

## Division E

# Litigation Funding

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## Litigation Funding Narrative

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# Litigation Funding

## I Introduction

### A *Origins of the legal regulation of litigation funding*

[1] The funding of litigation has long attracted the attention of the law, both in the form of statute and case law. Under the Statute of Westminster in 1275 Maintenance and Champerty were criminal offences and indeed remained so until the Criminal Law Act 1967 when they were abolished both as crimes and as torts. Section 14 of the Criminal Law Act 1967 preserves those doctrines in the context of public policy and a contract offending that policy can be struck down. For fuller treatment of maintenance and champerty see **Division A**.

### B *Legislative provision*

[2] The Civil Justice Review in 1989 led to the legislative recognition of the need to still further move away from the policy behind Maintenance and Champerty. The statute which resulted was the Courts and Legal Services Act 1990 (CLSA 1990). The Act was brought into force by the implementation of the Conditional Fee Agreements Regulations 1995 (CFA Regulations)<sup>1</sup> and the Conditional Fee Agreements Order 1995 (CFA Order)<sup>2</sup>. The Act permitted conditional fee agreements (CFAs) and in so doing permitted a solicitor to make an agreement which effectively gave the solicitor a financial interest in the success of the litigation. The 1995 Order restricted the use of a CFA to personal injury, insolvency and European Court of Human Rights cases only. This statutory regime also regulated the CFA itself. By the Conditional Fee Agreements Order 1998<sup>3</sup> the range of specified proceedings to which the CLSA 1990 applied was extended to all proceedings. The Act itself excludes criminal and family proceedings.

The CLSA 1990 was amended significantly by the Access to Justice Act 1999 (AJA 1999). The AJA 1999 effected the legislative changes by substituting CLSA 1990, s 58 with wholly new wordings and by the insertion of ss 58A and 58B. The recoverability of the insurance premium is effected by the AJA 1999, s 29. The major changes brought about by the AJA 1999 were:

- (1) The recoverable success fee<sup>4</sup> and insurance premium<sup>5</sup>.
- (2) The removal of CFAs from the common law<sup>6</sup>.
- (3) Extending CFAs to all proceedings for resolving disputes (and not just court proceedings)<sup>7</sup>.
- (4) Facilitating different forms of CFA with different conditions<sup>8</sup>.
- (5) Litigation funding agreements<sup>9</sup>.
- (6) The recoverability of costs by membership organisations<sup>10</sup>.
- (7) Facilitating the abolition or partial abolition of the indemnity principle.

The provision for litigation funding agreements has yet to be commenced<sup>11</sup>. The provision relating to the indemnity principle was commenced on 2 June 2003<sup>12</sup> and all other provisions were implemented from 1 April 2000.

## [2] Litigation Funding

The Conditional Fee Agreements Regulations 2000<sup>13</sup> also came into force on 1 April 2000 and set out the requirements for an enforceable CFA<sup>14</sup>. The Collective Conditional Fee Agreements Regulations 2000<sup>15</sup> came into force on 30 November 2000<sup>16</sup>. The CFA Regulations 2000 and the Collective CFA Regulations 2000 were amended from 2 June 2003 to provide for a simplified CFA and CCFA respectively<sup>17</sup>.

From 1 November 2005 the above regulations are revoked<sup>18</sup>. Other than for membership organisations there are from 1 November 2005 no regulations to govern CFAs<sup>19</sup>. The statutory regime therefore differs significantly according to when the CFA in the matter was entered into. The revocation is not retrospective. It is necessary as a result to consider separately CFAs made before 1 April 2000, those made after that date including simplified CFAs and finally with CFAs made on or after 1 November 2005.

Chronology of statutory provisions
<b>1990</b> Courts and Legal Services Act 1990, s 58 CFAs to be allowed in personal injury cases
<b>1993</b> Section 58 of the CLSA 1990 came into force 1 October 1993
<b>1995</b> Conditional Fee Agreements Order 1995 Conditional Fee Agreements Regulations 1995 From 5 July 1995 permitted CFAs in personal injury cases. Regulations in force until 1 April 2000.
<b>1998</b> Conditional Fee Agreements Order 1998 Repealed 1995 Order and permitted CFAs in all proceedings except criminal and family proceedings
<b>1999</b> Access to Justice Act 1999, s 27 Replaced s 58 of the 1990 Act with new ss 58 and 58A
<b>2000</b> Section 27 of the AJA 1999 came into force on 1 April 2000 Conditional Fee Agreements Regulations 2000 came into force on 1 April 2000
<b>2005</b> Conditional Fee Agreements (Revocation) Regulations 2005 repealed the 2000 Regulations from 1 November 2005

<sup>1</sup> See para [1031].

<sup>2</sup> See para [1021].

<sup>3</sup> See para [1041].

<sup>4</sup> CLSA 1990, s 58A(6).

<sup>5</sup> AJA 1999, s 29.

<sup>6</sup> CLSA 1990, s 58(1).

<sup>7</sup> CLSA 1990, s 58A(4).

## Introduction [3]

<sup>8</sup> CLSA 1990, s 58A(3)(b).

<sup>9</sup> CLSA 1990, s 58B.

<sup>10</sup> AJA 1999, s 30.

<sup>11</sup> CLSA 1990, s 58B.

<sup>12</sup> AJA 1999, s 31, commenced by the Access to Justice Act 1999 (Commencement No 10) Order 2003, SI 2003/1241.

<sup>13</sup> SI 2000/692.

<sup>14</sup> See para [1051].

<sup>15</sup> SI 2000/2988.

<sup>16</sup> See para [1080].

<sup>17</sup> Conditional Fee Agreement (Miscellaneous Amendments) Regulations 2003, SI 2003/1240.

<sup>18</sup> Conditional Fee Agreements (Revocation) Regulations 2005, SI 2005/2305, see para [1301].

<sup>19</sup> Access to Justice (Membership Organisation) Regulations 2005, SI 2005/2306, see para [1310].

**C The modern common law**

[3] During the same period in which the legislative changes were being made the courts addressed the issues of public policy in the funding of litigation on a number of occasions and with conflicting results. An early indication of retreat from Maintenance and Champerty was given by a decision of the House of Lords in the context of car hire. Here motorists whose cars were damaged in accidents not their fault were provided with a hire car, the cost of hire being sought not from the motorist but from the party at fault or their insurer. Lord Mustill, in rejecting the argument that the arrangement was unlawful as being champertous, said:

‘ . . . the balance of advantage is overwhelmingly in favour of those who receive professional and financial assistance to recover a valid claim which would otherwise go unsatisfied’.

The decision of the House of Lords approved with a minor exception the decision of the Court of Appeal where Stein LJ had reviewed the case law and explained the public policy underlying Maintenance and Champerty. That analysis is obiter on the law as it relates to conditional fee agreements which were not the subject of that case.

The balancing of advantages and the consideration of competing public policy interests led to major developments in the area of litigation funding but also to differing judicial attitudes. In *Aratra Potato Co Ltd v Taylor Joynson Garret (a firm)*<sup>2</sup> a retainer providing for a reduced fee where cases were lost was struck down as being unlawful, notwithstanding the decision in *Giles v Thompson*<sup>3</sup> and the passing of the CLSA 1990. It is to be noted that there was in this case no uplift on ordinary fees in the event of success. Garland J reached the following conclusions:

- (1) A contingency fee which is contrary to public policy is not confined to a direct or indirect share of the spoils but it includes a differential fee dependent on the outcome of the litigation.
- (2) Public policy has not been changed by the CLSA 1990 which in any event is extremely limited in scope.
- (3) The liberalisation of the law in relation to the assignment of choses in action and the approach of the House of Lords to the allegedly champertous agreement in *Giles v Thompson*<sup>4</sup> have not modified or cast any doubt upon public policy in relation to contingency fees which is, at the end of the day, a rule of statute.

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<sup>1</sup> *Giles v Thompson* [1993] 3 All ER 321 at 361, HL.

<sup>2</sup> [1995] 4 All ER 695, [1995] NLJR 1402.

<sup>3</sup> [1994] 1 AC 142, [1993] 3 All ER 321.

<sup>4</sup> [1994] 1 AC 142, [1993] 3 All ER 321.

[4] The provisions of the CLSA 1990 were not in force at the date of that decision and in any event the class of work covered by the retainer did not come within the 1995 Order. The clear basis of Garland J's decision was that public policy was still set against such arrangements.

*Aratra Potato Co Ltd* was overruled in the important decision of the Court of Appeal in *Thai Trading Co v Taylor*<sup>1</sup> where the direct question arose as to the legality of a fee arrangement whereby the solicitor would seek payment from his client only in the event of a successful outcome with an order for costs. Millet LJ, as he then was, reached a conclusion which has since been subjected to intense analysis and decisions which depart from it. In deciding that the fee arrangement in *Thai Trading* was not unlawful the court made the following points:

- (1) *Gundry v Sainsbury*<sup>2</sup> establishes the indemnity principle as being that a successful party can only recover from the unsuccessful party such costs as the successful party is legally liable to pay to his own solicitor.
- (2) The client in this case, Mrs Taylor, was not going to pay her solicitor unless she won.
- (3) The trial judge had felt bound by *British Waterways Board v Norman*<sup>3</sup> and *Aratra Potato Co Ltd* and so held the agreement on costs to be void as being against public policy. Accordingly, under the indemnity principle, the client had no legal obligation to pay her solicitor and thus no costs were awarded.
- (4) Section 59(2) of the Solicitors Act 1974 does not prohibit fee arrangements of this type. The section merely provides that nothing in the Act shall give validity to arrangements if they are otherwise unlawful – it does not render unlawful and arrangement which is otherwise lawful.
- (5) Although the arrangement would be contrary to the Solicitors Practice Rules 1990, relying on *Picton Jones & Co v Arcadia Developments Ltd*<sup>4</sup> that of itself does not make the practice unlawful.
- (6) The Solicitors Practice Rules 1990 were in any event based upon a perception of public policy which was now questioned.
- (7) In a case where the solicitor is not to be paid more than the normal fee if the case succeeds and no fee if he loses, the arrangement was probably never contrary to public policy and should not be so regarded today.
- (8) Rejecting *British Waterways Board v Norman*<sup>5</sup> it is not improper for a solicitor to agree to act on the basis that he is to be paid his ordinary costs if he wins but not if he loses.

It is instructive to note Millet LJ's treatment of the objections to agreements of this kind:

## Introduction [5]

- (1) Where the solicitor contracts for no more than his ordinary fee if he wins there is nothing unlawful in the agreement to pay ordinary fees. If there is anything unlawful it is the waiver or reduction of the fees if he loses. The result of that unlawful aspect is not that the whole agreement is unlawful. The client becomes liable to pay even where the case loses.
- (2) There is a public interest and policy of making access to justice readily accessible to persons of modest means. Legislation was needed to authorise the increase in the lawyer's reward over and above ordinary costs. It by no means follows that it was needed to legitimise the practice of acting for clients without means.

<sup>1</sup> [1998] QB 781, [1998] 3 All ER 65. *Aratra* was however referred to by Master O'Hare in *Tandara v Weightmans Solicitors* [2008] EWHC 90101 (Costs) without reference to *Thai Trading* which is itself doubted in *Awwad v Geraghty & Co (a firm)* [2001] QB 570, [2000] 1 All ER 608, CA: see para [6].

<sup>2</sup> [1910] 1 KB 645, CA.

<sup>3</sup> (1993) 26 HLR 232, [1993] NPC 143.

<sup>4</sup> [1989] 1 EGLR 43, [1989] 03 EG 85.

<sup>5</sup> (1993) 26 HLR 232, [1993] NPC 143.

[5] Before it was reported, *Thai Trading* was relied upon by Sir Richard Scott V-C to approve a CFA which carried a success fee<sup>1</sup>. This was in the context of arbitration proceedings which were omitted from the CLSA 1990. The basis of this decision is that public policy changes over time and that where an absurd result would be reached but for a change in policy then there must be such a change. The absurd result was to hold unlawful in arbitration proceedings a CFA with a success fee which fully complied with the CLSA 1990 and would thus be lawful in court proceedings. It is important to note that the cause of action was within the class of case sanctioned by the CLSA 1990.

*Thai Trading* was the most far reaching decision in that it did not rely on the CLSA 1990 either by requiring the CFA to comply with the Act's demands nor in it having to apply to a class of case sanctioned by the statute. The decision was seen as a common law authority to enter into a CFA without complying with the strictures of the CLSA 1990.

This breadth to the decision led to it being challenged. The Divisional Court considered *Thai Trading* in a judgment given in November 1998 dealing with a statutory nuisance case under the Environmental Protection Act 1990<sup>2</sup>. Heavy reliance is made here on the Solicitors Practice Rules which at the time of *Thai Trading* prohibited agreements where by a solicitor is to be paid any sum only in the event of success<sup>3</sup>. Although proceedings under the Environmental Protection Act 1990 are criminal and therefore were not within the specified proceedings of the CLSA 1990, Rose LJ did not base his decision on that point. *Thai Trading* was held here to be contrary to the authority of the House of Lords in *Swain v Law Society*<sup>4</sup> on the ground that that decision establishes that the Rules of Professional Conduct have the status of secondary legislation. Arguments based on the public policy of Maintenance and Champerty were rendered irrelevant given the fee agreement contravened the Rules.

*Swain v Law Society* was not cited to the court in *Thai Trading* where Millet LJ said that the contravention of a practice rule did not of itself result

## [5] Litigation Funding

in a contravention of law. *Swain* was not cited to the court in *Bevan Ashford* which relied upon *Thai Trading*. The practice rule point is not discussed in the judgment in *Bevan Ashford* which is decided on the public policy point alone. More recently the Court of Appeal in *Garbutt v Edwards*<sup>5</sup> has considered the status of rule 15 and the provision of costs estimates. It was argued that the failure to give a costs estimate rendered the retainer unlawful. The court held that although the rule had the force of subordinate legislation following *Swain*, the Code issued under the Rule made provision for the exercise by the solicitor of discretion. Accordingly it could not be said that all breaches of that rule or Code rendered the retainer unenforceable. *Garbutt* does not therefore alter the position with respect to *Thai Trading*.

<sup>1</sup> *Bevan Ashford (a firm) v Geoff Yeandle (Contractors) Ltd (in liquidation)* [1999] Ch 239, [1998] 3 All ER 238.

<sup>2</sup> *Hughes v Kingston upon Hull City Council* [1999] QB 1193, [1999] 2 All ER 49.

<sup>3</sup> Solicitor's Practice Rules 1990, rule 8 and see para [1253].

<sup>4</sup> [1983] 1 AC 598, [1982] 2 All ER 827, HL.

<sup>5</sup> [2005] EWCA Civ 1206, [2006] 1 All ER 553, [2006] 1 WLR 2907.

[6] Contravention of the Rules of Professional Conduct is then a separate ground of attack on CFAs where for whatever reason the CLSA 1990 does not apply. Further consideration of the status of those Rules has twice been given by the Court of Appeal. In a case involving contravention of rule 3 concerning introductions and referrals, Lord Bingham of Cornhill CJ held that the Rules have the force of subordinate legislation with the effect that a contract prohibited by the Rules was struck down<sup>1</sup>. In a further decision of the Court of Appeal concerning an arrangement with a client of no means, this view of the force of the Rules was reiterated by Scheimann LJ when considering rule 8<sup>2</sup>. The result here being that no fees were recovered because at the time that the agreement was made rule 8 prohibited such agreements. The legislative status of the Rules has taken over the role of Champerty and Maintenance as the means to strike down funding arrangements between solicitor and client and has led to the drawing of fine distinctions between agreements with a client on the one hand and a mere intention not to charge on the other. Kennedy LJ, who sat in *Thai Trading*, recently considered two appeals from magistrates under the Environmental Protection Act 1990<sup>3</sup>. In the first appeal the solicitor knew that the client was in receipt of state benefit. The magistrate found as a fact that there was an agreement to pay costs leaving to the solicitor the decision as to whether to enforce that liability. That finding was left in place by the Divisional Court. In the second appeal clients were in receipt of income support and the finding of fact was that the solicitor had no intention of enforcing the obligation to pay costs. Here Kennedy LJ held that such intention did not mean there was an agreement and accordingly costs were recoverable from the other side.

<sup>1</sup> *Mohamed v Alaga & Co (a firm)* [1999] 3 All ER 699, [2000] 1 WLR 1815, CA.

<sup>2</sup> *Awwad v Geraghty & Co (a firm)* [2001] QB 570, [2000] 1 All ER 608, CA.

<sup>3</sup> *Carr v Leeds City Council* (1999) 32 HLR 753, [2000] COD 10, DC.

[7] On the facts of *Thai Trading* itself, Millet LJ had not agreed with the trial judge's view that there was an understanding between the client and solicitor

## Introduction [9]

that fees would not be sought in the event of a loss. Millet LJ took the view that the client was legally liable to pay costs. On that basis and with the analysis of Kennedy LJ from the *Leeds* cases it is possible to circumvent the difficulty which is presented by the decision in *Geraghty* as to the status of the Professional Rules. Where the facts do not clearly preclude it there can be a finding that there is no agreement that costs will not be sought in the event of a loss and accordingly no breach of the Rules. To the extent that *Geraghty* disapproves of *Thai Trading* on this ground the result may not be far reaching. However, the court in *Geraghty* was clearly critical of the *Thai Trading* decision on the basis of the common law. It was not accepted that the common law had moved beyond the statute in 1990 and indeed it was not accepted that it had moved since. This is clearly a fundamental difference which could have far reaching effect with regard to agreements made before Rule 8 was amended where reliance was placed on the correctness of the decision in *Thai Trading*. Thus where, as in *Bevan Ashford*, there is no factual basis for a decision that there was no agreement, the agreement will be struck down as being both in contravention of the Rules and as offending the common law of Maintenance and Champerty. Millet LJ's view that such an unlawful element to an agreement does not render the whole agreement void and indeed leaves the client liable to pay ordinary fees is clearly not followed by the court in *Geraghty* or in *Alaga*.

[8] Rule 8<sup>1</sup> as it existed when the facts of all of these cases occurred, emphatically prohibited any agreement where by a sum would be payable only upon success. Following the decision in *Thai Trading*, Rule 8 was amended. As of July 1999 the Rule permitted any arrangement which statute or the common law permits. At the time of the amendment this wording did not seem to beg the question but following *Geraghty* the reference to the common law provides no assistance. Accepting the correctness of the *Geraghty* view of the status of Rule 8, that Rule cannot however change the common law and indeed it is clear from the wording of the Rule that it is regarded as being subordinate to the common law. An agreement made after the Rule change but which does not comply with the statute can be lawful if, but only if, the common law permits it. *Geraghty* is firm in deciding that the common law has not gone further than the statute. The change in the Rules did not remove one of the grounds of unlawfulness since there arises the then circular argument that if the common law has not changed then the agreement is not permitted at common law and accordingly it was a breach of Rule 8 in its revised wording. Rule 8 was later replaced by Rule 2.04(1) of the Solicitors Regulation Authority Code of Conduct when the SRA assumed responsibility for conduct.

<sup>1</sup> See para [1251] ff.

**Pre-litigation work**

[9] The common law and professional rules discussed above have no application outside of litigation. The Rule 8 of the Law Society Rules applies to 'contentious business' but not to non-contentious business. In *Gaynor v Central West London Buses Ltd*<sup>1</sup> an initial retainer letter provided for no charge if the claim was disputed and not pursued. There was no subsequent retainer or formal CFA but substantive proceedings issued and the case went to detailed assessment with no new retainer. It was argued that this was

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contentious business and (an invalid) CFA. The Court of Appeal held that the retainer was not a CFA. Only an agreement in respect of advocacy or litigation services could be a CFA. The retainer in this case stated there would be no charge for 'work done to date' if the client decided not to pursue her case. That decision said the court had to be made before the issue of proceedings. It followed that the retainer was not dealing with litigation or advocacy and was not a CFA:

'Advising a client as to whether he or she has a good prima facie case and writing a letter of claim are not enough to amount to litigation services.' [17]

The court did not address the issues that arise from the facts that proceedings were issued and there was a detailed assessment without any further retainer. There are difficult issues as to the status of the retainer post issue. The decision appears to mean that there cannot be a CFA for covering pre-issue work only. It was not argued that there can never be a CFA at such a stage where that retainer extended beyond the pre-issue stage, merely that this retainer was not a CFA. It is submitted that the decision does not affect the standard practice of making a CFA that covers the case right to trial, including any pre-issue work. The CPR makes provision for success fees where no proceedings have been issued and the fixed recoverable costs regime also provides for success fees (and therefore a CFA) for cases settled pre-issue.

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<sup>1</sup> [2006] EWCA Civ 1120, [2007] 1 All ER 84, [2007] 1 WLR 1045.

**[10]** The status of a Rule 15 letter was considered by the Court of Appeal in *Jones v Wrexham Borough Council*<sup>1</sup> in the context of a simplified CFA. The Rule 15 letter enclosed an as yet unsigned CFA. The letter, but not the subsequent CFA, made it clear that no fees or expenses would be payable unless recovered from the opponent. The court repeatedly referred to the letter to answer difficulties with the CFA wording and in so doing appears to approve of the view taken by the district judge that the solicitors would be estopped from proceeding against the client in a manner contrary to the letter. It follows that had work been done before the CFA had been signed the Rule 15 letter would have bound the solicitor.

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<sup>1</sup> [2007] EWCA Civ 1356, [2008] 1 WLR 1590, (2008) Times, 21 January.

