) *Our comments on Sir Rupert's recommendations in the light of these observations*

We do not believe that the problems which afflict the CFA regime (as described in the Report and the Paper) will be resolved by the abolition of the recoverability of success fees from paying parties as the MoJ and Sir Rupert propose. On the contrary, shifting the burden of success fees away from tort feasors and on to

claimants will not only cause injustice, but also cast aside the many commendable steps that have been taken by interested parties over the past decade to iron out the malign aspects of the CFA regime, which all sides have recognised have been a blight on the English and the Welsh legal system.

It is said of the CFA regime that it is the only form of litigation in which the claimant makes no contribution whatsoever to his or her own legal costs and has no interest in the level of costs being incurred because, win or lose, he will never have to pay them. It is not explained, however, that where a court has carefully and methodically assessed the damages which a claimant will require in order to pay for his care for the rest of his life, why sums should be siphoned off and given as legal fees to that litigant's own solicitors, thereby depriving him of money that the Court considers he will need and should have. Such an outcome is one that none other than Sir Rupert has described as "grotesque" in *Pankhurst v White* [2010] EWCA Civ 1445, in the context of the delayed payment of fees, when the claimant's solicitors (as they were entitled to do), levied a charge of £35,000 out of their client's damages to reflect the postponement element in the receipt of their costs payable under the CFA. However, t is not clear why such a deduction should be "grotesque" when the client's damages are used to meet the postponement element, but not grotesque when used to pay the success fee.

It is not strictly true, either, to say that, uniquely under the CFA regime, clients make no contribution whatsoever to their legal costs. Under legal aid, assisted parties are liable to the level of their contribution. Those who make no contribution and whose cases are unsuccessful, litigate "free" unless the court makes a determination under Section 11 of the Access to Justice Act 1999 which provides that their liability should be assessed at a figure other than nil (very rare). A party who wins his case on legal aid may find himself responsible for "legal aid only costs", being costs incurred as between his solicitors and the Legal Services Commission and/or costs not allowed inter partes but transferred by the court to the legal aid column in the bill, since these costs are recoverable out of his damages. However, in many actions, the solicitors waive the "legal aid" element of such costs.

As to the level of costs being incurred, under the CFA regime, certain costs are irrecoverable from a losing party, such as the postponement element which compensates the solicitor the delay in being paid for his work. These costs can be substantial as in *Pankhurst* and support our view that it is erroneous to say (as the Paper does) that CFA funded litigants have no interest in the costs. Moreover, if a regime which permits contingency fees in civil litigation is introduced, as recommended in the Paper, more rather than fewer litigants will be authorised to conduct the litigation without having made any contribution to their costs. Why this should be permissible or desirable in DBAs but not CFAs , is not explained.

Of a decade (2000 to 2010) that has been replete with satellite litigation about costs, many cases involving success fees and their recoverability, Sir Rupert has commented that "the mass of rules and case law which surrounds recoverable success fees form a jungle which should be cut down and cleared". [Response paragraph 2.14]

In fact, much of the jungle has already been cleared. Issues about the enforceability of CFAs caused by the CFA regulations 2000 (since repealed) are coming to an end Although these cases have a long tail, they are finally working through the system, and *Thornley v MoD* [2010] EWHC 2584 (QB) may well be one of the last, if not the last case concerning technical challenges to CFAs. *Thornley* and the recent decision in *Redwing Construction Ltd v Charles Wishart* (2011) EWHC 19 (TCC) are also examples of the judiciary taking far more robust action in reducing success fees (in *Redwing*, Akenhead J allowed counsel a nil% success fee on the grounds that there was no risk of going unpaid when the CFA was signed). There is also CPR Rule 45, which both Sir Rupert and the MoJ accept has worked well (see Paper paragraph 48). This rule provides that in road traffic accident claims, employers liability claims and employers liability disease claims, success fees are fixed, these having been discussed and agreed by interested parties through the auspices of the Civil Justice Council. As things stand at present, that part of CPR 45 will be a casualty of Jackson if the proposals are implemented in the form suggested even though all are agreed that the rule is effective and successful.