## Continuing relevance of *Thai Trading v Taylor*

**[11]** It is likely that there are funding agreements made before 1 April 2000 where the litigation has yet to conclude and where disputes as to costs have yet to arise. Where the funding agreement relates to the provision of litigation or advocacy services as defined in the CLSA 1990, s 119 it will be enforceable if it complies with s 58 of that Act as drafted and the Conditional Fee Agreements Regulations 1995.

Regulation 2 provides:

'An agreement shall not be a conditional fee agreement unless it complies with the requirements of the following regulations.'<sup>1</sup>

## Introduction [12]

This provision in conjunction with s 58(1)(c) has the effect of removing the statutory route to enforceability if the funding arrangement fails to comply with the statute and the Regulations<sup>2</sup>.

<sup>1</sup> SI 1995/1675, reg 2.

<sup>2</sup> See further, para [151].

[12] *Thai Trading*<sup>1</sup> involved a funding arrangement which could not comply with the statutory scheme because at the time the nature of the proceedings was not within those to which the statutory scheme applied. *Bevan Ashford*<sup>2</sup> was outside of the statutory scheme because the scheme applied only to court proceedings and not to arbitration. In each case the funding arrangement was held to be enforceable at common law. In the case of court proceedings the categories of case to which the statutory scheme applied was widened to all civil actions other than family actions by the Conditional Fee Agreements Order 1998<sup>3</sup> which came into force on 30 July 1998. From that date therefore, it was possible to use the statutory scheme for all classes of litigation in the courts. Arbitration was not, however, brought within the statutory scheme until 1 April 2000 by the enactment of the AJA 1999, s 27 which inserted s 58A into the CLSA 1990 to change the definition of proceedings to include ‘any sort of proceedings for resolving disputes (and not just proceedings in court) . . .’<sup>4</sup>. It follows that funding agreements relating to arbitration made before 1 April 2000 cannot rely upon the statutory scheme for enforceability where the agreement provides for payment of different fees in different circumstances.

*Thai Trading* remains relevant therefore in cases where the funding agreement was made before 30 July 1998 where the type of litigation was outside of the statutory scheme and in arbitration cases where the funding agreement was made before 1 April 2000. All of the difficulties dealt with above at paras [4]–[8] arise in arbitration cases because the Court of Appeal in *Bevan Ashford* held that arbitration was litigation with the result that Rule 8 of the Law Society Rules applies to arbitration. The amended Rule 8, which came into force on 7 January 1999, provides the circular argument as to the position at common law dealt with above at para 8. The CLSA 1990 seeks to govern the provision of advocacy and litigation services where rights of audience are exercised. No rights of audience are exercised in arbitration and but for the decision of the court in *Bevan Ashford* that arbitration is litigation no difficulty at all would arise. The definition of ‘proceedings’ given in the amended CLSA 1990 Act does not sit well with the definitions of advocacy and litigation services in that Act. As the law stands, however, arbitration is an area where, until relatively recently, fee agreements amounting to a CFA were potentially unenforceable on the basis of the disapproval of *Thai Trading*.

In *Kellar v Williams*<sup>5</sup> the Privy Council referred to the judgment of Millett LJ in *Thai Trading* in an appeal where it was argued that a funding agreement between client and lawyer in Turks and Caicos constituted an unenforceable CFA:

‘In approaching this issue their Lordships wish to make it plain that they are not to be taken as accepting without question the traditional doctrine of the common law that all such agreements are unenforceable on grounds of public policy. The content of public policy can change over the years, and it may now be time to reconsider the

## [12] Litigation Funding

accepted prohibition in the light of modern practising conditions. They would point only to the views expressed by Millett LJ giving the judgment of the Court of Appeal in *Thai Trading Co v Taylor* [1998] QB 781 and by May LJ in *Awwad v Geraghty & Co* [2001] QB 570 at 600. For the purposes of the present appeal, however, their Lordships propose, without deciding that issue, to consider the question argued before them whether the respondent and his attorneys had entered into a conditional fee agreement.’ At [21]

<sup>1</sup> *Thai Trading Co v Taylor* [1998] QB 781, [1998] 3 All ER 65.

<sup>2</sup> *Bevan Ashford (a firm) v Geoff Yeandle (Contractors) Ltd (in liquidation)* [1999] Ch 239, [1998] 3 All ER 238.

<sup>3</sup> SI 1998/1860.

<sup>4</sup> CLSA 1990, s 58A(4).

<sup>5</sup> [2004] UKPC 30, 148 Sol Jo LB 821, [2005] 4 Costs LR 559.

### Costs agreements with impecunious clients

[13] The Federal Court of Australia referring to *Awwad v Geraghty & Co (a firm)*<sup>1</sup> has held that it does not reflect Australian law if it is taken to mean that a solicitor cannot act for an impecunious client on the basis that normal fees will be recovered if and only if a costs order is made in favour of the client<sup>2</sup>. English law seems to have considerable difficulty in dealing with this everyday reality – that a client is not going to be able to pay their own costs unless their opponent is ordered to pay them.

<sup>1</sup> [2001] QB 570, [2000] 1 All ER 608.

<sup>2</sup> *Schokker v Comr of Taxation of the Australia Commonwealth* [2000] FCA 1734.

[14] In *Hunt v R M Douglas (Roofing) Ltd*<sup>1</sup> the Court of Appeal referred to *Adams v London Improved Motorcoach Builders Ltd*<sup>2</sup> establishing that a plaintiff whose litigation was in fact conducted by or under the instructions of a trade union on his behalf was nevertheless entitled to costs on the basis that although the solicitor was instructed by the union those instructions were given on behalf of the plaintiff who remained liable for their costs, however unlikely it was that he would ever have to pay them. The vital requirement is that the client must be primarily liable for the payment of costs. This is made clear in the more recent authority of *Joyce v Kammac (1988) Ltd*<sup>3</sup> where Morland J said:

‘The general principle is that a party in whose favour the order for costs was made, the receiving party, is entitled to be indemnified in respect of such costs that he was primarily and potentially legally obliged to pay his solicitors. It matters not whether the receiving party was able or not to discharge that legal obligation, so long as the primary potential legal obligation to his solicitors existed. It matters not whether the receiving party was able to discharge that obligation from funds of his own or funds provided by friends, family, trade union, employer, insurer or otherwise, so long as the obligation was primarily his.’<sup>4</sup>

The need for a primary liability in the client rather than the funder has been reaffirmed in the context of CCFAs<sup>5</sup>.

<sup>1</sup> (1987) 132 Sol Jo 935, [1988] 3 LS Gaz R 33, CA; revsd [1990] 1 AC 398, [1988] 3 All ER 823, HL.

## Introduction [16]

<sup>2</sup> [1921] 1 KB 495, CA.

<sup>3</sup> [1996] 1 All ER 923, [1996] 1 WLR 805.

<sup>4</sup> [1996] 1 All ER 923 at 928.

<sup>5</sup> See *Gliddon v Lloyd Maunder Ltd* [2003] NLJR 318, SC and *Thornley v Lang* [2003] EWCA Civ 1484, [2004] 1 All ER 886, [2004] 1 WLR 378 – Newcastle Combined Court Centre Claim No: NE 204504 considered at para [200.1].

[15] Impecunious clients must, therefore, have an arrangement which makes them legally liable for costs. In *British Waterways Board v Norman*<sup>1</sup>, the Divisional Court took the view that on the facts there must have been an understanding between the solicitor and the client that the solicitor would not seek costs from the client if the case lost. The outcome of such an agreement was that even where the case succeeded there would be no costs recovered either from the client or from the losing opponent. Such an arrangement failed at the time to comply with the statutory scheme for CFAs (because that class of litigation was not then included) and would in any event offend the indemnity principle. There are then difficult questions of fact and fine distinctions to be drawn as a result of this application of the indemnity principle.

<sup>1</sup> (1993) 26 HLR 232.

[15.1] The arrangements in *Dix v Townend and Frizzell Financial Services*<sup>1</sup> were that there was a CFA under which the claimant's solicitors undertook to indemnify their client against adverse costs should the claim fail. That risk was uninsured. The claim did not fail but the opponent then challenged the retainer as being champertous. The challenge succeeded on the grounds of public policy. The public policy behind the law of champerty was not confined to cases where there was a division of the spoils but extended to any arrangement that placed even a potential temptation in front of the solicitors to act under the influence of their own risk of having to make substantial payments. A different view of similar arrangements was taken by the Court of Appeal in *Sibthorpe v London Borough of Southwark*<sup>2</sup>. These were housing disrepair cases that had succeeded but the local authority challenged the validity of the CFA on the basis of champerty because the solicitors had provided an indemnity against adverse costs. The court held that the provision by the solicitors of an indemnity for adverse costs was not champertous since the modern case law on champerty suggested a restriction in the scope of the doctrine rather than the necessary extension of it to cover cases where the solicitor simply ran a risk of loss but with no prospect of a gain. The arrangement was also held not to constitute insurance.

<sup>1</sup> (SCCO CCD 0706942) [2008] EWHC 90117 (Costs).

<sup>2</sup> [2011] EWCA Civ 25.

[16] The view given some approval in *Thai Trading Co (a firm) v Taylor*<sup>1</sup>, that an agreement to pay in the event of a win but not a loss did not offend the indemnity principle in the event that the case wins, is difficult to support since it requires the agreement to be looked at as two agreements rather than one agreement as a whole. In *Carr v Leeds City Council*, *Coles v Barnsley Metropolitan Borough Council*<sup>2</sup> two appeals were heard together. In the *Leeds*

## [16] Litigation Funding

case the client was in receipt of income support. Solicitors represented the client had given her letters indicating that she would be liable for costs. The council alleged that any such agreement was a sham on the basis that the solicitors knew that the client would be unable to pay their costs and that they never expected her to do so. Kennedy LJ held that the finding of fact by the magistrate that there was a legally binding agreement under which the client was liable to pay the costs was conclusive. It was a matter for the solicitors as to whether they sought to enforce that liability. In the *Barnsley* case the clients were again given letters making it clear that they had a liability for costs. The clients were on income support. The magistrate found as a fact that the firm of solicitors had never sought to enforce a costs liability against a client of this type. Kennedy LJ held that a finding that the solicitors did not intend to pursue their clients for costs was not determinative of the matter. There was not sufficient basis for concluding that there was an agreement to receive a contingency fee.

<sup>1</sup> [1998] QGB 781, [1998] 3 All ER 65.

<sup>2</sup> (1999) 32 HLR 753, [2000] COD 10, DC.

[17] The decision in *Adams*<sup>1</sup> was also relied upon by Lloyd J in *R v Miller*<sup>2</sup> where it was held:

‘Costs are incurred by a party if he is responsible or liable for those costs, even though they are in fact paid by a third party, whether an employer, insurance company, motoring organisation or trade union, and even though the third party is also liable for those costs. It is only if it has been agreed that the client shall in no circumstances be liable for the costs that they cease to be costs incurred by him, as happened in *Gundry v Sainsbury*.’<sup>34</sup>

That passage has been relied upon by a Divisional Court in *R (on the application of McCormick) v Liverpool City Magistrates’ Court*<sup>5</sup> in overturning a decision by a magistrates’ clerk to deny costs under the Prosecution of Offences Act 1985 which had been reached on the basis that the client had no means to pay their costs and accordingly had not been expected to pay them notwithstanding a written agreement to pay them. Elias J held that the fact that solicitors do not expect to recover costs in the absence of a defendant’s costs order did not mean that there was no contractual liability on the part of the client to pay the costs. A differently constituted Divisional Court considered similar issues under the Environmental Protection Act 1990 in *R (on the application of Hazlett) v South Sefton Magistrates’ Court*<sup>6</sup> where there had been a finding that the agreement between solicitor and client was a sham. The *Leeds* and *Barnsley*<sup>7</sup> cases were not referred to in the decision to overturn the finding. Stanley Burton J dealt fully with the concept of a sham agreement holding that for there to be a sham both parties must agree that their agreement is to have no legal force and that it should be used to deceive. In awarding costs reference was made to Millett LJ in *Thai Trading*<sup>8</sup>:

‘It is not uncommon for solicitors to take on a case for an impecunious client with a meritorious case, knowing that there is no realistic prospect of recovering their costs from the client if the case is lost, without thereby waiving their legal right to their fees in that event. As every debt collector knows, what is legally recoverable and what is recoverable in practice are not the same.’<sup>9</sup>

## Introduction [17]

There remained from this series of cases the question of a CFA which seeks only to impose a liability to pay if costs are recovered from an opponent. The Senior Costs Judge held in *The Accident Group Test Cases Tranche Two*<sup>10</sup> that a CFA can validly define ‘win’ in terms of recovery of costs from an opponent:

‘There appears to be no reason why the circumstances specified should not be the recovery of those costs and/or disbursements from the paying party.’. At 384

This would require a CFA compliant with the statutory scheme. From 2 June 2003 a simplified CFA<sup>11</sup> has been permitted which limits the client’s liability to sums recovered whether by way of costs or otherwise. Agreements which provide for the client’s liability for own costs to depend upon recovering costs can therefore be in the standard form of CFA or a simplified CFA. The CPR 1998<sup>12</sup> makes provision for the recovery of costs notwithstanding the limit on the client’s liability. The CPR 1998 makes no such provision in respect of a CFA entered in to before 2 June 2003<sup>13</sup>. Here reliance must be placed on the decision of the Senior Costs Judge in *TAG Tranche Two* referring to a draft of changes to the CPR 1998<sup>14</sup>:

‘This Rule is not yet in force. In my view, when it is in force it will not alter the law. It will merely clarify it. In addition to the rule change, an amendment to the CFA Regulations is envisaged which will make very much simpler the steps required to be taken by a legal representative when entering into a CFA under which, in certain circumstances, the client’s liability for fees and expenses is limited to costs recovered. Also the amendment to Section 51 of the Supreme Court Act 1981 by Section 31 of the Access to Justice Act 1999 will be implemented. This also, in my judgment will not alter the law. CFAs of all types have been regularly used and regularly upheld in all courts, including the House of Lords, without this amendment being implemented.’. At 385

A CFA which provides for a liability for own disbursements in any event and for base costs only if recovered would be valid as a standard CFA. It is submitted that such a CFA entered into after 2 June 2003 is within the terms of the CPR 1998, r 43.2(3)<sup>15</sup>. It is less clear that such a CFA complies with the requirements for a simplified CFA<sup>16</sup>.

<sup>1</sup> *Adams v London Improved Motorcoach Builders Ltd* [1921] 1 KB 495.

<sup>2</sup> [1983] 3 All ER 186, [1983] 1 WLR 1056, DC.

<sup>3</sup> [1910] 1 KB 645.

<sup>4</sup> [1983] 3 All ER 186 at 189.

<sup>5</sup> [2001] 2 All ER 705.

<sup>6</sup> [2001] EWHC Admin 791, [2001] All ER (D) 18 (Oct) – proceedings under the EPA 1990 were not within the statutory scheme for CFAs at the time of the agreement. From 1 April 2000 a CFA with a nil success fee can be entered into under which the client can agree not to pay unless the case succeeds.

<sup>7</sup> *Carr v Leeds City Council, Coles v Barnsley Metropolitan Borough Council* (1999) 32 HLR 753, [2000] COD 10, DC.

<sup>8</sup> *Thai Trading Co v Taylor* [1998] QB 781, [1998] 3 All ER 65.

<sup>9</sup> [1998] 3 All ER 65 at 70.

<sup>10</sup> [2003] EWHC 9020 (Costs).

<sup>11</sup> Conditional Fee Agreement (Miscellaneous Amendments) Regulations 2003, SI 2003/1240 amending the CFA Regulations 2000, see para [31].

<sup>12</sup> CPR 1998, r 43.2 provides:

‘(3) Where advocacy or litigation services are provided to a client under a conditional fee agreement, costs are recoverable under Parts 44 to 48 notwithstanding that the client is liable to pay his legal representative’s fees and expenses only to the extent that sums are recovered in respect of the litigation, whether by way of costs or otherwise.’

## [17] Litigation Funding

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<sup>13</sup> Civil Procedure (Amendment No 2) Rules 2003, SI 2003/1242, r 6 (making transitional provision).

<sup>14</sup> SI 1998/3132.

<sup>15</sup> See fn 13.

<sup>16</sup> See paras [31]–[33].

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## Non-legal representative third party funders

[18] Much of the law concerning maintenance and champerty and the whole of the law relating to CFAs is concerned with legal representatives who provide services which in effect amount to the funding of the litigation. Where the third party funding comes from a source other than a legal representative, maintenance and champerty can still cause difficulties. In such cases the issue is most commonly encountered under the jurisdiction to order costs against a third party under the Supreme Court Act 1981, s 51. The Court of Appeal has recently considered again the basis for making a costs order where the competing principles are access to justice for the funded party and recovery of costs by the successful unfunded party. In *Hamilton v Al Fayed*<sup>1</sup> the Court of Appeal declared that the balance of interest lay with access to justice:

‘the pure funding of litigation (whether of claims or defences) ought generally to be regarded as being in the public interest providing only and always that its essential motivation is to enable the party funded to litigate what the funders perceive to be a genuine case.’<sup>2</sup>

The conclusion reached was that ‘pure funders’ are generally exempt from third-party costs orders:

‘There is in short nothing in the facts of this case to take it out of the general principle which for my part I would lay down: that pure funders generally are exempt from section 51 liability.’<sup>3</sup>

In *R (on the application of Factortame) v Secretary of State for Transport, Environment and the Regions (No 2)*<sup>4</sup> accountancy services provided in support of litigation but falling short of the provision of expert witnesses were not provided under a champertous agreement where the services were to be paid for by a percentage of recoveries. The question of the liability of the provider of these services for opponent’s costs did not arise.

Where costs negotiators were to be paid according to sums saved in costs that the insurer would otherwise have paid to claimants the negotiators were refused rights of audience in costs proceedings on the grounds that the agreement was champertous<sup>5</sup>.

The Senior Costs Judge rejected arguments based on maintenance and champerty in *RSA Pursuit Test Cases*<sup>6</sup>. Here the premium for an after the event insurance policy was payable only if the case succeeded. It was held that following *Factortame* there was no agreement to share in the ‘proceeds of litigation’. That phrase meant primarily damages and an insurance premium even though only payable in the event that the litigation was successful did not constitute ‘proceeds of litigation’.

Recent case law also establishes the legitimacy of commercial funders of litigation who either have a direct interest in the outcome or have provided funding on the basis of a share of proceeds in the event of success. Such funders will have a liability for the costs of opponents in the event that the litigation fails.

## Introduction [18]

In *CIBC Mellon Trust Company v Stolzenberg*<sup>7</sup> the 75% shareholder in two companies who were unsuccessful in set aside proceedings was held liable for the costs of the opponents to the set aside proceedings. The shareholder had funded the proceedings in his own interests. The Court of Appeal held there was no reason in principle why a non-director shareholder who funded, controlled and directed litigation by the company in order to protect his own financial interest should not be the subject of a costs order. Such a shareholder was in no different position to any third party who chose for his own purposes to fund and control litigation. In *Goodwood Recoveries Ltd v Breen*<sup>8</sup>. A company director, described by the trial judge as having played the parts of director, shareholder, company secretary, solicitor and investigator and only witness for the claimant, failed in the Court of Appeal to overturn a third party costs order against him as none of the costs of the litigation would have been incurred but for his third party involvement, and they had been caused by his dishonesty or impropriety. That was irrespective of whether he had any bona fide belief in the claim.

In *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* the Privy Council, hearing an appeal from the New Zealand Court of Appeal, held that costs orders against non-parties were to be regarded as 'exceptional' but that exceptional in this context means no more than outside the ordinary run of cases where parties pursued or defended claims for their own benefit and at their own expense. Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs.

The English Court of Appeal following *Dymocks*<sup>9</sup> considered in *Arkin v Borchard Lines Ltd*<sup>10</sup> the position of a professional commercial funder of litigation which had agreed to fund expert evidence and document management on a contingency basis. It was held that a professional funder who finances part of the costs of litigation should potentially have a liability for the costs of the opponent to the extent of the funding it has provided. Similarly the Federal Court of Australia held in *Spatialinfo Pty Ltd v Telstra Corpn Ltd*<sup>11</sup> that the fact that litigation was being supported by a commercial funder was not grounds for staying the proceedings as being unlawfully maintained. Whether proceedings are maintained, and the separate question whether such maintenance poses a potential risk to the court's processes so as to justify a stay, turn on the terms and conditions upon which the funding is provided.

<sup>1</sup> [2002] EWCA Civ 665, [2003] QB 1175, [2002] 3 All ER 641.

<sup>2</sup> [2002] EWCA Civ 665 at para [47].

<sup>3</sup> [2002] EWCA Civ 665 at para [51].

<sup>4</sup> [2002] EWCA Civ 932, [2003] QB 381, [2002] 4 All ER 97.

<sup>5</sup> *Ahmed v Powell* (SCCO Ref 0210290) [2003] EWHC 9011 (Costs).

<sup>6</sup> [2005] All ER (D) 88 (Aug).

<sup>7</sup> [2005] EWCA Civ 628, [2005] 2 BCLC 618, (2005) Times, 8 June.

<sup>8</sup> [2005] EWCA Civ 414, [2006] 2 All ER 533, [2006] 1 WLR 2723.

<sup>9</sup> [2004] UKPC 39, [2005] 4 All ER 195, [2004] 1 WLR 2807.

<sup>10</sup> [2005] EWCA Civ 655, [2005] 3 All ER 613, [2005] 1 WLR 3055.

<sup>11</sup> [2005] FCA 455.

[18] Litigation Funding

## II Conditional fee agreements after 1 April 2000 and before 1 November 2005

### A Statutory definition

[19] CLSA 1990, s 58(2)(a) (as substituted by the AJA 1999, s 27):

‘a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances.’

This wording came into force on 1 April 2000 when the AJA 1999, s 27 replaced the whole of s 58 as originally worded. From the same date a new section, s 58A<sup>1</sup>, added by the AJA 1999, s 27, also came into force. The CFA Regulations 2000 were amended from 2 June 2003<sup>2</sup> to provide for a simplified version of CFA alongside the standard version of the original regulations. The statutory regime differs significantly according to when the first CFA in the matter was entered into. It is necessary as a result to deal separately with CFAs made before 1 April 2000, those made after that date and with simplified CFAs.

<sup>1</sup> See para [1003].

<sup>2</sup> For simplified CFAs, see para [31].

[20] ‘Advocacy and litigation services’ are defined in the CLSA 1990, s 119 as follows:

‘“advocacy services” means any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right of audience in relation to any proceedings, or contemplated proceedings, to provide;

. . .

“litigation services” means any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right to conduct litigation in relation to any proceedings, or contemplated proceedings, to provide; . . .’

In *R (on the application of Factortame) v Secretary of State for Transport, Environment and the Regions (No 2)*<sup>1</sup> the Court of Appeal rejected the argument that services provided by a firm of accountants in support of litigation fell within this definition and accordingly held that the contingency fee agreement between the accountancy firm and the litigant was not governed by s 58. Accountancy expert witnesses were not included in that agreement and the court expressed disapproval were any such arrangement to be made.

‘Proceedings’ for the purposes of the above definitions is itself defined in the CLSA 1990, s 58A(4) as inserted by the AJA 1999, s 27:

‘In section 58 and this section (and in the definitions of “advocacy services” and “litigation services” as they apply for their purposes) “proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in court), whether commenced or contemplated.’

It is difficult to interpret the references to the exercise of rights contained within these definitions. The definition of ‘proceedings’ seems redundant given that rights of audience are confined to court proceedings. It is arguable that no

## CFAs after 1 April 2000 and before 1 November 2005 [21]

rights are exercised for example in arbitrations and that accordingly the CLSA 1990, both as originally worded and as amended, has no application. In *Ahmed v Powell*<sup>2</sup> the Chief Costs Judge held in answer to preliminary issue that an arrangement between an insurance company and a firm of costs negotiators was champertous. Under the agreement the costs negotiators were to be paid according to sums saved in costs that the insurer would otherwise have paid to claimants. The negotiators sought rights of audience in costs proceedings. It was held that no right of audience had arisen through the solicitors acting for the insurer since instructions had not been given by the solicitors but by the insurer. The court would not at its discretion grant a right of audience because of the champertous arrangement.

<sup>1</sup> [2002] EWCA Civ 932, [2003] QB 381, [2002] 4 All ER 97. See also *Dal-Sterling Group plc v WSP South & West Ltd* [2001] All ER (D) 228 (Jul) – where a contingency agreement with claims consultants who assisted in preparing a case for litigation was held to not be champertous.

<sup>2</sup> (SCCO Ref 0210290) [2003] EWHC 9011 (Costs).

**[21]** Any fee agreement which falls within this statutory definition must comply with the further provisions of the CLSA 1990 as amended and must comply with the CFA Regulations 2000 or the Collective CFA Regulations 2000 made under the authority of the CLSA 1990<sup>1</sup>. The CLSA 1990 and the CFA Regulations 2000 constitute the statutory scheme. The effect of failing so to comply is laid down in the CLSA 1990, s 58(1) (as substituted by the AJA 1999, s 27):

‘A Conditional Fee Agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5))<sup>2</sup> any other conditional fee agreement shall be unenforceable.’

The underlined words did not appear in the original wording of the Act but were added by s 27 of the Access to Justice Act 1999 and are clearly designed to bring litigation funding under the exclusive control of the statute<sup>3</sup>.

<sup>1</sup> CLSA 1990, s 58(3), as substituted. The CFA Regulations 2000 and Collective CFA Regulations 2000, SI 2000/2988 were amended from 2 June 2003 to provide for a simplified CFA and CCFA – see paras [31] and [199.1] and see the Conditional Fee Agreement (Miscellaneous Amendments) Regulations 2003, SI 2003/1240.

<sup>2</sup> ‘(5) If a conditional fee agreement is an agreement to which s 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies, subsection (1) shall not make it unenforceable.’ (CLSA 1990, s 58(5)).

This is a curious provision. Section 58 as originally worded expressly excluded from the definition of Conditional Fee Agreements a contentious business agreement as defined in the Solicitors Act 1974, s 59. That reference does not appear in the wording of s 58 substituted by the AJA 1999, s 27. The substituted wording appears to provide that an agreement concerning non-contentious business is not governed by a statute concerned with contentious proceedings. As to contentious business governed by a contentious business agreement, it seems that the effect of the substituted wording is that such an agreement, if it provides for payment only in specified circumstances, must comply with of the CLSA 1990, s 58 as well as the Solicitors Act 1974, s 59. A CFA is itself a contentious business agreement (*Hollins v Russell* [2003] EWCA Civ 718, [2003] 4 All ER 590, [2003] 1 WLR 2487.)

<sup>3</sup> See further: Unenforceable CFAs, see para [151].

## [22] Litigation Funding

[22] The intricacies of the common law decisions dealt with in Part I have no application to any funding agreement made after 1 April 2000. The clear effect of s 58(1) (para [21]) is that to be enforceable, all CFAs made after that date must comply with the statutory scheme<sup>1</sup>.

A CFA with a success fee is defined in s 58(2)(b) as one which provides:

‘ . . . for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances’<sup>2</sup>.

In *Crook v Birmingham City Council*<sup>3</sup>, clients were offered a discounted rate by way of a cap of £1,000. Irwin J held that there was no success fee in such an arrangement but a discount from the ‘normal fee’, and that it could be argued in every case that the reduced level of fees – which will often be nil – represents what the market will bear and therefore the increment represents the success fee. This argument, he said, would obliterate the distinction normal in conditional fee agreements between the ‘base fee’ and the ‘success fee’.

The Court of Appeal in *Gloucester County Council v Evans*<sup>4</sup> held that a CCFA providing for an hourly rate of £95 irrespective of outcome with a rate of £145 for a win did not amount to a success fee. The CCFA referred to the higher figure as base costs and to the lower figure as discounted charges. A success fee was then applied in the agreement only to the base charges. The court accepted that the success fee only applied to the higher figure and rejected the argument that it was in reality an uplift on £95 and therefore in excess of 100%. The court also rejected the argument that the costs at risk were £50 and that the percentage uplift ought to be measured against that giving a figure of 290%:

‘Applying the language of section 58(4)(b) to the present case, I consider that the Agreement states 100% as the percentage by which the amount of the fees which would be payable if it were not a CFA (£145 per hour) is to be increased. The Agreement provides for basic charges of £145 per hour. That is the amount of the fees that would be payable if the Agreement were not a CFA.’ [24]

<sup>1</sup> Compliance with the statutory scheme was considered by the Court of Appeal in *Hollins v Russell* [2003] EWCA Civ 718, [2003] 4 All ER 590, [2003] 1 WLR 2487, see para [151].

<sup>2</sup> See para [1002].

<sup>3</sup> [2007] EWHC 1415 (Admin), [2007] NLJR 939, [2007] 5 Costs LR 732.

<sup>4</sup> [2008] EWCA Civ 21, [2008] 1 WLR 1883, [2008] NLJR 219.

### Meaning of ‘proceedings’

[23] For the purposes of the statutory scheme, s 58A(4)<sup>1</sup> defines proceedings to include ‘any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated’.

Arbitration proceedings have been held to be litigation<sup>2</sup> and are clearly now within the statutory scheme having been omitted in 1990. As to the inclusion of contemplated proceedings in the definition of ‘proceedings’ this can be taken to be an expressed avoidance of doubt that where no proceedings have been issued nonetheless the fee agreement is within the statute with all that follows from that (in particular the provisions relating to recovery additional liabilities). It could be argued, given the definition of proceedings is so wide,

## CFAs after 1 April 2000 and before 1 November 2005 [23]

that the distinction between contentious and non-contentious business has been removed and that any fee agreement concerned with ‘contemplated proceedings’ is governed by s 58. If that interpretation is correct, the practice of treating potential litigious claims as non-contentious unless proceedings are issued, would be unsuccessful. Such an argument returns, however, to the point concerning the exercise of rights upon which s 58 appears to depend.

Where no right to provide advocacy or litigation services is being exercised in respect of contemplated proceedings, the statutory scheme need not be complied with. On this basis it is widely accepted (though not without criticism) that Employment Tribunal cases are not governed by the statutory scheme. An agreement to fund work up to but not including the exercise of rights to provide advocacy or litigation services would thus not need to comply with the statutory scheme whatever the nature of the contemplated proceedings may be<sup>3</sup>. This is to treat the work as non-contentious business. If it becomes necessary to issue proceedings, possibly even if only costs only proceedings, it seems that the whole of the work done will be regarded as contentious business following *Re Simpkin Marshall Ltd*<sup>4</sup>. If the whole of the work is contentious business then Rule 8 of the Solicitors Practice Rules 1990 had the effect of requiring a statutory CFA to cover the whole of the work.

In *Crosbie v Munroe*<sup>5</sup> Brooke LJ in an obiter statement said in the context of the Protocols Practice Direction that the dealings between the parties which lead up to the disposal of a clinical negligence claim are to be treated as ‘proceedings’ for the purposes of that Practice Direction even if the dispute is settled without the need to issue a claim form.

In *Gaynor v Central West London Buses Ltd*<sup>6</sup> the Court of Appeal held that a retainer letter, covering advice to a claimant before it was known whether the defendant would dispute the claim, was not a retainer in respect of advocacy and litigation services. As to ‘contemplated proceedings’ there had to be a real likelihood that proceedings would be issued and until the defendant disputed the claim it was not possible to say that proceedings were contemplated. The decision in *Roche v Newbury Homes Ltd*<sup>7</sup> was that a CFA in Law Society Model terms did not cover a pre-action application for disclosure. That said the court was pre-action and not action. The Model refers to “Your claim . . . ” and said the court that must mean a substantive claim and not any pre-action matter. The Law Society Model has not changed on this point so seemingly all pre-action work in all cases would fail to be covered – a most astonishing result given the vast majority of personal injury claims settle before issue.

<sup>1</sup> See para [1003].

<sup>2</sup> *Bevan Ashford (a firm) v Geoff Yeandle (Contractors) Ltd (in liquidation)* [1999] Ch 239, [1998] 3 All ER 238. See para [20] for the argument that arbitration does not involve advocacy or litigation services.

<sup>3</sup> See further Division L.

<sup>4</sup> [1959] Ch 229, [1958] 3 All ER 611.

<sup>5</sup> [2003] EWCA Civ 350, [2003] 2 All ER 856, [2003] 1 WLR 2033.

<sup>6</sup> [2006] EWCA Civ 1120, [2007] 1 All ER 84, [2007] 1 WLR 1045 and see paras [9]–[10].

<sup>7</sup> [2009] EW Misc 3 (EWCC).

**[24]** Litigation Funding**Excluded proceedings**

**[24]** Section 58A<sup>1</sup> lists proceedings which cannot be the subject of a conditional fee agreement:

- (a) criminal proceedings [except s 82 Environmental Protection Act 1990]; and
- (b) family proceedings<sup>2</sup>.

<sup>1</sup> See para [1003].

<sup>2</sup> Defined in s 58A(2) as proceedings under one or more of the following:

- (a) the Matrimonial Causes Act 1973;
- (b) the Adoption Act 1976;
- (c) the Domestic Proceedings and Magistrates' Courts Act 1978;
- (d) Part III of the Matrimonial and Family Proceedings Act 1978;
- (e) Parts I, II and IV of the Children Act 1989;
- (f) Part IV of the Family Law Act 1996; and
- (g) the inherent jurisdiction of the High Court in relation to children.

**B The statutory scheme**

**[25]** The hierarchy of statutory provisions which must be complied with –

Provision	In force	Effect
Courts and Legal Services Act 1990 as amended by the Access to Justice Act 1999	1 April 2000	CFA validity
Conditional Fee Agreements Regulations 2000	1 April 2000	Standard CFA validity
Conditional Fee Agreement (Miscellaneous Amendments) Regulations 2003	2 June 2003	Simplified CFA validity
Civil Procedure (Amendment No. 3) Rules 2000	3 July 2000	Costs recoverability
Practice Direction About Costs	3 July 2000	Costs recoverability
Protocols Practice Direction <sup>1</sup>	3 July 2000	Costs recoverability

The effect of the CLSA 1990, s 58(1) and (3)(c)<sup>2</sup> is that a CFA entered into after 1 April 2000 is unenforceable if it fails to comply<sup>3</sup> with the provisions of the Act or Regulations. Failure to observe the CPR 1998, the Practice Direction and when provided, the Protocol, has the usual effect under the CPR 1998 that the recoverable costs will be at the discretion of the court. Additionally regard must be had to CPR 44.3B(c) which provides that a party may not recover as an additional liability:

- (c) any additional liability for any period in the proceedings during which he failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order; . . .

The application of this rule to success fees appears straight forward because base costs for any given period of time will be known and the success fee can be dis-applied for those costs. Where the additional liability is an insurance premium the exercise is less easy and it appears that rule 44.3B(c) does not allow for a percentage reduction representing the percentage of the entire time

## CFAs after 1 April 2000 and before 1 November 2005 [26]

taken in the case during which the failure occurred. In *Wooldridge v Hayes*<sup>4</sup> it was held that in the case of an insurance premium it was the full premium that fell within CPR 44.3B since it does not accrue (unlike a success fee) on a daily basis. Relief from sanction was granted. Were such a deduction to be made it is likely that the client will look to the solicitor to make good the shortfall. From 1 October 2009 the words “Unless a court orders otherwise” are inserted into CPR 44.3B(1) and a new paragraph (e) is added disallowing an entire insurance premium where the receiving party has failed to provide the specified information about an insurance policy in the time provided for in a rule, practice direction or court order. CPR 44(3)(e) reads as follows:

“(e) any insurance premium where that party has failed to provide information about the insurance policy in question by the time required by a rule, practice direction or court order.”

<sup>1</sup> The Protocols Practice Direction provides at para 4A1: ‘Where a person enters into a funding arrangement within the meaning of rule 43.2(1)(k) he should inform other potential parties to the claim that he has done so.’ See para [73]. From 1 October 2009 the Practice Direction (Pre-Action Conduct) replaces the Protocols Practice Direction and provides that a party must inform the other parties about a funding arrangement as soon as possible and in any event either within 7 days of entering into the funding arrangement concerned or, where a claimant enters into a funding arrangement before sending a letter before claim, in the letter before claim. For relief from sanction for failure to give notice, see para [74].

<sup>2</sup> See para [1002].

<sup>3</sup> The effect of failure to comply with the statutory regime is governed by the decision of the Court of Appeal in *Hollins v Russell* [2003] EWCA Civ 718, [2003] 4 All ER 590, [2003] 1 WLR 2487, see para [152.1].

<sup>4</sup> (SCCO Case No 0100072) [2005] EWHC 90007 (Costs).

### The validity provisions – standard CFA

[26] A standard<sup>1</sup> CFA<sup>2</sup> between a client and legal representative, with or without a success fee:

- (1) Must be in writing<sup>3</sup>.
- (2) Must specify:
  - (a) the proceedings or part of them to which it relates (reg 2(1)(a));
  - (b) the circumstances in which the legal representative’s fees and expenses or part of them are payable;
  - (c) what payment, if any, is due if those circumstances only partly occur (reg 2(1)(c));
  - (d) what payment, if any, is due irrespective of whether those circumstances occur (reg 2(1)(c));
  - (e) what payment, if any, is due when the agreement ends for any reason (reg 2(1)(c));
  - (f) the amount payable in the specified circumstances or the method of calculation (reg 2(1)(d)); and
  - (g) whether the amount payable is limited by reference to damages (reg 2(1)(d)).
- (3) Must state that before making the agreement the matters required by reg 4 to be explained verbally and in writing were so explained (reg 2(2)).
- (4) Must be signed by the client and the legal representative (reg 5(1)).

## [26] Litigation Funding

Paragraph (a) caused difficulty in *Roche v Newbury Homes* (see para [23] with respect to pre-action work). In *Blair v Danesh*<sup>4</sup> the CFA referred to a claim for refund of monies given under undue influence but four years later the action ranged widely. Costs were awarded for the successful undue influence claim but it was argued that the CFA was invalid because the proceedings as they turned out were not specified. The Court of Appeal refused leave on that point seemingly because the costs had only been awarded for undue influence and the consumer protection purpose of the Regulations had been satisfied. The Law Society Model CFA includes an appeal brought against the client. The Court of Appeal in *Bexbes LLP v Beer*<sup>5</sup> where Bexbes had given notice before trial of funding by means of a conditional fee under a CFA which provided for a success fee was required to consider whether notice of the CFA had been given in relation to the appeal. It was held that there was no separate requirement for giving notice of a CFA in an appeal and opponents and advisers should know that a standard CFA would continue if the opponent brings an appeal. Paragraph (b) is usually satisfied by a definition of “win”. In *Hanley v Smith and MIB*<sup>6</sup> the CFA was made two years after a standard retainer and by then the first defendant had admitted liability albeit not its extent. It was argued that the definition of win in the Law Society model had already been satisfied. That argument failed with the court holding that the claim against the MIB was an essential ingredient of the claim, a reasonable person would have understood that the central purpose of the litigation would not be satisfied merely by obtaining a worthless (but necessary) judgment against the driver.

<sup>1</sup> ‘Standard’ is used to differentiate from a ‘simplified’ CFA made under the provisions added by the Conditional Fee Agreement (Miscellaneous Amendments) Regulations 2003, SI 2003/1240, see para [31].

<sup>2</sup> References to regs are to the Conditional Fee Agreements Regulations 2000, SI 2000/692. For collective CFAs, see paras [193] to [200].

<sup>3</sup> CLSA 1990, s 58(3)(a).

<sup>4</sup> [2009] EWCA Civ 516.

<sup>5</sup> [2009] EWCA Civ 628, [2009] All ER (D) 273 (Jun).

<sup>6</sup> [2009] EWHC 90144 (Costs).

**[27]** A standard CFA between a client and a legal representative which has a success fee must, in addition to the above:

- (a) briefly specify the reasons for setting the percentage increase<sup>1</sup> (reg 3(1)(a));
- (b) specify the percentage increase (if any) by which the amount of the fees which would be payable if it were not a CFA is to be increased<sup>2</sup>; and
- (c) specify how much of the percentage increase, if any, relates to the cost of waiting for payment (reg 3(1)(b)).

<sup>1</sup> The percentage increase is limited to 100% in all cases except under the Environmental Protection Act 1990, s 82 where there can be no success fee – Conditional Fee Agreements Order 2000, SI 2000/823.

<sup>2</sup> CLSA 1990, s 58(4)(b).

**[28]** Where the CFA with success fee relates to court proceedings it must:

CFAs after 1 April 2000 and before 1 November 2005 **[29.1]**

- (a) provide that where costs are assessed, the legal representative may disclose to the court or any other person the reasons for setting the percentage increase (reg 3(2)(a));
- (b) provide that if on assessment the percentage increase is reduced as being unreasonable, the amount disallowed ceases to be payable unless the court permits it to remain payable (reg 3(2)(b)); and
- (c) provide that where there is no assessment but the legal representative agrees with any person liable to pay the success fee that the percentage will be reduced, the amount due under the CFA will be reduced by that amount and cease to be payable unless the court is satisfied that the full amount should be payable (reg 3(2)(c)).

**Information to be given before a standard CFA, with or without a success fee, is made**

**[29]** Regulation 4 of the CFA Regulations 2000<sup>1</sup> provides a list of information and specifies the form in which it has to be given. The information must be given to the client by the legal representative defined in reg 1(3) as:

‘the person providing the advocacy or litigation services to which the conditional fee agreement relates’.

The use of the word ‘person’ is difficult in these circumstances since it might be expected that the information could be provided on behalf of the firm of solicitors which is providing the services. In *Hollins v Russell*<sup>2</sup> the Court of Appeal held that compliance with reg 4 can be delegated to a non-legally qualified agent, subject to the necessary level of supervision being in place. The court gave no guidance as to the level or manner of supervision:

‘ . . . it will be in theory permissible for a solicitors’ firm to delegate the performance of its regulation 4 duties to an organisation like TAG, and for TAG to sub-delegate to its representatives, provided that in so doing the solicitor is not abandoning the supervisory responsibilities required of him by Practice Rule 3.07 and the Guide to Professional Conduct. Whether the TAG scheme can and does provide properly for this is a matter for the fact-finding trial.’. At 216

The information to be given:

- (1) When will the client have to pay their own costs.
- (2) When and how the client can seek assessment of those costs.
- (3) Whether the client is already insured against any costs liability likely to arise.
- (4) How else those costs might be financed in this case.
- (5) Whether the solicitor thinks a particular method(s) of financing costs is appropriate.
- (6) The reasons for recommending insurance or a particular insurance as a method.
- (7) Any interest the solicitor has in recommending insurance.

<sup>1</sup> See para [1051].