(10) Concluding remarks: it follows from these comments that ~~the Costs Judges~~ we submit that the recommendations set out in the Paper are, in many cases, inappropriate. Whilst the recoverability regime has gone through a very troubled period which can be described as anything but "teething problems", the reality is that the majority of these difficulties have now been resolved and where improvements still need to be made, they can be completed without the dismantling the existing regime. In the next section of this Response, we set out our proposals to achieve this end , thereby avoiding the need to implement Jackson *en bloc* .

(11) The Costs Judges' proposals

(i) *Retain and expand CPR 45*.

As previously stated, the existing rules were formulated following detailed discussions, negotiations and compromises carried out with the assistance of the Civil Justice Council. The present CPR 45 ought to be extended to cover other types of litigation. Instead, under Jackson, the rule relating to fixed success fees will be abolished. The following example illustrates how unfairly Jackson would bear upon claimants if rule 45 was removed from the CPR:-.

+ Road traffic case assigned to the multi track, in a pre trial settlement, C recovers damages of £10,000 (being general damages £2,000, past special damages £1,000, damages for future loss and care £7,000). C's solicitors' costs are £1,000 recoverable from D plus a success fee of 12.5% under Rule 45 being £125. Accordingly, C recovers £10,000 and C's solicitors £1,125.

+ Under Jackson, the position is different. C recovers £10,000 plus £200 being 10% of general damages, total £10,200. However, C pays out 25% of his damages (excluding damages for future loss and care) for the success fee amounting to £750 plus VAT of £150. So C receives £9,300 and is £700 worse off.

+ The position would be more striking in a catastrophic injury case. Suppose on the same facts C recovers £500,000 (general damages £25,000, past losses £25,000 and future loss and care £450,000). C's solicitors costs are £100,000.

Under CPR 45, C would receive £500,000 damages and C's solicitors would recover £100,000 costs plus a success fee of £12,500 payable by D.

+ The position under Jackson is much worse for C. C recovers £502,500 (£500,000 damages plus 10% of general damages). However C pays out a success fee of 25% (being the aggregate of general damages and special damages for past loss) total £12,500 plus VAT of £2,500. Accordingly, C receives £487,500, and is £12,500 worse off under Jackson.

It should be noted, too, that the later the damages for past losses are assessed or agreed, the greater will be the sum that the claimant will lose from his compensation to pay the success fee. In these circumstances, if all agree that CPR 45 works well, why abolish the rule for a replacement that neither claimant or defendant lawyers and insurers have asked for, still less want?

(ii) *Restrict the availability of CFAs to individuals*

The purpose of the CFA regime when introduced was to provide access to justice. The clear inference to be drawn from that is that CFAs would provide prospective litigants unable to fund claims themselves with a means to do so. In the event, public limited companies, trade unions, corporate bodies, insurance companies, etc, have made use of the CFA regime, even though all can afford to fund litigation out of their own resources. The consequence of that has been to impose on losing defendants such as the National Health Service and City Councils, a costs burden that is often double the base costs that would have been payable had there been no CFA. As Sir Rupert has expressed the position "Any person, whether rich or poor and whether human or corporate is entitled to enter into a CFA; this gives rise to anomalies and unintended differences on a grand scale"

Were the availability of CFAs to be limited to individuals, this would secure real costs savings since those well able to fund litigation for themselves (PLCs, trade unions, etc) would be obliged to do so. That is no different to the position which pertained under legal aid, when funding was available to individuals and no one else. We also

recommend that the availability of CFAs is limited to those who can afford to pay. Those individuals who have the means to do so but chose to use the CFA regime instead, will run the risk that they may only be able to recover their base costs if successful. In this respect, it seems to us that the proportionality argument discussed by the ECHR in *Campbell*, will fall away.

(iii) *Lower the level of recoverable success fees*

The fallacy that high success fees are justified because winning cases must finance losing cases, has already been explained, see paragraph 3(1) above. It follows, that, save in cases to which CPR 45 apply, there is no compelling reason why the maximum success fee should remain at 100%. To cap success fees at say 50% (or a higher figure if this can be incorporated into an expanded CPR 45) in cases that proceed to trial, would make a big inroad into the level of recoverable costs, without dismantling the whole system, but this does not appear even to have been considered by the MoJ in the Paper.