<sup>2</sup> [2003] EWCA Civ 718, [2003] 4 All ER 590, [2003] 1 WLR 2487.

**[29.1]** In *Samonini v London General Transport Services Ltd*<sup>1</sup> a claims management company (CMC) referred the claimant to a solicitor on the basis that the claimant did not have existing legal expenses insurance. The CMC had

### [29.1] Litigation Funding

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not enquired sufficiently because it had asked only about the claimant's motor insurance. The solicitor had not carried out an enquiry independent of the CMC. The Senior Costs Judge concluded that although it may be possible to delegate the reg 4 responsibility it had not in any event been discharged.

The county court in *English v Clipson*<sup>2</sup> held that where a client was already committed to an ATE insurer at the time of first instructing a solicitor, the solicitor was not relieved from giving advice under the CFA Regulations 2000. The view then taken was that there was an inherent conflict of interest because the clients were provided to the solicitor by the insurer. In the result it was held that the ATE premium was not recoverable. This issue was not the subject of consideration by the Court of Appeal in *Hollins v Russell*.

Breach of reg 4(2)(c) occurred in *Myatt v National Coal Board*<sup>3</sup> where the Court of Appeal concluded that in asking the client to decide whether existing legal expenses insurance provided cover for the particular claim (industrial injury) the solicitor had asked the wrong question. It will be only in rare cases that the client will have sufficient understanding of insurance that such a question can be asked.

In *Langsam v Beachcroft LLP*<sup>4</sup> where a replacement CFA did not contain the cap on total fees that the original CFA did contain the failure to explain the change was a breach of Regulation 4(3) and the CFA was unenforceable.

The conjoined appeal to *Myatt* is *Garrett v Halton Borough Council*<sup>5</sup> where the breach was of reg 4(2)(e)(ii). The CFA stated that the firm had no interest in recommending the insurance policy. The firm's arrangement with a claims management company whereby it received referral and was obliged to recommend a particular insurance did amount to an interest for the purposes of the regulation.

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<sup>1</sup> [2005] EWHC 90001 (SCCO), [2006] NLJR 457.

<sup>2</sup> (2002) unreported, Peterborough County Court – Claim No PE102464.

<sup>3</sup> [2006] EWCA Civ 1017, [2007] 1 All ER 147, [2007] 1 WLR 554 considered fully at para [152.6].

<sup>4</sup> [2011] EWHC 1451 (Ch).

<sup>5</sup> [2006] EWCA Civ 1017, [2007] 1 All ER 147, [2007] 1 WLR 554 considered fully at para [152.8].

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**[29.2]** The *Myatt/Garrett* decision was distinguished in *Tankard v John Fredricks Plastics Ltd*<sup>1</sup> where validity challenges to Accident Line panel firms failed. For the purposes of reg 4, a solicitor has an interest if a reasonable person with knowledge of the relevant facts would think that the existence of the interest might affect the advice given by the solicitor to his client<sup>2</sup>. The court went on to state obiter that had the firms involved had an interest, compliance with the regulation required more than merely stating that there was an interest. The firm had to go further and state to the client what the nature of that interest was. The court made no reference to whether this had ever been the practise of solicitors. Paying parties would need access to a receiving party's CFA in order now to determine whether there has been compliance either in terms of stating that there is an interest or where such is stated whether further explanation has been given. The retrospective requirement of the court provides scope for more satellite litigation.

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CFAs after 1 April 2000 and before 1 November 2005 **[31]**

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- <sup>1</sup> [2008] EWCA Civ 1375, [2009] 4 All ER 526, [2009] 1 WLR 1731.  
<sup>2</sup> [2008] EWCA Civ 1375 at [13].
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*Form in which this information must be given*

**[30]** All of the information above must be given orally (whether or not also given in writing). The information in (5), (6) and (7)<sup>1</sup> must be given in writing as well as orally. It should be noted that the Regulations require that this information is provided before a CFA is entered into. Recording this information as part of the CFA itself does not therefore comply with this Regulation and indeed would suggest that the information has not been given in advance of the making of the CFA. Where a solicitor does not have an interest in recommending insurance the Regulation does not require a statement to that effect<sup>2</sup>.

In addition, the ‘effect’ of a CFA must be explained both orally and in writing before the CFA is made. The regulations give no definition of ‘effect’. The Law Society Model CFA provides Law Society Conditions that are separate from the CFA itself and explain the effect of the CFA. Providing a client with a copy of those conditions attached to the CFA itself is sufficient to satisfy the regulation but a separate free-standing document is to be preferred<sup>3</sup>. The Law Society Solicitor’s Costs Information and Client Care Code 1999 provides a means of complying with reg 4(3)<sup>4</sup> together with Annex 14F. A client care letter is a further means of ensuring that the effect of a CFA is explained in writing.

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- <sup>1</sup> See para [29].  
<sup>2</sup> *Hollins v Russell* [2003] EWCA Civ 718, [2003] 4 All ER 590, [2003] 1 WLR 2487.  
<sup>3</sup> [2003] EWCA Civ 718 at 152–154.  
<sup>4</sup> See para [1051].
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**The validity provisions<sup>1</sup> – simplified CFAs**

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- <sup>1</sup> Conditional Fee Agreements Regulations 2000, SI 2000/692, see para [1051] as amended by the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003, SI 2003/1240, in force 2 June 2003.
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**[31]** The Conditional Fee Agreements Regulations 2000 were amended from 2 June 2003 by the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003. The 2003 Regulations insert a new reg 3A into the CFA Regulations 2000.

Regulation 3A provides:

‘(1) This regulation applies to a conditional fee agreement under which, except in the circumstances set out in [paragraphs (5) and (5A)], the client is liable to pay his legal representative’s fees and expenses only to the extent that sums are recovered in respect of the relevant proceedings, whether by way of costs or otherwise.’<sup>2</sup>

The regulations thus provide for a ‘simplified’ CFA that is not required to comply with the client care requirements of regs 2, 3 and 4<sup>3</sup> of the CFA

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Regulations 2000. The changes permit a solicitor to agree to run the case on recovered costs only, thereby guaranteeing damages stay with the client or on recovered sums thereby ensuring the client is no worse off for having taken the action. Where a CFA limits the client's liability to recovered costs then the removal of the requirements as to advice, particularly as to own costs assessment, is explained by the fact that the client can have no liability which has not already been met by the opponent in costs. Where the CFA limits own costs liability to sums recovered the explanation for the removal of the client care provisions cannot apply. If the CFA does not limit the client's liability to costs recovered then although the applicable regulations do not require the full explanation applicable to a standard CFA, Rule 15 of the Law Society Rules applies in the usual way.

<sup>2</sup> Words 'paragraphs (5) and (5A)' in square brackets substituted by SI 2003/3344, reg 2(1), (2).

<sup>3</sup> See para [1051].

[32] The revised regulations, together with the commencement of the AJA 1999, s 31, and changes to the CPR 1998, r 43.2, have the effect of removing the indemnity principle for such an agreement. The Senior Costs Judge in *The Accident Group Test Cases Tranche Two*<sup>1</sup> held that a CFA could in any event define 'win' in terms of recovering costs without causing difficulties with the indemnity principle:

'There appears to be no reason why the circumstances specified should not be the recovery of those costs and/or disbursements from the paying party.' At 384

A simplified CFA is one under which, except in the certain circumstances set out in the regulations, the client is liable to pay his legal representative's fees and expenses only to the extent that sums are recovered in respect of the relevant proceedings, whether by way of costs or otherwise<sup>2,3</sup>. Such an agreement does not affect the client's liability for after the event insurance<sup>4</sup>.

<sup>1</sup> [2003] EWHC 9020 (Costs).

<sup>2</sup> SI 2000/692, reg 3A(3) as inserted by SI 2003/1240.

<sup>3</sup> The words 'or otherwise' permit own costs to be taken from damages.

<sup>4</sup> SI 2000/692, reg 3A(2).

[33] A simplified CFA must:

- (a) be in writing<sup>1</sup>;
- (b) specify:
  - (i) the particular proceedings or parts of them to which it relates (including whether it relates to any appeal, counterclaim or proceedings to enforce a judgment or order) (reg 3A(4)(a)(i)), and
  - (ii) the circumstances in which the legal representative's fees and expenses, or part of them, are payable (reg 3A(4)(a)(ii)); and
- (c) if it provides for a success fee:
  - (i) briefly specify the reasons for setting the percentage increase at the level stated in the agreement (reg 3A(4)(b)(i)), and

## CFAs after 1 April 2000 and before 1 November 2005 [33]

- (ii) provide that if, in court proceedings, the percentage increase becomes payable as a result of those proceedings and the legal representative or the client is ordered to disclose to the court or any other person the reasons for setting the percentage increase at the level stated in the agreement, he may do so (reg 3A(4)(b)(ii)).

A CFA which provides for a liability for own disbursements in any event and for base costs only if recovered would be valid as a standard CFA. It is submitted that such a CFA entered into after 2 June 2003 is within the terms of the CPR 1998, r 43.2(3). Whether such an agreement complies with the requirements for a simplified CFA depends upon the meaning of reg 3A(4)(a)(ii) above. This regulation replicates the reference in reg 2(1)(b) applicable to a standard CFA that such must specify 'the circumstances in which the legal representative's fees and expenses, or part of them, are payable. The words 'or part of them' appear in both reg 2 and 3A and are a reference back to the definition of a CFA contained in the CLSA 1990, s 58. Section 58(2)(a) defines a CFA as 'an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances'. An agreement under which base costs are payable only in specified circumstances is therefore a CFA with respect to those fees. It is arguable that because disbursements are payable in all circumstances that the agreement is valid under the simplified form in that the CFA only applies to base costs. Provided the CFA as to base costs limits the liability for those costs to sums recovered the CFA would appear to comply with the simplified regulations. Judge Richard Harvey QC sitting in the High Court declined to rule on such an agreement in *Munkenbeck & Marshall v Harold*<sup>2</sup> leaving the point for full argument at a costs assessment hearing.

The Court of Appeal in *Jones v Wrexham Borough Council*<sup>3</sup> could see no reason why the court should not look at the whole package produced by the solicitor, the CFA agreement, the Rule 15 letter explaining to the client the effect of the agreement, and indeed the insurance policy recommended by the solicitor. The words of the Regulation 'or otherwise' were wide enough to include the proceeds of an ATE policy. The court also held that the word 'expenses' in the Regulation does include disbursements so that the arrangement must limit such to sums recovered. Similar reasoning in *King v Halton Borough Council*<sup>4</sup> was that by taking the CFA together with an ATE policy covering own disbursements the result was a simplified CFA.

By reg 3A(5) of the CFA Regulations 2000<sup>5</sup>, as inserted by the 2003 Regulations<sup>6</sup>, a simplified CFA can impose an own costs liability not limited to sums recovered if the client:

- (a) fails to co-operate with the legal representative;
- (b) fails to attend any medical or expert examination or court hearing which the legal representative reasonably requests him to attend;
- (c) fails to give necessary instructions to the legal representative;
- (d) withdraws instructions from the legal representative;
- (e) is an individual who is adjudged bankrupt or enters into an arrangement or a composition with his creditors, or against whom an administration order is made; or

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(f) is a company for which a receiver, administrative receiver or liquidator is appointed<sup>7</sup>.

By reg (5A)<sup>8</sup> a simplified CFA may specify that, in the event of the client dying in the course of the relevant proceedings, his estate will be liable for the legal representative's fees and expenses, whether or not sums are recovered in respect of those proceedings.

<sup>1</sup> CLSA 1990, s 58(3)(a).

<sup>2</sup> [2005] EWHC 356 (TCC), [2005] All ER (D) 227 (Apr).

<sup>3</sup> [2007] EWCA Civ 1356, [2008] 1 WLR 1590, (2008) Times, 21 January contrary to the decision in *Foord v American Airlines Inc* [2007] EWHC 90076 (Costs).

<sup>4</sup> (Chester County Court 5ML00874).

<sup>5</sup> SI 2000/692.

<sup>6</sup> SI 2003/1240.

<sup>7</sup> Sub-paragraphs (e), (f) inserted by SI 2003/3344, reg 2(1), (3)(b) with effect from 2 February 2004: see SI 2003/3344, reg 1.

<sup>8</sup> Para (5A) inserted by SI 2003/3344, reg 2(1), (4) with effect from 2 February 2004: see SI 2003/3344, reg 1.

*Liability for own costs*

**[34]** The wording of the revised regulations limits the client's liability to 'sums' recovered 'whether by way of costs or otherwise'. Whilst that does not appear to prevent the CFA limiting liability to recovered costs it does allow a broader basis which can potentially swallow the whole of the client's damages. A justification for the broader wording is that it is still leaving the client better off than having a liability to pay the solicitor simply because the claim succeeded, even though nothing is recovered. That justification would require that 'recovered' means actually paid rather than an agreement or order which has not been met. It is by no means certain however that that is the meaning of 'recovered'<sup>1</sup> where the CFA wording 'you recover costs or sums on account' was held to be satisfied by an order for costs at an interim stage.

<sup>1</sup> See *Arkin v Borcard Lines Ltd* [2001] CP Rep 108, [2001] NLJR 970, [2001] CP Rep 108.

**[35]** It is necessary to consider separately the two types of simplified CFA possible under the 2003 Regulations: a CFA which limits the client's liability to costs recovered; a CFA which limits the client's liability to sums recovered by way of costs or otherwise:

**Simplified CFA which limits the client's liability to costs recovered**

<i>Case fails</i>	No liability for own costs or disbursements. Because there is no liability in this circumstance it is not possible for the client's insurance policy to cover these costs. The solicitor is taking the risk on disbursements. The cost of that risk needs to be accounted for in success fees.
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## CFAs after 1 April 2000 and before 1 November 2005 [35]

<i>Case succeeds</i>	The client has a liability only to the extent of costs paid by the opponent. A global offer to settle, which makes no distinction between damages and costs, would present insurmountable difficulties. It is essential that the costs element is specified in the settlement. If the only settlement available is a no-costs settlement then the client has no liability for own costs or disbursements.
<i>Failure to beat Part 36</i>	Assuming the opponent agrees or is ordered to pay pre-Part 36 costs and the client agrees or is ordered to pay opponent's costs post-Part 36, it will be necessary to determine what is meant by the words 'sums recovered by way of costs'. The simplest explanation is that the client does have a liability for own costs pre-Part 36 because the opponent is liable for those costs so that those costs are 'recovered'. This ignores any set-off approach against the client's post-Part 36 liability. If the client has ATE insurance the adverse costs liability is covered. The client has no liability either for own costs or for disbursements post-Part 36 nor would those costs be insured – they are risked by the solicitor under the CFA. This is a costs risk that some ATE insurers have insisted upon but it is not the standard approach of the Law Society Model CFA which provides for base costs but no success fee – that option is not available if the wording of the CFA limits liability to costs recovered. The risk on post-Part 36 disbursements need to be reflected in the success fee.

Simplified CFA which limits the client's liability to sums recovered by way of costs or otherwise

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These are the words used in the 2003 regulations and have the effect of permitting recovery of costs from any monies recovered, whether costs, damages or proceeds of an ATE insurance policy or any combination thereof.

<i>Where the case fails</i>	There is no liability for own costs or disbursements because no sums at all will have been recovered. Because there is no liability in this circumstance it is not possible for the client's insurance policy to cover these costs. The solicitor is taking the risk on disbursements as well as base costs. The cost of that risk needs to be accounted for in success fees.
<i>Where the case succeeds</i>	The client has a liability for own costs and disbursements to the extent of costs and damages paid by the opponent. Issues as to what element of sums received represented costs and what represented damages do not therefore arise.
<i>Where there is a failure to beat Part 36</i>	Assuming the opponent agrees or is ordered to pay pre-Part 36 costs and the client agrees or is ordered to pay opponent's costs post-Part 36, the client has a liability for own costs and disbursements up to the limit of all sums recovered from the opponent. Post-Part 36 own costs will not have been recovered as costs but this wording does not link the client's liability to costs recovered. That seems to allow a simplified CFA to provide, as in the standard CFA, for base costs (and even a success fee) to be paid by the client post-Part 36. The only limitation is the total sum recovered from the opponent. Such a post Part 36 liability for own costs would not be covered by insurance.

*Part 36 risk illustration***[36]**

Own costs	Opponent's costs
£500	£300
Opponent liable	Client not liable
Client liable?	
Part 36	Rejected

## CFAs after 1 April 2000 and before 1 November 2005 [42]

£300 Opponent not liable Client not liable?	£300 Client not liable
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**After the event insurance and simplified CFAs***CFA limited to costs recovered*

[37] By definition the client has no liability for own costs beyond costs recovered and accordingly no own costs are insurable in the event that the case loses. Unrecovered disbursements will also be uninsured and the client will have no liability to reimburse them. Adverse costs can be insured in the same way as under a standard CFA. Part 36 adverse costs liabilities can be insured. It is essential that the policy does not set-off against an adverse costs order any own costs recovered by the client. There is no client risk on own costs and these cannot be insured.

*CFA limited to sums recovered*

[38]–[40] The client can have no own costs liability in the event that the case loses and that cannot therefore be insured. Where the case loses there will be no sums recovered and hence no client liability for costs and disbursements. Adverse costs can be insured as in a standard CFA. Part 36 adverse costs liabilities can be insured and cover should be obtained which does not apply a set-off against own costs or sums recovered. The client can have an own costs liability post Part 36 because some sums will be recovered and therefore these costs and disbursements can also be insured in the event that the Part 36 payment is not beaten.

**Amendments to the CFA**

[41] It is entirely feasible that a CFA will require amendment during its lifetime. The use of CFAs in stages of proceedings is a recognised practice enabling a case to be progressed and the risk to be managed by both client and solicitor. Regulation 6<sup>1</sup> provides that where there is an amendment to cover further proceedings or parts of them the Regulations must again be complied with as if it were an original agreement.

<sup>1</sup> See para [1051].

**C The Law Society model agreement for personal injury cases**

[42] The Law Society produced a model agreement<sup>1</sup> for use only in personal injury cases not including clinical negligence. The model was been redrafted to comply with the requirements of the CFA Regulations 2000<sup>2</sup>. A checklist for solicitors was also available<sup>3</sup>. No model has been produced to make use of the simplified regulations. A new Model<sup>4</sup> for use in personal injury and clinical negligence cases was produced by the Law Society for use from 1 November 2005. A separate document was also provided as client information and appeared to be intended to form part of the contractual relationship between solicitor and client.

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- <sup>1</sup> The version of the model available from June 2000 is reproduced at para [1261]. The June 2000 version was held to be not compliant with reg 3(2)(c) of the CFA Regulations in *Ghanmouchi v Houni* (SCCO Ref: TSB 0307009) [2004] EWHC 9002 (Costs), but the departure from compliance was held to be not material. The Senior Costs judge has not followed the *Ghanmouchi* analysis of reg 3(2)(c) in *Oyston v Royal Bank of Scotland* [2006] EWHC 90053 (Costs). Between April and June 2000 a ‘running repair’ version was available. It was this early version which was the subject of the decision in *Hollins v Russell* [2003] EWCA Civ 718, [2003] 4 All ER 590, [2003] 1 WLR 2487.
- <sup>2</sup> See para [1051]. The Model was not amended to provide for simplified CFAs introduced from 2 June 2003 by the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003, SI 2003/1240, see paras [31]–[37].
- <sup>3</sup> See para [1271].
- <sup>4</sup> The new Model is reproduced at para [1320].

## The clauses

### *The proceedings*

[43] The agreement must state the proceedings or part of proceedings to which it applies. In *Brierley v Prescott*<sup>1</sup> the CFA referred to a claim against an insurer. In the proceedings the driver’s name was later substituted for that of the insurer. On assessment it was argued that there was no liability under the CFA in respect of the claim against the driver and that therefore the driver could not be liable to indemnify those costs. It was held that the CFA covered a claim arising out of the accident and costs were therefore payable by the client and recoverable. The Model excludes counterclaims and appeals against final judgment. Enforcement of judgment is dealt with in the conditions annexed to the CFA. Condition 4 gives the solicitor power to take enforcement proceedings in the name of the client and makes the costs of such proceedings part of the basic charges under the CFA. The Court of Appeal in *Halloran v Delaney*<sup>2</sup> has held that costs only proceedings are not enforcement proceedings but that the model includes costs only proceedings within the ‘claim’ for which it provides coverage.

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<sup>1</sup> 2006 (SCCO) Ref 0504718.

<sup>2</sup> [2002] EWCA Civ 1258, [2003] 1 All ER 775, [2003] 1 WLR 28.

### *The fees*

[44] Regulation 2(1)(c)<sup>1</sup> is complied with by detailing the liability of the client to pay fees and disbursements in a number of situations falling short of success as well as in the event of success. This part of the Model also states that the amount of fees is not based on or limited by the damages. The ordinary rules on proportionality contained in r 44.5<sup>2</sup> apply to the success fee.

The model does not seek to provide a cap on the success fee by reference to damages. To apply any such limit would mean that under the indemnity principle the paying party would not be required to pay any success fee in excess of the cap. The commencement of the AJA 1999, s 31<sup>3</sup> does not alter the indemnity principle in itself but provides for rules of court to permit a recovery of costs notwithstanding that the client has no liability for those costs. CPR 1998<sup>4</sup>, r 43.2 relates specifically to a CFA where the client’s liability for costs is limited to sums recovered and it is submitted that this rule would not enable

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CFAs after 1 April 2000 and before 1 November 2005 [44]

a success fee to be recovered in excess of any cap. It is possible to provide for a cap on the part of a success fee which relates to delay in payment although the model does not do so. The earlier Law Society Model which was published in April 2000 was unsuccessfully challenged on the grounds that the wording referred only to the success fee as not being limited by reference to damages whereas the Regulation refers to all costs amounts<sup>5</sup>. For the consequences of failing to comply with the Regulations, see para [151] – Unenforceable CFAs.

The terms which apply where the agreement is terminated before the end of the case are contained in Condition 7 to the Model<sup>6</sup>. Either party to the CFA may wish to terminate the agreement, the main issue then arising is the amount payable and particularly the position of the success fee. The reasons for termination will affect the question of payment. Where termination is for failure to take advice on settlement it may be seen as legitimate to seek a success fee, at least where the case wins little or no more than the advised settlement. If termination is because the client has misled the solicitor payment of the success fee irrespective of the outcome of the case may be appropriate. It is important that these provisions which lead to the client being liable for paying the success fee in circumstances where it may not be recovered from the opponent are carefully explained.

Regulation 2(1)(d)<sup>7</sup> is complied with by providing for an hourly rate at various scales according to the experience of the person doing the work. In *Williams v Myler*<sup>8</sup> the High Court considered the use of the A+B formula. The client did not need to be informed of a specific formula by which fees would be calculated, and it was sufficient if he was told that a system of basic charges and an uplift would be used. Moreover, the system specified in the agreement was one which was approved and applied by the court. In those circumstances, the agreement had specified the method by which fees would be calculated and, accordingly, complied with the requirements of reg 2(1)(d). The CFA also provided for an annual review of the hourly rate but failed to state any method by which that review would be made. That was a departure from reg 2(1)(d) but that departure did not have an adverse effect on either the claimant or the administration of justice. It followed that the agreement was not rendered unenforceable.

In *Cox v MGN Ltd*<sup>9</sup> the CFA provided: “[Basic charges] are calculated for each hour engaged on your matter from now until the review date of which we shall notify you”. This failed to comply with reg 2(1)(d) and was held to be inadequate to support a claim to more than one increase in hourly rates.

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<sup>1</sup> CFA Regulations 2000, SI 2000/692. See para [1051].

<sup>2</sup> SI 1998/3132, r 44.5 and see para [1177].

<sup>3</sup> Access to Justice Act 1999 (Commencement No 10) Order 2003, SI 2003/1241 commenced the AJA 1999, s 31 as from 2 June 2003.

<sup>4</sup> SI 1998/3132.

<sup>5</sup> *Hollins v Russell* [2003] EWCA Civ 718, [2003] 4 All ER 590, [2003] 1 WLR 2487, see para [151].

<sup>6</sup> See para [1261].

<sup>7</sup> See n 1 and para [1051].

<sup>8</sup> [2003] EWHC 1587 (QB), [2003] All ER (D) 364 (Jun).

<sup>9</sup> [2006] EWHC 1235 (QB), [2006] All ER (D) 396 (May).

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### Increase in fee

**[44.1]** The 2002 Model wording as to increases in fees is as follows:

We will review the hourly rate on the review date and on each anniversary of the review date. We will not increase the rate by more than the rise in the Retail Prices Index and will notify you of the increased rate in writing.’

In *Puksis v Brumby*<sup>1</sup> the question arose as to whether the claimant was liable to pay the hourly rates claimed in the bill or was liable only to pay rates increased by the retail price index. The increases exceeded the retail price index as the result of an oversight. The court decided that the client was not obliged to pay any more than the rates set out in the conditional fee agreement as increased by the retail price index.

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<sup>1</sup> [2008] EWHC 90095 (Costs).

### The success fee

**[45]** The reasons for setting the level of the success fee are set out in the Model in a separate schedule to the agreement in compliance with reg 3(1)(a)<sup>1</sup>. That schedule requires brief reasons of the assessment of the risk of the individual case failing. Compliance with the requirement of the Regulation to provide ‘brief reasons’ for the success fee is achieved even where the CFA stated only that the success fee reflected the risks in the case without identifying what those risk were<sup>2</sup>.

Regulation 3(1)(b)<sup>3</sup> is complied with by setting out in the same schedule the percentage of the success fee which relates to waiting for payment of fees and disbursements. That part of the success fee cannot be recovered from the opponent<sup>4</sup> and remains the responsibility of the client. If the success fee does not incorporate such a calculation the agreement should state that no part of the success fee relates to waiting for payment. Where the CFA leaves this percentage blank but the risk assessment attributes a figure the CFA prevails and no delay element is recoverable from the client<sup>5</sup>. In *Spencer v Gordon Wood t/a Gordon Tyres (a firm)*<sup>6</sup> there was a breach of reg 3(1)(b) where the CFA failed to specify how much of the stated success fee related to waiting for payment. There was a separate risk assessment on file which indicated the respective percentages but that had not formed part of the CFA. It was not argued before the Court of Appeal that there had been no breach nor that any breach was not material but rather that to hold the CFA unenforceable with the consequence that no fees at all will be payable was so disproportionate as to be wrong. That argument was rejected by the Court of Appeal. This must be contrasted with *Hollins v Russell* where a similar breach was held not to be material where a non-CFA document enabled a client to understand what part of the success fee related to waiting for payment and any unfavourable agreement would simply not have been enforced against the client. The view taken in *Hollins* was that if the client is not prejudiced because on an own client assessment the client would not be put in a prejudiced position then the breach of regulations is not material. In *Hughes v George Major Skip Hire*<sup>7</sup> a CFA in Law Society Model form for 2000 referred to a 50% success fee. Schedule 1 to the CFA stated that the postponement element was 50%, that risk elements amounted to 50% and that the total success fee was 50%. That

CFAs after 1 April 2000 and before 1 November 2005 **[45.1]**

confusion and breach of reg 3 was rescued by the oral explanation that left the client certain that they would not be paying any costs out of damages so there was no material breach. Burnton J in *Palmier plc (in liq), Re, Sidhu v Sandhu*<sup>8</sup> upheld a CFA that stated there was no charge for postponement although the schedule risk assessment made no reference to postponement. That absence of postponement in the schedule made it clear that there was no charge for that element.

Condition 4 complies with the requirements of reg 3(2)(a) and (b)<sup>9</sup> relating to the assessment of the success fee. The same condition provides that the client will not instruct the solicitor to accept an offer of a lower success fee than that contained in the CFA.

<sup>1</sup> See para [1051].

<sup>2</sup> *Bray Walker Solicitors v Silvera* [2010] EWCA Civ 332.

<sup>3</sup> See para [1051].

<sup>4</sup> SI 1998/3132, r 44.3B(1)(a).

<sup>5</sup> *Hollins v Russell* [2003] EWCA Civ 718, [2003] 4 All ER 590, [2003] 1 WLR 2487.

<sup>6</sup> [2004] EWCA Civ 352, 148 Sol Jo LB 356, (2004) Times, 30 March. See para [1261].

<sup>7</sup> [2009] EWHC 90147 (Costs).

<sup>8</sup> [2009] EWHC 983 (Ch), [2009] All ER (D) 93 (May).

<sup>9</sup> See para [1051].

**[45.1]** In *C v W*<sup>10</sup> the Court of Appeal was concerned with a serious personal injury case where liability had been admitted before the CFA was entered into. The model CFA was used and provided that the client would have no liability for Part 36 work if the offer was not beaten. The court allowed a success fee of 20%. The decision in *Halloran v Delaney*<sup>11</sup>, where a 5% success fee was allowed, was not referred to. The reasoning of the court in *C v W* was that there was no doubt that the solicitor had assumed a risk of some kind, but in the circumstances it was not equivalent to more than a 15% risk of failure overall. Nothing would be added for the general risks of litigation since they must be taken to have been subsumed in the basic assessment, but in any event to increase the risk by a factor of 10% would add little. The court did not add anything for the size of the claim and made no allowance for the risk that C might decide not to pursue the claim. The court accepted that there was a virtually certain prospect of recovering substantial damages given the nature of the injuries and the admission of liability. The 20% uplift permitted applied of course to all of the fees recovered which was in fact for 100% of the work. Had there been a failure to beat the Part 36 the uplift would still have applied to a substantial portion of the work and therefore of the fees. It is submitted that a truer reflection of the Part 36 risk is given by estimating the likely proportion of total costs risked at Part 36. For example if it was thought likely that 20% of the total fees would be attributable to Part 36 and therefore at risk the 20% risk element ought to be reduced 4% – (20% x 20%). *C v W* considered the success fee that could be set where liability had been admitted prior to the CFA being made. The figure arrived at was 20%. In *Hanley v Smith and MIB*<sup>12</sup> the CFA was made two years after a standard retainer and by then the first defendant had admitted liability. The extent of liability, quantum and the liability of the MIB were all still live. The solicitor had a 100% success fee of which 90% was for risk. It was held that apart from a double counted element in the risk assessment the risks were properly assessed and 82% was

#### [45.1] Litigation Funding

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allowed. Leading counsel whose CFA was made after the MIB had admitted liability but before quantum was agreed had sought a success fee of 82% but it was reduced to 54%. The court said that there was a Part 36 risk and the earlier an offer was likely to be made the greater the risk was, but not great enough to justify 82%.

In *Thornley v Ministry of Defence*<sup>4</sup> counsel entered into a CFA with a 100% success fee at a time when liability and causation had been admitted. Counsel's CFA provided for fees to be paid even if counsel advised rejection of a Part 36 offer which was subsequently not beaten. In all of those circumstances there was no realistic possibility that counsel would not get her fees. No success fee was allowed. The Court of Appeal described as 'grotesque' the fee arrangements in *Pankhurst v White and MIB*<sup>5</sup>. The claimant suffered catastrophic injuries in a road accident. The CFA provided for the client to pay own costs where the Part 36 offer is not beaten. The CFA had been entered into after summary judgment had been entered against the uninsured driver. There was accordingly no risk on liability. Nonetheless the CFA provided for a 22.5% success fee rising to 100% if the case went to trial. There was also an ATE policy which indemnified Part 36 adverse costs without any set off against recoveries.

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<sup>10</sup> [2008] EWCA Civ 1459, [2009] 4 All ER 1129, [2009] RTR 199.

<sup>11</sup> [2002] EWCA Civ 1258, [2003] 1 All ER 775, [2003] 1 WLR 28.

<sup>12</sup> [2009] EWHC 90144 (Costs).

<sup>4</sup> [2010] EWHC 2584 (QB).

<sup>5</sup> [2010] EWCA Civ 1445.

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#### Value Added Tax

[46] The model applies VAT to the total basic charges and the success fee.

#### Giving of information

[47] The model addresses the requirements of reg 2(2)<sup>1</sup> to incorporate a statement that the information to be given to the client under reg 4<sup>2</sup> has been given. The model states that information has been given 'verbally' whereas the Regulation requires a statement that reg 4 has been complied with. Regulation 4 requires some of the information to be given both orally and in writing before the CFA is entered into. It is essential to have regard to reg 4 in that information has to be given in writing before a CFA is entered into. It follows that to give that information only within the CFA cannot comply with the Regulation<sup>3</sup>. Where reg 4 requires information to be given in writing before the CFA is entered into it cannot only be given in the CFA itself. The Law Society Model CFA provides Law Society Conditions that are separate from the CFA itself and explain the effect of the CFA. Providing a client with a copy of those conditions attached to the CFA itself is sufficient to satisfy the regulation but a separate free standing document is to be preferred<sup>4</sup>.

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<sup>1</sup> See para [1051].

<sup>2</sup> See para [1051].

<sup>3</sup> See paras [29]–[40].

<sup>4</sup> *Hollins v Russell* [2003] EWCA Civ 718 at 152–154, [2003] 4 All ER 590, [2003] 1 WLR 2487.

## CFAs after 1 April 2000 and before 1 November 2005 [48]

*The insurance policy*

[48] The model enables compliance with reg 4(2)(e)<sup>1</sup> which requires reasons to be given for recommending insurance or a specific contract of insurance. The model states that the solicitor does not have an interest in recommending the insurance. If the solicitor does have such an interest this clause must be amended to declare that interest. The CFA Regulations do not define ‘interest’ for these purposes. In *English v Clipson*<sup>2</sup> a county court held that a solicitor had an interest where the client had been referred to him by the insurer. Similarly in *Garrett v Halton Borough Council* and *Myatt v National Coal Board*<sup>3</sup> where clients were referred by a claims management company under arrangements that then required the solicitor to recommend a particular ATE policy, that arrangement amounted to an interest for the purposes of reg 4. The Court of Appeal in *Tankard v John Fredricks Plastics Ltd*<sup>4</sup> distinguished *Garrett* and held that Accident Line Protect did not give rise to an interest. The main reason for solicitors choosing membership of ALP was the quality of the product endorsed by the Law Society. For the purposes of regulation 4, a solicitor has an interest if a reasonable person with knowledge of the relevant facts would think that the existence of the interest might affect the advice given by the solicitor to his client. There was nothing that would lead a reasonable person with knowledge of the facts to think that the solicitors had an interest in the scheme that might affect their advice.

Where insurance is being recommended after receipt of an admission of liability<sup>5</sup> there is doubt as to the wording of the model. The regulations require the client to be told the reasons for recommending insurance. The model refers to insurance ‘in case you lose’. It can be argued that there is no risk of losing if there has been an admission of liability and accordingly that cannot have been the reason for the recommendation. If that amounts to a failure to comply with the regulations the consequences will depend upon an application of the test laid down in *Hollins v Russell*<sup>6</sup> of material breach.

An additional wording is provided at the end of the conditions to comply with the requirements of the Accident Line insurance scheme. Similar wording may be used to comply with the requirements of other insurers.

From 14 January 2005 further requirements as to information and recommendations concerning insurance apply in furtherance of regulation of general insurance by the Financial Services Authority. It is possible that failure to comply in some respects with these requirements may lead to challenges to the validity of the insurance and to paying parties denying liability for the premium<sup>7</sup>. The Court of Appeal in *Tankard* went on to state that an obiter statement of Brooke LJ in *Garrett* at [103] to the effect that post 1 November 2005 it is only necessary to inform the client that a contractual duty to recommend a particular insurance policy should not now be followed. The court did not state what it thought the consequences are post 1 November 2005 where the *Garrett* advice has been followed.

<sup>1</sup> See para [1051].

<sup>2</sup> (2002) unreported, Peterborough County Court – Claim No PE104264.

<sup>3</sup> [2006] EWCA Civ 1017, [2007] 1 All ER 147, [2007] 1 WLR 554.

<sup>4</sup> [2008] EWCA Civ 1375, [2009] 4 All ER 526, [2009] 1 WLR 1731.

<sup>5</sup> See however *Re Claims Direct Test Cases* [2003] EWCA Civ 136, [2003] 4 All ER 508, [2003] 2 All ER (Comm) 788 at para [110] as to the reasonableness of taking out insurance after an admission of liability has been made.

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<sup>6</sup> [2003] EWCA Civ 718, [2003] 4 All ER 590, [2003] 1 WLR 2487, see para [151].

<sup>7</sup> See para [209].

## D Recoverability of the success fee

[49] Section 58A(6) of the CLSA 1990 provides for a costs order to include a success fee. That section applies only where the first CFA in respect of the proceedings or cause of action was made after 1 April 2000<sup>1</sup>. The CPR 1998 make provision for a costs order to include an ‘additional liability’ arising from a ‘funding arrangement’ which is defined as including a CFA, a Collective CFA and an insurance policy to which the AJA 1999, s 29 applies<sup>2</sup>. Section 9 of the CPD provides that under an order for payment of ‘costs’ the costs payable will include an additional liability.

For fixed success fees, see para [1191].

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<sup>1</sup> Access to Justice Act 1999 (Transitional Provisions) Order 2000, SI 2000/900, art 2(1) and see para [1071].

<sup>2</sup> SI 1998/3132, r 43.2(1)(k).

## Meaning of success fee

[50] Section 58(2)(b) of the CLSA 1990 defines success fee as an increase in specified circumstances above the amount which would be payable if it were not payable only in specified circumstances. In *Crook v Birmingham City Council*<sup>1</sup>, clients were offered a discounted rate by way of a cap of £1,000. Irwin J held that there was no success fee in such an arrangement but a discount from the ‘normal fee’, and that it could be argued in every case that the reduced level of fees – which will often be nil – represents what the market will bear and therefore the increment represents the success fee. This argument, he said, would obliterate the distinction normal in conditional fee agreements between the ‘base fee’ and the ‘success fee’. The Court of Appeal in *Gloucester County Council v Evans*<sup>2</sup> held that a CCFA providing for an hourly rate of £95 irrespective of outcome with a rate of £145 for a win did not amount to a success fee. The CCFA referred to the higher figure as base costs and to the lower figure as discounted charges. A success fee was then applied in the agreement only to the base charges – ie the higher fee. The court accepted that the higher figure was the fee which would have been charged had it not been a conditional fee and accordingly the 100% success fee applied to that figure was valid. In *Morris v Dennis*<sup>3</sup> the CFA defined basic charges to which a 100% success fee was applied plus an administration charge of £150. It was held that the charge was not part of the uplift which accordingly did not exceed the 100% maximum.

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<sup>1</sup> [2007] EWHC 1415 (Admin), [2007] NLJR 939, [2007] 5 Costs LR 732.

<sup>2</sup> [2008] EWCA Civ 21, [2008] 1 WLR 1883, [2008] NLJR 219.

<sup>3</sup> [2008] EWHC 90112 (Costs).

## Fixed success fees

[51] CPR 1998, Part 45 makes provision for fixed success fees in road traffic and employer liability cases. Successive additions to Part 45 from October

## CFAs after 1 April 2000 and before 1 November 2005 [52]

2003 to September 2005 have produced a scheme applicable to road traffic costs only proceedings, road traffic substantive proceedings, employer liability accident cases and finally employer liability disease cases. The commencement date for the section of Part 45 applicable to each of these types of proceedings differs<sup>1</sup>. There is nothing in Part 45 to suggest that the relevant date is anything other than the commencement of proceedings. In consequence claims for costs will be governed by the CPR 1998 applicable at the date proceedings commenced. The terms of a CFA may well not reflect, therefore, the rules applicable at the time for assessment but are likely to reflect the rules as they existed at the date of the CFA<sup>2</sup>. It was held in *Nizami v Butt*<sup>3</sup> that Sections II to V of Part 45 dis-applied the indemnity principle and that costs, including a fixed success fee, are recoverable irrespective of the validity of the CFA. The difficulty with this decision is with the wording of the relevant parts of the CPR 1998. Recovery of a fixed success fee is provided for in the CPR 1998, r 45.11(1): A claimant may recover a success fee if he has entered into a funding arrangement of a type specified in rule 43.2(1)(k)(i). Rule 43.2(1)(k)(i) provides: ‘funding arrangement’ means an arrangement where a person has –(i) entered into a CFA or a collective conditional fee agreement which provides for a success fee within the meaning of the CLSA 1990, s 58(2)<sup>1</sup>. It is submitted that there is a direct link between the recovery of a fixed success fee and a valid CFA since an invalid CFA is not one that complies with s 58. In *Wetzel v KBC FIDEA*<sup>4</sup>, the result was that the reasonableness of using a CFA rather than BTE was also irrelevant, at least for Part II – Master O’Hare being of the view that the court’s powers may be different under Part III.

<sup>1</sup> A summary in table form is given at para [55].

<sup>2</sup> See further at para [56]–[60].

<sup>3</sup> [2005] EWHC 159 (QB), [2006] 2 All ER 140, [2006] 1 WLR 3307.

<sup>1</sup> A summary in table form is given at para [55].

<sup>4</sup> [2007] EWHC 90079 (Costs).

*Road traffic costs only proceedings*

**[52]** A fixed success fee is recoverable under the road traffic accidents – fixed recoverable costs in costs-only proceedings procedure under Section II of the CPR 1998, Part 45<sup>1</sup>:

**‘45.11**

- (1) A claimant may recover a success fee if he has entered into a funding arrangement of a type specified in rule 43.2(k)(i).
- (2) The amount of the success fee shall be 12.5% of the fixed recoverable costs calculated in accordance with rule 45.9(1), disregarding any additional amount which may be included in the fixed recoverable costs by virtue of rule 45.9(2).’

Where the accident occurred on or after 6 October 2003 but costs only proceedings were issued before 1 March 2004 the success fee was not fixed but was subject to agreement or assessment<sup>2</sup>.

CPR 45.11 was considered by the Court of Appeal in *Kilby v Gawith*<sup>3</sup> which held that the word ‘may’ did not confer any discretion on a court and accordingly the availability of BTE insurance was not a factor where the fixed costs regime applied. A success fee of 12.5% was due irrespective of whether

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BTE insurance could have been used. This decision does not address the recovery of an ATE premium in such a case. ATE premiums are not a fixed recovery under Part 45 and therefore reasonableness is an issue. This decision may inadvertently put pressure on solicitors to run cases uninsured<sup>4</sup> or it may lead to solicitors paying the ATE premium rather than allow cases to go to a panel firm.

<sup>1</sup> SI 1998/3132. See para [1190.1].

<sup>2</sup> This wording came into force on 1 March 2004 – see 34th update to the CPR 1998. For costs only proceedings commenced before that date in respect of an accident occurring on or after 6 October 2003 the success fee was not fixed and was subject to assessment if not agreed. The new wording cannot have applied to proceedings commenced before it came into force – ie before 1 March 2004.

<sup>3</sup> [2008] EWCA Civ 812, [2009] 1 WLR 853, [2009] RTR 8.