(iv) *Notification*

Currently, the only requirement on a party is to notify his or her opponent that a case is being funded by a CFA which provides for a success fee. There is no obligation to tell the opponent what the level of the success fee is, still less whether it is staged. The rationale behind that, it is said, is that if a claimant were to be obliged to notify a defendant that the success fee was, say, 100%, this would "give the game away" and that the claimant in truth, considered the case to be extremely risky.

If that were ever the case, it is certainly not correct now, since the Court of Appeal has progressively endorsed the adoption of staged success fees which start low and end high. It follows that there is no possibility that notification of the amount of the success fee or the date of any increase, would convey any confidential information about the claimant's view of the merits of the claim. Accordingly, we recommend that the amount of the success fee should be notified to the opponent at the outset and if there is to be an increase, the dates upon which the success fee will rise and

the amount. This will provide a positive incentive for defendants to settle or admit liability (where appropriate) at an earlier stage, in the certain knowledge that if they press on and fail, the outcome will be commensurately more expensive.

(v) *Reduce the success fee after admission of liability*

In *Pankhurst*, Sir Rupert criticised the claimant's solicitors for claiming a significant success fee after liability had been admitted, when there was no risk that the solicitors would go unpaid.

This difficulty emanates from the decision of the Court of Appeal in *KU v Liverpool City Council* [2005] EWCA Civ 475, when Brooke LJ said this at paragraph 47:

> "... Once it is clear that a CFA may only carry one success fee, and that the task of a Costs Judge is to determine whether that success fee was a reasonable one in the light of the matters that the legal representative knew or should have known when it was made, there is simply no room for a Costs Judge to substitute different percentage increases for different items of costs, or for different periods when costs were incurred. He could only do this with the benefit of hindsight, which is prohibited. His powers of interference are limited to altering the success fee to a more reasonable one when he considers the size of the additional liability the paying party should bear. …
>
> It follows that … the court has no power to direct that a success fee is recoverable at different rates for different periods of the proceedings. In so far as paragraph 11.8(2) of the Costs Practice Direction suggests otherwise, it is wrong."

It follows from *KU* that even if a defendant admits liability shortly after a CFA with a 100% success fee is signed, the court cannot vary that success fee downwards if, having regard to CPD 11.7 and 8(1)(a) , on the date the CFA was made, 100% was reasonable. In the result, *KU* has meant that claimants' solicitors continue to collect high success fees, even though there is no risk that they will go unpaid. Expressed

differently, a defendant who admits liability early, receives no credit for doing so if the CFA is already in place and the court is satisfied the success fee was justified when the CFA was signed, having regard to CPD 11.7 and 8(1)(b). If, however, a defendant who admitted liability at an early stage were to be rewarded by a corresponding reduction in a success fee (contrary to the view expressed by Brooke LJ), this would reduce costs without dismantling the recoverability regime in the process.

This issue should be addressed in conjunction with CPD s.11.7 and 8. As currently worded, these sections facilitate "cherry picking" by lawyers and the mischief that is thereby caused, will be avoided if an appropriate alteration is made to the CPD. In particular, lawyers should not be rewarded because they chose to be ignorant about the merits of cases they take on, for fear that if they make a simple enquiry they might be told a fact supportive of a favourable outcome. An amended CPD or rule change needs to be made to address this issue, so that it is permissible to re-visit the success fee after an admission of liability, in which case the risk of going unpaid will be limited solely to the failure to beat a Part 36 offer.

Concluding remarks: For these reasons, we do not agree with the proposals set out in the Report about success fees. The CFA regime has undergone many changes and improvements since implementation. Having taken a decade for these to have been achieved, now is not the time to made radical changes which give no guarantee that access to justice at reduced costs will be delivered under Jackson where it failed under Woolf.

3. After the Event Insurance

(1) The proposal (Paper paragraph 82 et seq) says this:

> "Sir Rupert considers the regime of recoverable ATE insurance premiums to be an expensive form of one-way costs shifting. In his view, it is based on the policy objective that certain claimants need to be protected against the risk of having to pay adverse costs. However, the flaw in the current regime

is that it is not targeted upon those who merit such protection but is open to all. Sir Rupert believes that the existing regime is unfair, and an unsatisfactory way of achieving its policy objective. Sir Rupert therefore recommends that the recoverability of ATE insurance premiums should be abolished, but that, in order to protect those who merit protection against adverse costs, one way costs shifting should be introduced … In personal injury litigation (including clinical negligence in particular) claimants require protection against adverse costs orders. Under one way costs shifting, losing claimants are only liable to pay their own legal costs including any success fee and not the winner's costs if the case is lost. Losing defendants would continue to be liable to pay both their own and the claimants' costs in the normal way. With qualified one way costs shifting, a losing defendant would continue to pay a claimants' costs but a losing claimant would pay a winning defendants' costs only where – and to the extent that – in all the circumstances it is reasonable to do so."

We agree that the existing ATE regime is unsatisfactory, but the proposals recommended by Sir Rupert go much too far. In our view the following are the problems which need to be addressed:

(i) Reduction in the level of premiums. Although policies taken out early in proceedings often have low premiums, the reverse is true when cover is purchased late, eg, close to trial, when premiums are often in the tens or even hundreds of thousands of pounds. However, in view of the decisions in *Rogers v Merthyr Tydfill* (2007) 1 WLR 808 (CA) and *Callery v Gray No 2* (2002) 2 Costs LR 205 Costs Judges have little power to reduce them.

(ii) ATE cover is available to all, which means that it is directed at litigants who have no need to be protected against adverse costs orders, because they have the means to satisfy them, for example trade unions, litigants with BTE cover, County Councils, PLCs, etc. The recoverability of such premiums by such litigants adds another layer to the costs which ought not to be permitted.

(iii) ATE cover is often taken out inappropriate cases, for example after liability has been admitted, at which point the only risk on the claimant that he will not recover costs will be if he fails to accept an offer under CPR Part 36, which he subsequently fails to beat at trial. In paragraphs 3(4) below, this Response sets out how these problems are capable of resolution without taking all the steps recommended by Sir Rupert.

(2) The Advantages of ATE

Under the recoverability regime, a defendant who is successful in his defence, is *paid* his costs. This did not happen under the old legal aid regime; all the defendant received was a "football pools order" (see paragraph 2 (4) ante). Moreover, where an unsuccessful claimant becomes insolvent, or is simply unable to meet a costs order, the winning defendant will not receive the costs that the court has ordered the losing claimant to pay him. Under the recoverable ATE regime, that does not happen, so where such bodies as the National Health Service, County Councils, etc, are successful, they are *paid* their costs from the ATE policy.

(3) The Proposals in the Paper

Sir Rupert proposes that the recoverable ATE regime is replaced by qualified one way costs shifting. The rationale behind this recommendation is that litigants should be protected against liability for payment of their opponent's costs if the claim fails. We do not believe that such a proposal is fair or workable. In the first place, why should a defendant who has "won" fairly and squarely, be deprived of his right to recover his costs? Secondly, such an arrangement would perpetuate the risk free costs environment that the Report and Paper criticise, namely one in which a litigant has no interest in the level of the costs, since, win or lose, he will not be paying them personally. Thirdly, if, as appears to be the case, it is envisaged that "wealthy" litigants will be excluded from QOCS, who is to decide when a litigant is sufficiently wealthy so that costs protection will not apply? Whilst this difficulty would not arise were the claimant to be an individual backed by his trade union, or a PLC , etc, if he were simply an individual, who and at what point would decide whether he should be

excluded from QOCS costs protection? The Report envisages that the Judge at the end of the claim would do so and determine the amount summarily, but on what basis; should the amount depend upon the individual's income, capital or even age? Should a litigant in middle age who has saved for his retirement , be compelled to give to his opponent as costs, the funds he has carefully set aside to pay for his old age, because he is considered to be "wealthy"? With all due respect, this recommendation does not appear to have been thought through.