<sup>4</sup> See *Dix v Townend* in para [15.1].

### *Road traffic other than in costs only proceedings:*

**[52.1]** A fixed success fee is recoverable under Section III of the CPR 1998, Part 45<sup>1</sup> – CPR 1998, r 45.15 in road traffic accident cases other than in costs only proceedings. CPR 1998, r 45.11 and r 45.15 apply to cases where the accident occurred on or after 6 October 2003.

The road traffic accidents rules fix base costs and success fees but do not fix the level of ATE premium. For cases settling pre-issue the success fee is fixed at 12.5%<sup>2</sup>. Cases settling after issue carry the same rate unless they settle at trial in which case the rate is 100%<sup>3</sup>. Success fees for counsel are dealt with differently by providing an increment of 50% if the case settles within 14 days of the trial date in fast track and 75% if the case settles within 21 days of the trial date in multi-track.

In *Dabele v Thomas Bates*<sup>4</sup> and *Lamont v Burton*<sup>5</sup>, settlement on the day set for trial but without any trial taking place was held to trigger the 100% success fee. Success fees for counsel are dealt with differently by providing an increment of 50% if the case settles within 14 days of the trial date in fast track and 75% if the case settles within 21 days of the trial date in multi track. If detailed assessment is not part of the trial process for the purposes of 45.16(1)(a) a case settling but on the basis that costs will be assessed at a detailed assessment will attract a success fee for the substantive claim of 12.5%<sup>6</sup>. Part 45.7 applies to costs only proceedings but that requires that no proceedings have been started. If no substantive proceedings have been issued it is unclear as to what rule applies to a detailed assessment. In *Sitapuria v Khan*<sup>7</sup> on the day fixed for the final hearing, before the case was opened, the judge made a consent order in the terms of an agreement reached by the parties. It was held, contrary to *Dabele v Thomas Bates & Son Ltd* that the claimant's solicitors and counsel were not entitled to a 100% success fee. In *Kingdom Thenga v Elsa Louise Quinn*<sup>8</sup> it was argued that a summary assessment hearing following a settlement of the substantive claim constituted a trial and therefore gave rise to an uplift of 100%. The Court of Appeal rejected that argument holding it was plain beyond serious argument that, in drafting Rule 45.15(6)(b), the rule-makers had not thrown out the conventional notion of a 'trial' and 'final contested hearing' related to the substantive claim, albeit including a hearing referable to a disputed claim for an award of

## CFAs after 1 April 2000 and before 1 November 2005 [55]

costs in principle, ie subject to quantification. Slade J disapproved *Dabele* in favour of *Sitapura* in *Amin and Hussain v Mullings*<sup>9</sup> rejecting an argument that under CPR 45 “at trial” meant merely the day of the trial and holding that where the case had settled on the day set for trial but without any hearing taking place the case had not settled “at trial”. The defendant’s counterclaim, which did proceed to a hearing, was held that to be a separate action from the claim.

<sup>1</sup> See para [1191].

<sup>2</sup> SI 1998/3132, Part 45, Section II.

<sup>3</sup> SI 1998/3132, Part 45, Section III.

<sup>4</sup> [2007] EWHC 90072 (Costs).

<sup>5</sup> [2007] EWCA Civ 429, [2007] 3 All ER 173, [2007] 1 WLR 2814.

<sup>6</sup> *Styler v Ingham* (2008) Leeds CC Ref 6MA 10298 where the view taken was that detailed assessment is not part of the trial process for the purposes of CPR 45.16(1)(a).

<sup>7</sup> Unreported – Liverpool County Court, 10 December 2007.

<sup>8</sup> [2009] EWCA Civ 151.

<sup>9</sup> [2011] EWHC 278 (QB).

*Employer liability cases other than disease*

[53] A fixed success fee is recoverable under Section IV of the CPR 1998, Part 45 – CPR 1998, r 45.21 in employer liability accident cases where the injury was sustained on or after 1 October 2004. Base costs and ATE premiums are not fixed. CPR 1998, r 45.21 applies the CPR 1998, rr 45.16 and 45.17 so that the same structure applicable to road traffic cases applies to employer liability cases but with a variation in the level of success fees providing 27.5% where a membership organisation has undertaken to meet the claimant’s liabilities for legal costs under the AJA 1999, s 30 and 25% in all other cases.

*Employer liability disease cases*

[54] For disease cases Section V of the CPR 1998, Part 45 – CPR 1998, r 45.23 came into force on 1 October 2005 and applies to disease cases where the claimant sent a letter of claim to the defendant containing a summary of the facts on which the claim is based and main allegations of fault on or after 1 October 2005. Success fees are fixed by the CPR 1998, r 45.24 with the rate being dependent upon the stage of proceedings and the type of disease. Different success fees apply to counsel than to solicitors.

*Road traffic cases*

[55] The following table sets out the dates from which the fixed fee rules apply and sets out the type of proceedings to which the rules apply:

Date rule in force	Date of accident	Costs only/ substantive proceedings	Base costs	Success fee
06.10.03	On or after 06.10.03	Costs only proceedings	Fixed	Agreed or assessed (not fixed)

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01.03.04	On or after 06.10.03	Costs only proceedings	Fixed	Fixed at 12.5%
01.06.04	On or after 06.10.03	Substantive proceedings	Fixed	Fixed according to stage proceedings reach

*Employer liability accident cases***[55.1]**

Date rule in force	Date of injury	Costs only/ substantive proceedings	Base costs	Success fee
1 October 2004	On or after 1 October 04	Both	Not fixed	Fixed according to stage proceedings reach

*Employer liability disease cases***[55.2]**

Date rule in force	Date letter of claim sent	Costs only/ substantive proceedings	Base costs	Success fee
1 October 2005	Before 1 October 2005	Both	Not fixed	Fixed according to type of disease and stage proceedings reach

**CFA wordings and fixed fees**

**[56]–[60]** It should be kept in mind that costs belong to the client. Part 45 fixes the success fee which can be ordered against a paying party. The CFA itself will govern the level of fees payable to the solicitor and the CFA needs to be drafted to reflect the fixed fee steps. The decision in *Nizami v Butt*<sup>1</sup> that fixed success fees are recoverable from an opponent irrespective of the validity of the CFA does not affect the point that costs belong to the client. It is difficult to see that *Nizami* would support an argument that the client has a liability under an invalid CFA. If *Nizami* is correct the result is that the opponent has a liability to pay costs that the client has no liability to pay and over which the solicitor has no rights. The multiple variations increase the complexity of the explanation to the client but if they are not included then the client will keep any difference between the costs allowed and those specified in the CFA. In this respect even the use of a simplified CFA which provided that the client's liability for costs will be limited to the costs recovered from the opponent will not avoid the complexities of the variable success fee because it is the

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CFAs after 1 April 2000 and before 1 November 2005 [61]

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CLSA 1990, s 58 that requires the CFA to state the percentage by which fees are to be increased. The success fee in the case of solicitors therefore must be expressed as a two stage fee fixed at the date of the CFA. In the case of the CFA with counsel there must be three stages, again fixed at the date of the CFA.

Each Section of Part 45 will apply to costs assessments on the basis of the date of commencement of proceedings, including costs only proceedings. The CFA in respect of those proceedings may well have been entered into before the relevant Section of the CPR 1998, Part 45 came into being. This will give rise to two situations of complexity:

- (1) Cases where the CFA provides for a success fee that is lower than the fixed success fee applicable at the date of commencement of proceedings.
- (2) Cases where the CFA provides for a higher success fee than that applicable at the date of commencement of proceedings.

The liability of the client in both cases will be governed by the CFA. The liability of a paying party will depend upon whether or not the Part 45 is regarded as an exception to the indemnity principle. If it is an exception then it is possible that the paying party will be liable for the fixed success fee even though the client is liable for a lower fee. The client would not be liable to pay the difference between the fee set in the CFA and that recovered. If Part 45 is not regarded as an exception to the indemnity principle then the paying party will be liable only to the extent of the lower fee stated in the CFA. If the CFA provides for a higher success fee than the fixed figure then although the client is liable for the higher rate the paying party is not.

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<sup>1</sup> [2005] EWHC 159 (QB), [2006] 2 All ER 140, [2006] 1 WLR 3307.

### **Success fees and CFAs made after 1 April 2000 and before 3 July 2000**

[61] The success fee is only recoverable in respect of things done and costs incurred from the date the CFA was made<sup>1</sup>. This appears to mean that although the CFA may cover work done before it was made, a not unusual position, the opponent is not at risk of paying a success fee in respect of that period. If it is intended by the CFA that the client should remain liable for that part of the success fee this should be carefully explained. Where a CFA covers work done before and after 1 April 2000, the CPR become difficult through lack of provisions to deal with this transitional combination. A court cannot include in an order for costs an additional liability in relation to costs relating to work done before 1 April. The CFA Regulations 2000<sup>2</sup>, reg 3(2)(b) requires the CFA to provide that any disallowed part of a success fee is to cease to be payable unless the court orders otherwise. In the transitional circumstances it is assumed that the court will order that part of the success fee relating to work done before 1 April to continue to be payable.

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<sup>1</sup> Practice Direction About Costs, s 57.9(3) and see para [1230].

<sup>2</sup> SI 2000/692.

## [62] Litigation Funding

### Success fees and CFAs made after 3 July 2000

[62] There is no provision limiting the period of work to be covered by the recoverable success fee. An opponent is at risk of having to pay a success fee in respect of work done before a CFA is made since the CFA when made will usually relate to all work done in respect of the cause of action. An opponent is therefore at risk of having to pay a success fee in respect of work done before the CFA is notified (although since 1 April 2004 in the case of personal injury the protocol provides that notice should be given). On ordinary principles of contract such an agreement with the client would be valid. The result in terms of the transitional period is that where the CFA was made after 3 July 2000 to include work done before 1 April 2000 the success fee will be recoverable for the pre-April work. To decide otherwise would be to deny effect to the transitional rules which specifically dealt with agreements made between 1 April and 3 July 2000. By analogy an additional liability in the form of an insurance premium has been allowed in respect of a policy of insurance purchased in December 2000 giving retrospective cover for costs incurred before April 2000<sup>1</sup>. The Senior Costs Judge in *King v Telegraph*<sup>2</sup> doubted nonetheless that a retrospective success fee ought to be recoverable:

‘Although there is no prohibition in the legislation against backdating a success fee, such backdating seems to me to fly in the face of the CFA Regulations and the CPR. As [counsel for the defendant] has pointed out the solicitors are placed under a strict duty to explain the position to their client, which they did not do until shortly before the CFA was signed. The solicitors do not assume any risks under the CFA until it is signed (although they may well have been at the normal commercial risk of not being paid prior to that point). The solicitors are under no duty to give notice of funding until the CFA has been signed. It is of great importance that an opposing party should be aware of any additional liability as early as possible. The Claimant is, to an extent, protected in that the level of the success fee does not have to be disclosed, but, unless and until the Defendants are made aware that they are potentially liable for a success fee this may fundamentally affect the way in which they choose to conduct the litigation.’ [89]

The question of a retrospective success fee arose directly in *Forde v Birmingham City Council*<sup>3</sup> where *King v Telegraph* was followed and no success fee was recoverable in respect of the retrospective period of the CFA. This was a case where a second CFA had been put in place to replace a first CFA thought to be invalid. The first CFA did not have a success fee. Had the first CFA included a success fee then the result may have been different as to the retrospective effect of the success fee in the second CFA.

<sup>1</sup> *Ashworth v Peterborough United Football Club* (10 June 2002, unreported) SCCO 0201106. Retrospective cover was also purchased in *Inline Logistics v UCI Logistics Ltd* [2002] EWHC 519 (Ch), (2002) Times, 2 May, [2002] 2 Costs LR 304.

<sup>2</sup> [2005] EWHC 90015 (Costs).

<sup>3</sup> [2008] EWHC 90105 (Costs).

### Statutory limit to the success fee

[63] The success fee cannot exceed 100% of basic costs<sup>1</sup>. Proposals to remove this limit from the Commercial Court, Construction and Technology Court and Admiralty have not been implemented. In such commercial litigation the statutory maximum is likely to cause difficulty, particularly where a charge is

## CFAs after 1 April 2000 and before 1 November 2005 [65]

included in the success fee to reflect waiting for payment. In a commercial case it may be expected that the matter will not conclude for perhaps three years from the signing of the CFA. A waiting for payment element near 20% is not unlikely in such circumstances, leaving 80% for merits in cases where 100% is justified. In such a case it would seem open for the CFA to state that the total success fee including waiting for payment would be in excess of 100% and that only the success fee relating to the merits has been applied.

In *Oyston v Royal Bank of Scotland*<sup>2</sup> the CFA originally provided for a success fee of 100% but was later altered to include a bonus of £50,000 in the event that damages in excess of £1m were recovered. That was held to be a breach of s 58 rendering the CFA invalid. The breach was regarded as serious in terms of the adverse effect on the administration of justice. In *Jones v Caradon Catnic Ltd*<sup>3</sup> a collective CFA provided that the solicitor should carry out a risk assessment and stated that the success fee should not exceed 100%. The risk assessment however specified a success fee of 120%. The Court of Appeal held this to be a breach of the Act and the Conditional Fee Agreements Order 2000 and that there was a materially adverse effect on the administration of justice (*Hollins v Russell*<sup>4</sup>). In *Crook v Birmingham City Council*<sup>5</sup> clients were offered a discounted rate by way of a cap of £1,000. Irwin J held that there was no success fee in such an arrangement but a discount from the 'normal fee', and that it could be argued in every case that the reduced level of fees – which will often be nil – represents what the market will bear and therefore the increment represents the success fee. This argument, he said, would obliterate the distinction normal in conditional fee agreements between the 'base fee' and the 'success fee'. The Court of Appeal in *Gloucester County Council v Evans*<sup>6</sup> held that a CCFA providing for an hourly rate of £95 irrespective of outcome with a rate of £145 for a win did not amount to a success fee.

<sup>1</sup> CFA Order 2000, SI 2000/823 and see para [1061]. In cases brought under the Environmental Protection Act 1990, s 82 this order prohibits any success fee.

<sup>2</sup> [2006] EWHC 90053 (Costs).

<sup>3</sup> [2005] EWCA Civ 1821; [2006] 3 Costs LR 427.

<sup>4</sup> [2003] EWCA Civ 718, [2003] 4 All ER 590, [2003] 1 WLR 2487.

<sup>5</sup> [2007] EWHC 1415 (Admin), [2007] NLJR 939, [2007] 5 Costs LR 732.

<sup>6</sup> [2008] EWCA Civ 21, [2008] 1 WLR 1883, [2008] NLJR 219.

*The non-recoverable element*

[64] Rule 44.3B(1)(a)<sup>1</sup> precludes recovery of any part of a success fee which relates to waiting for payment of fees and expenses. This element remains payable by the client. There is no statutory control over this amount, other than by the overall limit of 100% for the entire success fee.

<sup>1</sup> Civil Procedure (Amendment No 3) Rules 2000, SI 2000/1317.

*Calculating the success fee***Waiting for payment element**

[65] The standard practice for a CFA is for payment of fees to be postponed until the (successful) outcome of the case. The payment of disbursements is less standard with some CFAs providing for payment before the conclusion of the

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case and others postponing this also. There is a cost attached therefore to this delay and it is carried by the solicitor. If a charge for this delay is to be included in the success fee then the percentage relating to waiting for payment must be separately stated in the CFA<sup>1</sup>. This element cannot form part of the additional liability to be recovered from an unsuccessful opponent<sup>2</sup>. It remains the liability of the client in the event that the case is successful. In *Hollins v Russell*<sup>3</sup> there was a conflict between the wording of the CFA and that of the risk assessment with the former failing to refer to a percentage for delay and the later providing for such an element. The Court of Appeal approved an admission that in such circumstances that element would not be recoverable from the client.

The client can challenge the percentage of the success fee in the usual way under Rule 48. The percentage of the success fee relating to waiting for payment will on the face of the CFA apply to the base costs actually incurred in the litigation and not merely to those costs recovered from the unsuccessful opponent. Those costs will have been incurred over a period of time accumulating to a total to which the percentage of the success fee is then applied. Using the success fee as the mechanism for this recovery of cost will, therefore, have a tendency to inflate the amount recovered if it assumes all costs were incurred from day one. The difficulty in an individual case is accurately to predict the length of time during which the solicitor is waiting for payment.

The use of the success fee as the mechanism for recovering the cost of waiting for payment calls for an accurate prediction of the length of time which will elapse before the conclusion of the case. The following table illustrates the percentage of a success fee which would be called for to obtain the annual interest rates in the table.

Interest Rate (%)	6.0	8.0	10.0		6.0	8.0	10.0
Month				Month			
9	4.5	6.0	7.5	23	11.5	15.3	19.2
10	5.0	6.7	8.3	24	12.0	16.0	20.0
11	5.5	7.3	9.2	25	12.5	16.7	20.8
12	6.0	8.0	10.0	26	13.0	17.3	21.7
13	6.5	8.7	10.8	27	13.5	18.0	22.5
14	7.0	9.3	11.7	28	14.0	18.7	23.3
15	7.5	10.0	12.5	29	14.5	19.3	24.2
16	8.0	10.7	13.3	30	15.0	20.0	25.0
17	8.5	11.3	14.2	31	15.5	20.7	25.8
18	9.0	12.0	15.0	32	16.0	21.3	26.7
19	9.5	12.7	15.8	33	16.5	22.0	27.5
20	10.0	13.3	16.7	34	17.0	22.7	28.3
21	10.5	14.0	17.5	35	17.5	23.3	29.2
22	11.0	14.7	18.3	36	18.0	24.0	30.0

<sup>1</sup> CFA Regulations 2000, SI 2000/692, reg 3(1)(b) at para [1051].

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- <sup>2</sup> SI 1998/3132, r 44.3B (inserted by the Civil Procedure (Amendment No 3) Rules 2000, SI 2000/1317).
- <sup>3</sup> [2003] EWCA Civ 718 at 133, [2003] 4 All ER 590, [2003] 1 WLR 2487 referring to the conjoined appeal of *Tichband v Hurdman*.

**The risk that the case will lose**

[66] The major part of the success fee will reflect the risk that fees will not be earned because the case fails. Nonetheless, the Court of Appeal in *Gloucester County Council v Evans*<sup>1</sup> rejected the argument that the lawfulness of a success fee in terms of the statutory maximum of 100% should be measured by reference to the costs at risk. The agreement was for £95 per hour in any event and £145 for a win, it being then argued that the costs at risk were £50 so that the true success fee amounted to 290%. The court held that the proper measure was against the fee that would have been payable had the agreement not been a CFA which it said was £145. The CFA must contain brief reasons for setting this percentage<sup>2</sup>. A risk assessment of the individual case will provide the reasons for this element<sup>3</sup>. The risk assessment needs to be expressed as a percentage level of confidence which can then be translated into a percentage success fee. The purpose of this element of the success fee is to recover from the successful cases sufficient funds to offset the losses incurred in unsuccessful cases. If the costs typically incurred in winning cases were the same as those typically incurred in cases which lose, an arithmetic conversion would be possible<sup>4</sup>. This conversion requires a simple mathematical formula as follows: Express the confidence of success in percentage terms – eg 60%. Convert that to a two figure decimal by dividing the percentage figure by 100 – eg  $60 \div 100 = .6$ . Divide 1 by that decimal eg  $1 \div .6 = 1.67$ . 1 represents the normal fee. To find the success fee, deduct 1 and multiply by 100. Eg  $1.67 - 1 = .67 \times 100 = 67\%$ .

In *Spiralstem v Marks & Spencer*<sup>5</sup>, the claimants entered into a CFA with their solicitors that provided for a success fee of 100%. Master Campbell in the SCCO held that the decision as to whether or not the ready reckoner should be adjusted to reflect that the fact that there is a split trial on liability and quantum and, therefore, a change in the level of risk should be left to an appeal court. The same costs judge sat in *Barham v Athreya*<sup>6</sup> where Judge Dean QC appears to have been referred to a shortened version of the ready reckoner which listed a 50% chance case and then a 60% chance case with dramatic decrease in the success fee from 100% in the former to 67% in the latter. In *Oliver v Whipps Cross Hospital NHS Trust*<sup>7</sup> the view taken in *Barham* of the firm's standard CFA was comprehensively rejected. The judge rejected the argument that the firm would not have taken the case had it only had 50% prospects. He also rejected the view that there had to be a two stage fee if a 100% figure was ever to be approved. The result was approval of a single stage 100% fee. *McCarthy v Essex Rivers Healthcare NHS Trust*<sup>8</sup> is, according to the judgment, the fourth case in which the same clinical negligence firm's CFA has been reviewed by a court. Here the point taken was that the CFA (as do most) provided that it could be terminated “ . . . if we believe that you are unlikely to win.” That, said Mackay J, was relevant to the level of a single stage success fee (claimed at 100%). Also relevant was the fact that this was not a two stage success fee. The success fee had been reduced to 80% and this appeal against that decision failed. It was accepted that the case was, at the

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time taken on, a 50:50 risk. Mackay J took the view that the termination clause meant that at a fairly early stage cases below a 50% chance can be removed leaving claims falling into the range of 50% to 80% prospects. The table below provides the detail explaining what appears to be a dramatic change. Ignoring this detail will always give a false appearance of dramatically varying figures. Crane J in *Edwards v Smiths Dock Ltd*<sup>9</sup> approved of the ready reckoner as not producing unreasonable levels of success fee.