(4) Our Alternative Proposals

(i) The recoverable ATE regime should be retained but the obligations on the parties to notify opponents about ATE cover should be increased. Opponents should be notified of the level of cover, the amount of the premiums and if the policy is staged, the dates on which liability will be incurred for payment of the next premium. This will provide a positive incentive for the defendants to negotiate and/or settle cases earlier than they do now; if they continue to fight, defendants will know precisely what they will be in for if they lose.

(ii) Prohibit the recoverability of ATE premiums in certain cases. Where a party has BTE, or is backed by his trade union, or is a PLC or public body, all of whom can afford to pay adverse costs orders, or liability has been admitted, there is no need for ATE and if a policy is taken out, the premium should cease to be recoverable by these types of party. This would address Sir Rupert's concern that, at present, ATE is not targeted at the correct market.

(iii) Premiums should be standardised wherever possible. At present, high premiums are frequently allowed solely on the ground that "this was the only quote we could obtain" or that "we accepted the cheapest quote". This is unsatisfactory and discussions need to take placed between ATE providers and defendant insurers with a view to standardising premiums in all cases. In particular, the problem that arises when ATE is taken out well into the proceedings, such as just before trial, should be addressed. When this

happens, the premium is high because it is bespoke due to *Merthyr Tydfil* and *Callery v Gray*, the scope for the Courts to reduce such premiums is very limited.

4. Funding Disbursements

The Paper states at paragraph 87:

> "… A question arises as to how disbursements would be funded under the new arrangements. Disbursement costs include, for example, medical and other experts reports, counsel's fees, court fees, etc … Under the current arrangements a losing claimants ATE insurance policy covers the costs of disbursements as well as the defendant's costs. If the claimant wins, disbursement costs are paid by the defendant."

The Paper proposes a refinement that ATE premiums should continue to be recoverable insofar as they relate to claimants' disbursements. Sir Rupert, in his response at paragraph 3.6, gives three reasons why this refinement should be rejected:

(i) losing claimants should not have their disbursements paid by winning defendants;

(ii) there is a strong case for saying that losing defendants or their solicitors should meet their own disbursements;

(iii) if the Government decides that losing claimants should still have their disbursements paid out of public funds, the ATE regime is an extremely inefficient and expensive way of achieving that result. A much better and cheaper way of achieving the policy objective would be to provide legal aid for such disbursements.

We agree with (3). All forms of civil litigation involve disbursements and how they

are to be financed is often a formidable difficulty which prospective claimants with good cases frequently face. We support Sir Rupert's view that if the Government presses ahead with the abolition of recoverable ATE (which it is submitted it should not), it cannot do so without providing an alternative and that this should be by way of public funding. There is no reason why this should be expensive; if a claim is won, the costs of the disbursements will be recovered and repaid to the public funds. If the case is lost, there will be no such recovery, but consideration ought to be given to the imposition of a levy in winning matters, as was the case when legal aid was available for personal injury claims; in the High Court 10% of the costs recovered were paid back into public funds. If this way done in order to fund disbursements, the Government should simply provide the equivalent of an bank overdraft, save that repayment would not be on demand but at the conclusion of the case from either the recovered disbursements or from the 10% levy (or from a combination of both).

5. 10% Increase in General Damages

For the reasons given in paragraphs 2 and 3 above, the Costs Judges do not support the abolition of recoverable success fees and ATE premiums, in which case the proposal to increase general damages is otiose. If, however, the increase is implemented, 10% will be inadequate to compensate a successful claimant for the additional amount he will lose from his damages to pay his lawyer's success fee.

6. Qualified One Way Costs Shifting

The proposal is that QOCS should be introduced in various types of case, in particular personal injury claims, because claimants are usually successful, the parties are almost always in an unequal relationship and QOCS would be a cheaper way of protecting claimants against adverse costs orders than ATE insurance.

One particularly striking criticism of the existing CFA regime made by both Sir Rupert and the Government is that win or lose, the claimant operates in a risk-free environment so far as costs are concerned and has no interest in the level of the

costs. Were QOCS to be implemented in the manner suggested, this would perpetuate and not curtail the risk-free environment about which the Paper and Report complain. Under QOCS, the claimant would have no interest in the level of costs being incurred by his opponent because he would never be ordered to pay them; insofar as his own costs were concerned, he would only (as now) have an interest in any irrecoverable element.

7. Proportionality

The Paper sets out Sir Rupert's proposals for the introduction of a new definition of proportionality to be adopted within the CPR. At present, the court's approach to proportionality as advanced in *Lownds v Home Office* [2002] EWCA Civ 365 applies only to costs awarded on the standard basis. The Paper does not suggest that proportionality should be extended to costs on the indemnity basis, but Sir Rupert proposes amending the rule so that when assessing costs on the standard basis, proportionality becomes the dominant test over reasonableness or necessity. His intention is that the court should first assess the reasonableness of the work and the amount on an item by item basis. The court will then consider the proportionality of the resulting costs and if the total amount is disproportionate, make a further reduction to a proportionate level.

We disagree with this proposal which was considered and rejected in *Lownds*, since its implementation would introduce an element of "double jeopardy". Where a court has reached a figure for costs that are reasonable (viz reasonable costs reasonably incurred) following an item –by-item assessment, it should not then make a further reduction of an arbitrary amount if the costs still appear to be too high.

The approach recommended by Sir Rupert bears a resemblance to the "Singh adjustment" in the determination of criminal costs (see *R v Supreme Court Taxing Office ex parte Singh & Co* [1997] 1 Costs LR 49). Under the Singh adjustment, once the Determining Officer has carried out an audit exercise in relation to individual items in the bill, he is permitted to stand back and consider whether the aggregate produced from those individual items still produce a result which

establishes that the time claimed is unreasonable. If it does, he is permitted to make a further reduction. However, costs in criminal appeals proceed on a different basis to those in civil costs; in particular, it is rare for the Lord Chancellor (as Paymaster) to be represented.

The position in civil detailed assessments is that these are conducted on an adversarial basis. Under *Lownds*, where the court decides at the outset that the costs claimed are, or give the appearance of being disproportionate, they must be assessed on the basis of reasonableness and necessity. Sir Rupert proposes that there should, in addition, be a new test of proportionality, introduced by rule change.

We disagree. Firstly, the rules already provide the court with sufficient weapons on detailed assessment to ensure that on completion of the process, costs are reasonable and proportionate. An additional test on the lines suggested is not needed. Second, if costs budgeting is implemented and operated effectively, the Court will exercise control over the level of costs before they are incurred, so that they are not and cannot become disproportionate. Third, the proposed rule change would give rise to yet more satellite litigation. Having carried out the detailed assessment, it appears that there is then to be a second assessment of the resulting total, having regard (on Sir Rupert's proposals), to the sums at issue in the proceedings, the value of any non-monetary relief in issue, the complexity of the litigation, any additional work generated by the conduct of the paying party and any wider factors involved in the proceedings, such as reputation or public importance (see Paper paragraph 2.5). If Implemented, this will simply move the *Lownds* arguments from the beginning of the assessment hearing to the end.

All the matters envisaged in the proposed new rule will provide fertile grounds for paying parties, dissatisfied with the resulting total following assessment, to make a further assault on the receiving party's bill. The Paper suggests that only in a minority of cases would the new proportionality test bite, but this is fanciful. The proposal envisages that after all the costs have been assessed, there is a further round of argument about proportionality, thereby end loading the detailed assessment process and adding still further to the overall costs. In practice, the

distinction between costs reasonably incurred and costs necessarily incurred is so thin that it is almost invisible since if it was reasonable to incur a cost, invariably it was also necessary to do so. Sir Rupert has said that the rules are complicated enough as it is. This is true. Making another attempt by rule change to widen the concept of proportionality will not work, but instead will prolong the already excessively expensive detailed assessment process at yet further cost.

8. Litigants in Person

The Costs Judges support Sir Rupert's proposal that litigants who cannot prove financial loss should be paid an hourly rate of £20 per hour.

Master Colin Campbell
Master Peter Haworth
Master Colum Leonard

SCCO

14 February 2011