<sup>1</sup> [2008] EWCA Civ 21, [2008] 1 WLR 1883, [2008] NLJR 219.

<sup>2</sup> CFA Regulations 2000, SI 2000/692, reg 3(1)(a).

<sup>3</sup> See para [221] ff.

<sup>4</sup> Such a conversion is produced in a table in Bawdon, Napier and Wignall *Conditional Fees – A Survival Guide* (2nd edn) Law Society publications.

<sup>5</sup> [2007] EWHC 90084 (Costs).

<sup>6</sup> [2007] EW Misc 6 (EWCC) Central London County Court.

<sup>7</sup> [2009] EWHC 1104 (QB), 108 BMLR 181, 153 Sol Jo (no 21) 29.

<sup>8</sup> Unreported, Case No HQ06X03686, 13 November 2009, QBD.

<sup>9</sup> [2004] EWHC 1116 (QB), [2004] 3 Costs LR 440,.

**[67]** Table of commonly used percentage success fees:

Confidence of success	Success fee	Confidence of success	Success fee
100	0	65	54
80	25	60	66
75	33.3	55	81
70	43	50	100

Such a conversion ratio cannot give an accurate reflection where costs incurred in a typical losing case exceed in a significant amount the costs typically incurred (and recovered) in successful cases. The conversion method can be used as a starting point in such an environment in that it shows the level of success fee which would be needed even where there is no differential in costs in won and lost cases.

The table below calculates the risk assessment part of the success fee according to the ratio of costs in lost cases to won cases. Thus a costs ratio of 1 means that it is assumed that the costs in a case which loses are equal to a case which wins. A ratio of 2 means that the assumption is that costs in a lost case will be double the costs in a case which wins. Percentages have been rounded up.

	Costs ratio	1	1.5	2	2.5	3	
	<b>Chance of winning</b>			Success Fee			
	50	100%	150%	200%	250%	300%	
	51	96%	144%	192%	240%	288%	
	52	92%	138%	185%	231%	277%	
	53	89%	133%	177%	222%	266%	
	54	85%	128%	170%	213%	256%	

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55		82%	123%	164%	205%	245%	
56		79%	118%	157%	196%	236%	
57		75%	113%	151%	189%	226%	
58		72%	109%	145%	181%	217%	
59		69%	104%	139%	174%	208%	
60		67%	100%	133%	167%	200%	
61		64%	96%	128%	160%	192%	
62		61%	92%	123%	153%	184%	
63		59%	88%	117%	147%	176%	
64		56%	84%	113%	141%	169%	
65		54%	81%	108%	135%	162%	
66		52%	77%	103%	129%	155%	
67		49%	74%	99%	123%	148%	
68		47%	71%	94%	118%	141%	
69		45%	67%	90%	112%	135%	
70		43%	64%	86%	107%	129%	
71		41%	61%	82%	102%	123%	
72		39%	58%	78%	97%	117%	
73		37%	55%	74%	92%	111%	
74		35%	53%	70%	88%	105%	
75		33%	50%	67%	83%	100%	
76		32%	47%	63%	79%	95%	
77		30%	45%	60%	75%	90%	
78		28%	42%	56%	71%	85%	
79		27%	40%	53%	66%	80%	
80		25%	38%	50%	63%	75%	
81		23%	35%	47%	59%	70%	
82		22%	33%	44%	55%	66%	
83		20%	31%	41%	51%	61%	
84		19%	29%	38%	48%	57%	
85		18%	26%	35%	44%	53%	
86		16%	24%	33%	41%	49%	
87		15%	22%	30%	37%	45%	
88		14%	20%	27%	34%	41%	
89		12%	19%	25%	31%	37%	
90		11%	17%	22%	28%	33%	
91		10%	15%	20%	25%	30%	
92		9%	13%	17%	22%	26%	
93		8%	11%	15%	19%	23%	
94		6%	10%	13%	16%	19%	
95		5%	8%	11%	13%	16%	
96		4%	6%	8%	10%	13%	
97		3%	5%	6%	8%	9%	
98		2%	3%	4%	5%	6%	

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	99		1%	2%	2%	3%	3%	
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The shaded area of the table shows the levels of confidence needed to achieve a success fee below the statutory maximum of 100%. Allowance may still need to be made for disbursement liability and for waiting for payment, in which case the level of confidence will need to be higher.

**Ratio of 1 – cut-off point**

**[68]** 51% is the margin – out of 100 cases, 51 will win and 49 will lose (on average). With costs in losing cases being the same as the winning cases, there must be at least a 51% confidence of winning the case for the success fee to cover the losses.

This can be shown as follows: 51 cases win, at a success fee of 96% on £1,000.00 costs. Your total regained funds for these 51 cases are therefore  $51 \times 96\% \times 1000 = £48,960.00$ .

On the 49 cases that, on average, would lose, £49,000.00 would be paid out. The work just breaks even.

**Ratio of 1.5 – cut-off point**

**[69]** 61% confidence is your lowest possible limit. Recovered costs are  $61 \times 95.9\% \times 1000 = £59,000.00$  and costs out are  $£39,000.00 \times 1.5 = £59,000.00$ .

At a ratio of 2 the same confidence level would give this result: costs recovered:  $61 \times 100\% \times 1000 = £61,000.00$  whereas costs out are  $£39,000.00 \times 2 = £78,000.00$  leaving a deficit of £17,000.00.

**Ratio of 2 – cut-off point**

**[70]** The cut-off point is now 67% confidence: Costs recovered will be £67,000.00 and costs going out will be £66,000.00. If the ratio went to 2.5 at that confidence level the following results: costs recovered £67,000.00 but costs going out are £82,500.00 giving a deficit of £15,500.00.

The following examples illustrate the effect of the costs ratio assumptions where the level of confidence is 75%:

Costs Ratio	Success fee %					
		Case Number	Costs	Success Fee	Loss	Net loss
1	33	1	1000	333.33	0	
		2	1000	333.33	0	
		3	1000	333.33	0	
		4	0	0	1000	
				1000	1000	NIL
		Case Number	Costs	Success Fee	Loss	

## CFAs after 1 April 2000 and before 1 November 2005 [70]

1.5	50	1	1000	500	0	
		2	1000	500	0	
		3	1000	500	0	
		4	0	0	1500	
				1500	1500	NIL
		<b>Case Number</b>	<b>Costs</b>	<b>Success Fee</b>	<b>Loss</b>	
2	66	1	1000	666.66	0	
		2	1000	666.66	0	
		3	1000	666.66	0	
		4	0	0	2000	
				2000	2000	NIL
		<b>Case Number</b>	<b>Costs</b>	<b>Success Fee</b>	<b>Loss</b>	
2.5	83	1	1000	833.33	0	
		2	1000	833.33	0	
		3	1000	833.33	0	
		4	0	0	2500	NIL
				2500	2500	
		<b>Case Number</b>	<b>Costs</b>	<b>Success Fee</b>	<b>Loss</b>	
3	100	1	1000	1000	0	
		2	1000	1000	0	
		3	1000	1000	0	
		4	0	0	3000	NIL
				3000	3000	

All of the above calculations can be used where the CFA states that in the event of the case losing no fee at all will be paid. In such a case the success fee reflects the risk of no payment. Where the CFA provides for some payment where the case loses, then the calculation of the success fee must reflect the fact that only part of the fees are being risked. One method of doing this is to calculate the success fee as above but provide that it is only to be applied to the part of the basic fees which would not be paid if the case loses.

Example assuming normal base fee is £1000:

Case loses – 50% of normal fees payable – £500

Case wins – 100% of normal fees payable £1000 plus success fee of 66%

Success fee applied to 50% of basic fee is  $66\% \times £500 = £330$

The alternative method would be to reduce the ordinary success fee by the percentage of the basic fees being risked. In the above example, the success fee of 66% would be reduced by 50% to 33%. This reduced success fee when

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applied to normal basic costs gives the same result as the first method – ie 33% × £1000 = £330 but this does not reflect the risk assessment which should support a success fee at 66% and it is submitted that this method ought not to be used.

### Liability for disbursements

**[71]** Section 11.8(1)(b) of the Practice Direction About Costs (CPD) expressly refers to the legal representative's liability for any disbursements as being a factor to be taken into account in assessing the reasonableness of the success fee. The success fee is applied to the fees charged and is not applied to disbursements. If the solicitor is carrying the liability for disbursements in the event that the case is unsuccessful, the only mechanism for reflecting that risk lies in increasing the percentage of the success fee. The increase attributable to this liability will be recoverable from a losing opponent and can therefore be challenged as being set at an unreasonable level. The test is whether the percentage increase was reasonable having regard to the circumstances as they reasonably appeared at the time the percentage was set<sup>1</sup>. As with the percentage for waiting for payment the difficulty is in accurately predicting the level of disbursements to be reflected in a percentage of the success fee which is a multiplier to the fees incurred throughout the life of the case. In order to calculate the percentage success fee to recover disbursement liability it is first necessary to express the disbursements as a percentage of costs. That percentage is then multiplied by the success fee percentage figure representing the risk of the case losing. This element of the success fee is vulnerable to inaccuracy in predicting costs and/or disbursements.

<sup>1</sup> CPD, s 11.7 at B[2474].

### Outsourced services

**[71.1]** The Court of Appeal in *Crane v Canons Leisure Centre*<sup>1</sup> considered the question of whether charges of an outside agency could be treated as work done by a fee earner rather than as a disbursement. The court concluded in the context of an independent costs draftsman that the fee could be charged as the solicitor's fee and a success fee could therefore be levied on it. The distinction was drawn between charges by solicitors themselves for work which they themselves do or are directly responsible for and expenses which they incur for a client for other people's work for which they are not directly responsible and in respect of which they simply pass on the cost to the client.

<sup>1</sup> [2007] EWCA Civ 1352, [2008] 2 All ER 931, [2008] 1 WLR 2549.

**[72]** Illustration of the calculation of the disbursement element of a success fee

Disbursements	Costs	Ratio D to C	% Confidence success fee	Disbursement success fee %
£500	£10,000	5%	33.3%	1.66

## CFAs after 1 April 2000 and before 1 November 2005 [74]

*Disclosure to opponent***Pre-issue**

[73] The requirements for disclosure are contained in r 44.15<sup>1</sup> and s 19 of the Practice Direction About Costs<sup>2</sup>. There are no requirements relating to pre-issue disclosure but such is recommended in the CPD<sup>3</sup>, the Protocols Practice Direction<sup>4</sup> until 1 October 2009 and thereafter the Practice Direction (Pre-Action Conduct). The Protocols Practice Direction provides that disclosure ‘should’ occur pre-issue. From 1 April 2004 the Personal Injury Pre-action Protocol provided that notice should be given when a funding arrangement is made. There are conflicting views on the meaning of ‘should’. In *Metcalfe v Clipstone*<sup>5</sup> it was held to mean can but not must disclose and in *Cullen v Chopra*<sup>6</sup> the same costs judge was not persuaded that the decision in *Metcalfe* was wrong, whereas in *Bainbridge v MAF Pipelines*<sup>7</sup> it was held to mean ‘must’ with the usual costs consequences of a failure to comply with the Practice Direction. From 1 October 2009 the Practice Direction (Pre-Action Conduct) provides that where a party enters into a funding agreement that party must inform the other parties as soon as possible and in any event either within 7 days of entering into the funding arrangement concerned or, where a claimant enters into a funding arrangement before sending a letter before claim, in the letter before claim. The CPD uses the phrase ‘funding arrangement’ to refer both to a CFA with success fee and to an insurance policy. Where more than one such arrangement has been made in respect of a case a single notice can provide the information relating to each arrangement<sup>8</sup>.

<sup>1</sup> See para [1188].

<sup>2</sup> In force 3 July 2000.

<sup>3</sup> CPD, s 19.2(5) at para [1227].

<sup>4</sup> The Protocols Practice Direction came into force on 3 July 2000 and remained in force until 1 October 2009. It provided:

‘4A.1 Where a person enters into a funding arrangement within the meaning of rule 43.2(1)(k) he should inform other potential parties to the claim that he has done so.

4A.2 Paragraph 4A.1 applies to all proceedings whether proceedings to which a pre-action protocol applies or otherwise.’

From 1 April 2004 the Personal Injury pre-action protocol provides in clause 3.2 that where the case is funded by a conditional fee agreement (or collective conditional fee agreement), notification should be given of the existence of the agreement and where appropriate, that there is a success fee and/or insurance premium, although not the level of the success fee or premium.

<sup>5</sup> 2004 unreported SCCO Case No: HN300882.

<sup>6</sup> [2007] EWHC 90093 (Costs).

<sup>7</sup> 2004 unreported – Teesside County Court.

<sup>8</sup> CPD, s 19.4(5) at para [1227].

**Relief from sanction**

[74] CPR 1998, r 44.3B(1)(c) provides that a party may not recover any additional liability for any period in the proceedings during which he failed to provide information about a funding arrangement in accordance with a rule,

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practice direction or court order. Part 3, r 3.9 provides a procedure for the granting of relief from sanction for failure to comply with a Rule, Practice Direction or Court Order:

‘3.9

- (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –
  - (a) the interests of the administration of justice;
  - (b) whether the application for relief has been made promptly;
  - (c) whether the failure to comply was intentional;
  - (d) whether there is a good explanation for the failure;
  - (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol (GL);
  - (f) whether the failure to comply was caused by the party or his legal representative;
  - (g) whether the trial date or the likely trial date can still be met if relief is granted;
  - (h) the effect which the failure to comply had on each party; and
  - (i) the effect which the granting of relief would have on each party.
- (2) An application for relief must be supported by evidence.’

The CPD 10.1 provides–

‘In a case to which rule 44.3B(1)(c) or (d) applies the party in default may apply for relief from the sanction. He should do so as quickly as possible after he becomes aware of the default. An application, supported by evidence, should be made under Part 23 to a costs judge or district judge of the court which is dealing with the case. (Attention is drawn to rules 3.8 and 3.9 which deal with sanctions and relief from sanctions).’

[75] In *Hardcastle v Leeds and Holbeck Building Society*<sup>1</sup> the claimant alleged negligence in a mortgage valuation causing the claimant to purchase a property at a significant over value. There was a further claim for personal injury in the form of depression as result of living in a house with serious defects. Solicitors acted from February 2000 and entered into a CFA in October 2000. No notice of the CFA was given until costs were sought following a Tomlin order made in March 2002. It was held that CPR 1998, rr 44.3B and 44.15(1) required information to be given once proceedings were issued. This was a pre-condition to recovery of a success fee. The CPD at 19.2(5) recommended that notice be given prior to issue but that was not an absolute requirement. There was no applicable pre-action protocol in this case. The court could disallow all or part of a success fee if the paying party could show some prejudice had been caused to it by the failure to give notice. No such prejudice was shown because the defendant had totally rejected the claim and there was nothing to suggest that its position would have altered had it known of the CFA. No reference is here made to the Protocols Practice Direction which provides as follows –

- ‘4A.1 Where a person enters into a funding arrangement within the meaning of rule 43.2(1)(k) he should inform other potential parties to the claim that he has done so.
- 4A.2 Paragraph 4A.1 applies to all proceedings whether proceedings to which a pre-action protocol applies or otherwise.’

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CFAs after 1 April 2000 and before 1 November 2005 [76]

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The result would seemingly have not altered because this notice requirement would also not have altered the defendant's stance.

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<sup>1</sup> [2003] 7 CL 48 (QBD).

[76] In *Tait v Cataldo*<sup>1</sup> a Notice of Funding served in February 2008 referred only to a CFA made in November 2006 with no reference to two earlier CFAs or to an ATE policy. In respect of the ATE the failure was an error in transcribing a written N251 into the typed version sent to the defendants. As to the two earlier CFAs those had come to an end by the time the notice had to be given and the solicitor took the view that those earlier CFAs, being spent, did not need to be referred to. That understanding was not however relied upon before Master O'Hare who took the view that counsel was right not to argue that the earlier CFAs need not be referred to. The explanations given for the mistakes did not count in favour of granting relief but Master O'Hare did grant relief in all respects based on the view that the CFA mistakes were of little significance, the ATE mistake had caused no prejudice to the defendants and the mistakes had in terms of substance been remedied informally before the settlement process commenced.

The failures in *Supperstone v Hurst*<sup>1</sup> were that service by email was not sufficient, the notice was unsigned and omitted the address of the insurer and the policy number, and the notice was late. The lateness was explained in respect of the ATE policy in that the solicitors assumed the policy came into effect at a later date and had given notice at that point. Relief from sanction was given and on appeal upheld on the basis of the explanation given as to lateness, including the fact that the notice stated the later date for commencement of cover, and that there was no evidence of disadvantage to the opponent. In *Kutsi v North Middlesex University Hospital NHS Trust*<sup>2</sup> contrary to CPR 44.15 and CPR 44.3B, the defendant had not been notified of the existence of the policy until after the claim was settled, as a result of which the claimant needed the court to grant relief from sanctions before she could attempt to recover the premium of £80,325.00 from the defendant on detailed assessment. On appeal it was held right to be critical of the firm's failure to be aware of rudimentary CPR principles and there was no good explanation for the complete failure to give any notice of the premium at all. It followed that irrespective of any prejudice to the paying party relief from sanction would be refused. In *Haydon v Strudwick*<sup>4</sup> an initial CFA with success fee was entered into whilst the client was a minor. Upon gaining majority the client's position became one of patient and a second CFA was entered into. ATE insurance was also taken out. No notice of funding for any of these additional liabilities was ever sent. Both CFAs were at various stages referred to in correspondence. Early correspondence did refer also to the first CFA having additional liabilities. At no point was the ATE policy referred to. Relief from sanction was granted in respect of the two CFAs but not in respect of the ATE policy. Having applied all of the factors of CPR 3.9 for the granting of relief none of those factors indicated that relief ought to be withheld. In particular the opponent was aware that there was a CFA with additional liabilities (but not the ATE) and was not prejudiced by a failure to provide the technical detail that form N251 sets out.

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<sup>1</sup> [2010] EWHC 90166 (Costs).

<sup>1</sup> [2008] EWHC 735 (Ch), [2008] 4 Costs LR 572, [2008] BPIR 1134.

<sup>2</sup> [2008] EWHC 90119 (Costs).

<sup>4</sup> [2010] EWHC 90164 (Costs).

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**[77]–[80]** In *Williams v Plymouth Community Services NHS Trust*<sup>1</sup>, a county court appeal, notice had not been given of the existence of a CFA or of insurance entered into in February 2002. Notice was given in July 2002 and immediate application for relief under the CPR 1998, Part 3, r 3.9. The county court held that the appeal was brought by the client and not the solicitor and that if a sanction was to be imposed it would necessitate a differentiation between the success fee attributable to work done before notice was given and that attributable to later work. That would involve an unjustifiable expense in itself. The court considered that the relatively modest mistake by the solicitor ought not to deprive the client of her success fee.

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<sup>1</sup> [2003] 4 CL 57.

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## Claimant funding arrangement in place before issue

**[81]** Notice of the funding arrangement must be given to the court when issuing the claim form<sup>1</sup>. Form N251<sup>2</sup> sets out the details required. Sufficient copies of Form N251 must be provided to the court for service on all other parties. If the claimant is serving the claim form in person then form N251 must be served at the same time.

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<sup>1</sup> Claim form includes petition and application notice. See CPD, s 19.2(1) at para [1227].

<sup>2</sup> See para [1241].

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## Defendant funding arrangements in place before filing a document

**[82]** Notice to the court must be given when filing the first document<sup>1</sup>. Sufficient copies of the notice should be provided to the court for service on all other parties. If the defendant serves the first document in person then notice of the funding arrangement must be served at the same time.

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<sup>1</sup> First document includes an acknowledgment of service, a defence, application to set aside default judgment or any other document. See CPD, s 19.2(3)(a) at para [1227].

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## Funding arrangements made after issue

**[83]** A party must file and serve notice to the court and to all other parties within seven days of making the funding arrangement<sup>1</sup>.

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<sup>1</sup> CPD, s 19.2(4) at para [1227].

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CFAs after 1 April 2000 and before 1 November 2005 **[88]**

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*The information required to be disclosed<sup>1</sup>*

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<sup>1</sup> CPD, s 19.4 at para [1227].

**CFAs with success fee**

**[84]** State the date of the CFA and the claim(s) to which it applies.

*Disclosure where the funding arrangement was made after 1 April and before 3 July 2000*

**[85]** Where a party has entered into a funding arrangement and started proceedings after 1 April but before 3 July 2000, the disclosure requirements were to be complied with by 31 July 2000 irrespective of the date within the transitional period on which the funding arrangement was made<sup>1</sup>. This provision applies only to claimants. Where a defendant entered into a funding arrangement between 1 April and 3 July 2000 there is no provision<sup>2</sup>.

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<sup>1</sup> Civil Procedure (Amendment No 3) Rules 2000, SI 2000/1317, r 39 at para [1081]. This Rule does not amend the CPR 1998 and stands alone as the transitional provision.

<sup>2</sup> It was held in *Inline Logistics Ltd v UCI Logistics Ltd* [2002] EWHC 519 (Ch), (2002) Times, 2 May, [2002] 2 Costs LR 304 by Ferris J that the AJA 1999, s 29 gave the court power to award an additional liability, that there were no applicable rules for defendants and that the absence of applicable rules should not prevent recovery. The entire premium was allowed in costs to the successful defendant.

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*Estimates of costs*

**[86]** A party intending to seek to recover from another party an additional liability is not required to reveal the amount of that additional liability when giving an estimate of costs<sup>1</sup>.

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<sup>1</sup> CPD, s 6.2(2). See A[3003].

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***E Recoverability of after the event insurance premiums***

**[87]** AJA 1999, s 29 provides:

‘Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy’.

**[88]** Rule 43.2(1) of the CPR 1998 provides:

‘(m) “insurance premium” means a sum of money paid or payable for insurance against the risk of incurring a costs liability in the proceedings, taken out after the event that is the subject matter of the claim’<sup>1</sup>.

It is important to note that the litigation need not be funded by a CFA in order for the insurance premium to be recovered under the AJA 1999, s 29. In *Ashworth v Peterborough United Football Club*<sup>2</sup> the premium for a both sides’ cover policy was allowed in full on assessment. As to what constitutes premium, see para [108.2].

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<sup>1</sup> See para [1162].

## [88] Litigation Funding

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<sup>2</sup> (10 June 2002, unreported), SCCO 0201106.

## Insurance policies taken out between 2 April and 3 July 2000

[89] A premium can only be recovered as an additional liability and only constitutes a funding arrangement if it is the first policy of insurance relating to those proceedings or cause of action<sup>1</sup>. It seems that only that part of the premium relating to cover for costs which are incurred after the policy is taken can form the basis of an additional liability<sup>2</sup>. The result will be a complex matter of separating costs incurred by the paying party before the receiving party entered into the insurance policy. It also requires separation of own disbursements, if covered, incurred before and after taking out the policy. Having made these calculations it is assumed that some apportionment of the premium between the costs incurred before the policy was taken out will be made and the additional liability confined to that portion attributed to the costs incurred after the policy was taken out.

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<sup>1</sup> Access to Justice Act 1999 (Transitional Provisions) Order 2000, SI 2000/900, art 3. See para [1071].

<sup>2</sup> CPD, s 57.9(3). See para [1230].

## Insurance policies taken out after 3 July 2000

[90]–[93] There are no provisions limiting the period in which the insured costs are themselves incurred. It is standard for policies to carry retrospective cover in respect of adverse costs and many policies give retrospective cover for own disbursements. The cover is for the benefit of the paying party and accordingly the distinctions made in the transitional period are not made thereafter. In *Ashworth*<sup>1</sup> it was argued that the premium in respect of the period of retrospective cover should not be recoverable on the grounds that this imposed an additional costs liability which was not known at the time. That argument failed on the basis that had it been intended to preclude recovery of the cost of retrospective cover the Rules, Practice Direction or Regulations would have so provided.

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<sup>1</sup> (10 June 2002, unreported) SCCO 0201106.

## Disclosure

[94] An insurance policy is a funding arrangement and the provisions on disclosure apply in respect of it in the same way as they do for the CFA with a success fee. Form N251 may be used to provide the necessary information and sufficient copies given to the court for service on all other parties in the same manner as for the CFA with a success fee<sup>1</sup>. In the context of an application for a costs capping order in a libel claim it was held in *Henry v BBC*<sup>2</sup> that a defendant is entitled to enquire as to the limit of indemnity of an ATE policy and as to whether it excluded cover where the insured is found to be dishonest. In the particular case the key issue was the claimant's honesty. In *Barr v Biffa Waste Services Ltd*<sup>3</sup> the ATE Insurance policy was a disclosable document pursuant to CPR 31.14, was relevant and not privileged. It enabled the defendant to a GLO to assess the costs risk it faced. It seems that the level

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#### CFAs after 1 April 2000 and before 1 November 2005 [96]

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of premium is not relevant in those circumstances and would be redacted from the disclosed policy. In *R (on the application of Buglife, The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation*<sup>4</sup> the court of appeal held that although the provisions of 44 PD do not say in terms that the level of a success fee should be disclosed, in the context of an application for a costs capping order, there was no doubt that this information should be supplied.

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<sup>1</sup> The provisions for disclosure are dealt with fully above when considering the recoverability of the success fee. Where there is an insurance policy but no CFA the disclosure on Form N251 will refer only to the policy. Where there is a CFA with success fee and an insurance policy Form N251 (see para [1241]), should refer to both funding arrangements.

<sup>2</sup> [2005] EWHC 2503 (QB), [2006] 1 All ER 154, [2005] NLJR 1780.

<sup>3</sup> [2009] EWHC 1033 (TCC), [2010] Lloyd's Rep IR 428.

<sup>4</sup> [2008] EWCA Civ 1209, [2008] 45 EG 101 (CS), (2008) Times, 18 November.

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#### The information to be disclosed

[95] The name and address of the insurer, the date and number of the policy and the claim(s) to which cover applies must be disclosed. From 1 April 2004 the address of the insurer and the policy number must also be given<sup>1</sup>. From 1 October 2009 notice must also state the level of cover<sup>2</sup>. It is not a requirement that the cost of the insurance be disclosed at this stage. In *Ashworth*<sup>3</sup> a claimant gave notice in advance of taking out insurance. An indication of the size of premium was also given by referring to its size relative to the value of the claim. Whilst such advance disclosure is not required it is likely to influence decisions on assessment as to reasonableness. Where a party has a policy with a staged or stepped premium it should inform its opponent that the policy is staged, and should set out accurately the trigger moments at which the second or later stages will be reached<sup>4</sup>. This obligation should be undertaken in addition to the obligations set out in the CPR 1998, r 44.15(1) and in paras 19.1(1) and 19.4 of the CPD. If this is done, the opponent has been given fair notice of the staging, and unless there are features of the case that are out of the ordinary, his liability to pay at the second or third stage a higher premium than he would have had to pay if the claim had been settled at the first stage should not prove to be a contentious issue.

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<sup>1</sup> CPD 19.4(3).

<sup>2</sup> CPD 19.4(2)(b) Form N251 applicable from 1 October 2009 assumes that “level of cover” means the financial limit of indemnity.

<sup>3</sup> (10 June 2002, unreported) SCCO 0201106.

<sup>4</sup> *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134, [2007] 1 All ER 354, [2007] 1 WLR 808.

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#### Failure to disclose

[96] A party may not recover, as an additional liability, for any period during which there was a failure to provide information about the funding arrangement as required by a rule, practice direction or court order<sup>1</sup> nor where a requirement of the practice direction or a court order to disclose at assessment the reasons for setting the percentage increase at the level stated in the CFA has not been complied with<sup>2</sup>.

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As in all cases of failure to comply with provisions of the CPR 1998, the court may grant relief from the sanction under r 3.9<sup>3</sup>. In *Wooldridge v Hayes*<sup>4</sup> the claimant disclosed an insurance schedule that described the cover as being ‘subject to the Policy Wording’. The policy wording had not been served but in any event it did not provide the information required by the Costs Practice Direction para 32.5(2). Under CPR 44.3B(1)(c) a party may not recover any additional liability for any period in the proceedings during which he failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order. It was held that in the case of an insurance premium it was the full premium that fell within CPR 44.3B since it does not accrue (unlike a success fee) on a daily basis. On the facts relief from sanction was granted. From 1 October 2009 the words “Unless a court orders otherwise” are inserted into CPR 44.3B(1) and a new paragraph (e) is added disallowing an entire insurance premium where the receiving party has failed to provide the specified information about an insurance policy in the time provided for in a rule, practice direction or court order. CPR 44(3)(e) reads as follows:

“(e) any insurance premium where that party has failed to provide information about the insurance policy in question by the time required by a rule, practice direction or court order.”

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<sup>1</sup> SI 1998/3132, r 44.3B(1)(c) and see para [1175].

<sup>2</sup> SI 1998/3132, r 44.3B(1)(d) and see para [1175].

<sup>3</sup> See para [73]. CPD, s 10.1 further provides that the party in default should apply for relief under Part 23. See para [1223].

<sup>4</sup> (SCCO Case No 0100072) [2005] EWHC 90007 (Costs).

## **F Assessment of an additional liability**

### **Stage at which assessment to be made**

[97]–[98] Rule 44.3A(1)<sup>1</sup> of the CPR 1998 states:

- (1) The court will not assess any additional liability until the conclusion of the proceedings<sup>2</sup>, or the part of the proceedings, to which the funding arrangement relates.

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<sup>1</sup> Inserted by the Civil Procedure (Amendment No 3) Rules 2000, SI 2000/1317.

<sup>2</sup> CPD, s 2.4 provides that proceedings are concluded when the court has finally determined the matters in issue in the claim, whether or not there is an appeal. The making of an award of provisional damages (Part 41) is also treated as a final determination of the matters in issue. CPD, s 2.5 provides that proceedings are to be treated as concluded, although they are continuing, where the court so orders or the parties in writing so agree.

### **Disclosure to the court**

#### *Summary assessment*

#### **[98.1] CPD 14.9**

‘In order to facilitate the court in making a summary assessment of any additional liability at the conclusion of the proceedings the party seeking such costs must

CFAs after 1 April 2000 and before 1 November 2005 **[98.1]**

prepare and have available for the court a bundle of documents which must include

- (1) a copy of every notice of funding arrangement (Form N251) which has been filed by him;
- (2) a copy of every estimate and statement of costs filed by him;
- (3) a copy of the risk assessment prepared at the time any relevant funding arrangement was entered into and on the basis of which the amount of the additional liability was fixed.

**Detailed assessment**

## CPD 32.4

If the detailed assessment is in respect of an additional liability only, the receiving party must serve on the paying party and all other relevant persons the following documents:

- (a) a notice of commencement;
- (b) a copy of the bill of costs;
- (c) the relevant details of the additional liability;
- (d) a statement giving the name and address of any person upon whom the receiving party intends to serve the notice of commencement.

## CPD 32.5

The relevant details of an additional liability are as follows:

- (1) In the case of a conditional fee agreement with a success fee:
  - (a) a statement showing the amount of costs which have been summarily assessed or agreed, and the percentage increase which has been claimed in respect of those costs;
  - (b) a statement of the reasons for the percentage increase given in accordance with Regulation 3(1)(a) of the Conditional Fee Agreements Regulations or Regulation 5(1)(c) of the Collective Conditional Fee Agreements Regulations 2000.
- (2) If the additional liability is an insurance premium: a copy of the insurance certificate showing whether the policy covers the receiving party's own costs; his opponents costs; or his own costs and his opponent's costs; and the maximum extent of that cover, and the amount of the premium paid or payable.
- (3) If the receiving party claims an additional amount under Section 30 of the Access of Justice Act 1999: a statement setting out the basis upon which the receiving party's liability for the additional amount is calculated.'

Where the detailed assessment is in respect of base costs and an additional liability the details required in the CPD 32.5 must be provided<sup>1</sup>.

In *Wooldridge v Hayes*<sup>2</sup> the claimant disclosed an insurance schedule that described the cover as being 'subject to the Policy Wording'. The policy wording had not been served but in any event it did not provide the information required by the CPD 32.5(2).<sup>23</sup> Under the CPR 1998, r 44.3B(1)(c) a party may not recover any additional liability for any period in the proceedings during which he failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order. It was held that in the case of an insurance premium it was the full premium that fell within the CPR 1998, r 44.3B since it does not accrue (unlike a success fee) on a daily basis. On the facts relief from sanction was granted. In *Hutchings v British Transport Police*<sup>3</sup> the Senior Costs Judge refused an application for

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disclosure of home and buildings and contents policies and restricted a request for further information under Part 18 to three questions:

- (1) Does the claimant have insurance?
- (2) With whom?
- (3) Does the claimant have any legal expenses insurance?

CPD 35.2(1)(b) requires a statement. That statement must be complete, its purpose being to enable the paying party to know the basis of the uplift when it was set. Where reasons given in reply to points of dispute differed from those in the CFA that was not a complete statement. In any event a statement must be given at commencement not in reply to points of dispute – *Middleton v Vosper*<sup>1</sup>. In the case of an additional liability in the form of a success fee CPR 1998, r 44.3B(1)(d) disentitles a receiving party to recover any success fee at all if there is a failure to provide the relevant details of the success fee as required by paragraph 32.5 of the CPD.

In *Findlay v Cantor Index Ltd*<sup>5</sup> it was held that CPD 32.5 could have no application to post 1 November 2005 CFAs given the revocation of the regulations.

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<sup>1</sup> CPD 32.7.

<sup>2</sup> (SCCO Case No 0100072) [2005] EWHC 90007 (Costs).

<sup>3</sup> (Claim No: CH 304636) [2006] EWHC 90064 (Costs).

<sup>4</sup> (2009) unreported: Southampton CC 6SO05696.

<sup>5</sup> EWHC 90116 (Costs).

[98.2] Regulation 3(2)(a) of the CFA Regulations 2000<sup>1</sup> requires the CFA to provide that where a court on an assessment orders disclosure of the CFA it may be given. This effectively provides a contractual waiver of the privilege which exists in the CFA. An issue has arisen, however, in respect of other documents relevant to the fee arrangements between solicitor and client. The issue has arisen in several cases in the context of the indemnity principle and concerns raised by paying parties that the principle was being breached where the client did not have the means to pay their own costs unless they were paid by the opponent. In *Dickinson (t/a Dickinson Equipment Finance) v Rushmer (t/a FJ Associates)*<sup>2</sup> bills were signed by the solicitor who certified compliance with the indemnity principle<sup>3</sup>. Documents were voluntarily shown to the judge at the costs hearing but were not disclosed to the paying party nor did the judge put the receiving party to an election as to disclosure or reliance on other evidence. Rimer J accepted that the bills were privileged but that the client care letter and the calculations showing actual amounts of costs paid were not privileged. Following *Goldman v Hesper*<sup>4</sup> and *Pamplin v Express Newspapers Ltd*<sup>5</sup> it was held that the paying party had by assertion raised a genuine issue as to compliance with the indemnity principle. The judge ought not to have decided the point by reference to documents not shown to the paying party. The case was remitted.

In *South Coast Shipping Co Ltd v Havant Borough Council*<sup>6</sup> a different view was taken on very similar facts. Here bills and copies of cheques had been voluntarily submitted to the costs judge but not to the paying party. Pumfrey J held that the costs judge ought to have followed CPD, s 40.14, a provision which Rimer J in *Dickinson* (above) said did not apply where documents had

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been volunteered. On the facts it was held that the failure to apply s 40.14 should not give rise to still further satellite litigation and the costs judge's decision was confirmed.

The CPD, s 40.14:

'The court may direct the receiving party to produce any document which in the opinion of the court is necessary to enable it to reach its decision. These documents will in the first instance be produced to the court, but the court may ask the receiving party to elect whether to disclose the particular document to the paying party in order to rely on the contents of the document, or whether to decline disclosure and instead rely on other evidence.'

In the *South Coast* case (above) it was held that where a costs judge relies upon privileged material (albeit voluntarily provided and not ordered to be produced under s 40.14), then s 40.14 ought to be followed with the receiving party put to an election.

The Court of Appeal in *Hollins v Russell*<sup>7</sup> declined to decide the issue of privilege given that full argument had not been heard on that point. The court concluded that the *Pamplin*<sup>8</sup> election procedure was applicable where a claimant wished to rely on a CFA in costs only proceedings. Ordinarily therefore the claimant must disclose the CFA. It will not ordinarily be appropriate to require disclosure of attendance notes.

<sup>1</sup> SI 2000/692.

<sup>2</sup> [2001] All ER (D) 369 (Dec).

<sup>3</sup> See *General of Berne Insurance Co v Jardine Reinsurance Management Ltd* [1998] 2 All ER 301, [1998] 1 WLR 1231, CA and *Bailey v IBC Vehicles Ltd* [1998] 3 All ER 570, 142 Sol Jo LB 126, CA.

<sup>4</sup> [1988] 3 All ER 97, [1988] 1 WLR 1238, CA.

<sup>5</sup> [1985] 2 All ER 185, [1985] 1 WLR 689.

<sup>6</sup> [2002] 3 All ER 779, [2002] NLJR 59.

<sup>7</sup> [2003] EWCA Civ 718 at 80–81, [2003] 4 All ER 590, [2003] 1 WLR 2487.

<sup>8</sup> See fn 5.

### Assessment powers

#### At the conclusion of the case

[99] Rule 44.3A(2)<sup>1</sup> of the CPR states:

- (2) At the conclusion of the proceedings, or the part of the proceedings, to which the funding arrangement relates the court may –
- (a) make a summary assessment of all the costs, including any additional liability<sup>1</sup>;
  - (b) make an order for detailed assessment of the additional liability but make a summary assessment of the other costs; or
  - (c) make an order for detailed assessment of all the costs<sup>2</sup>.

Where, however, there have been separate trials of different issues, there will not normally be an assessment of the additional liability until all issues have been tried<sup>3</sup>.

Where the parties do not agree the additional liability, the court may make a summary assessment or order detailed assessment of that liability<sup>4</sup>.

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- <sup>1</sup> The court may assess base costs alone or both base costs and the additional liability – CPD, s 3.1. See B[2471]. Where the summary assessment includes an additional liability the assessment must be of the additional liability for the whole of the proceedings – CPD, s 14.7 at para [1225].
- <sup>1</sup> The court may assess base costs alone or both base costs and the additional liability – CPD, s 3.1. See B[2471]. Where the summary assessment includes an additional liability the assessment must be of the additional liability for the whole of the proceedings – CPD, s 14.7 at para [1225].
- <sup>2</sup> Unless base costs have already been assessed, the court will, on a detailed assessment, assess both the base costs and the additional liability – CPD, s 3.4. See B[2471].
- <sup>3</sup> CPD, s 14.5 at para [1225].
- <sup>4</sup> CPD, s 14.8. See para [1225].

### Before conclusion of the case

**[100]** The court should make a summary assessment of base costs at any hearing or application unless there is good reason not to do so<sup>1</sup>. The existence of a funding arrangement is not sufficient reason to not carry out a summary assessment<sup>2</sup> of base costs.

Where there has been a summary assessment before the conclusion of the case, no order for payment will be made unless the court is satisfied that the receiving party is at the time liable to pay the legal representative<sup>3</sup>. The court has power to order costs to be paid into court and to make orders to postpone the receiving party's right to payment<sup>4</sup>.

- <sup>1</sup> CPD, s 13.12 at para [1224].
- <sup>2</sup> CPD, s 14.1 at para [1225].
- <sup>3</sup> CPD, s 14.3 at para [1225].
- <sup>4</sup> CPD, s 14.4 at para [1225].

## G Success fees

### Disallowance of any part of the success fee

**[101]** Rule 44.16<sup>1</sup> provides that where the court disallows any part of the success fee the legal representative may apply for an order that the disallowed part should remain payable by the client. If such an application is made the court may adjourn the hearing to enable the client to be notified.

- <sup>1</sup> See para [1189].

### Success fee applied only to recovered base costs

**[102]** Rule 44.3A provides:

- (1) The court will not assess any additional liability until the conclusion of the proceedings, or the part of the proceedings, to which the funding arrangement relates.

[“Funding arrangement” and “additional liability” are defined in rule 43.2.]

- (2) At the conclusion of the proceedings, or the part of the proceedings, to which the funding arrangement relates the court may –

CFAs after 1 April 2000 and before 1 November 2005 **[102.2]**

- (a) make a summary assessment of all the costs, including any additional liability;
- (b) make an order for detailed assessment of the additional liability but make a summary assessment of the other costs; or
- (c) make an order for detailed assessment of all the costs.<sup>1</sup>

If the court makes a summary assessment of costs at the conclusion of proceedings the court will specify separately

- (1) the base costs, and if appropriate, the additional liability allowed as solicitor's charges, counsel's fees, other disbursements and any VAT; . . .<sup>2</sup>

Nowhere in the CPR nor the CPD is it made explicit whether the additional liability, in the form of a success fee, is applied only to base costs ordered to be paid from or whether it applies to the whole of the base costs claimed. Nonetheless, it is implicit from the CPD dealing with summary assessment at the conclusion of proceedings, that the additional liability relates to assessed base costs. A contrary view would in effect be to base the additional liability on an indemnity basis as to the base costs, or indeed upon a costs claimed basis. It is submitted that the general principles applicable to an assessment of costs must in any event lead to the attachment of the allowed additional liability to the allowed base costs. The contractual nature of the CFA and the references to success fees in the CLSA 1990 and the CFA Regulations 2000<sup>3</sup> have relevance as between solicitor and client but cannot govern the assessment of recoverable costs.

<sup>1</sup> SI 1998/3132, r 44.3A.

<sup>2</sup> CPD, s 13.7.

<sup>3</sup> SI 2000/692.

**Preparation for summary assessment at conclusion of the case**

**[102.1]** The party seeking an additional liability must prepare and have available for the court a bundle including all notices of funding arrangements (N251), estimates and statements of costs filed and a copy of the risk assessment prepared at the time any funding arrangement was made<sup>1</sup>.

<sup>1</sup> CPD, s 14.9. See para [1225]. In compliance with the CFA Regulations 2000, SI 2000/692, reg 3, at para [1051], the CFA will contain brief written reasons for the success fee. Those reasons form part of communications between lawyer and client and as such are privileged. The CFA must contain a term enabling the solicitor and client to comply with any requirement of the court to disclose, to the court or any other person, the reasons stated in the CFA for setting the percentage success fee if the additional liability is to be assessed. CPD, s 14.9 anticipates the court requiring such disclosure. The CFA thus gives a contractual waiver of the privilege only in respect of assessment of the additional liability.

**Costs only proceedings and CFAs**

**[102.2]** Rule 44.12A<sup>1</sup> provides for the procedure to apply where no proceedings have been started and where the parties have reached agreement on all issues, including which party is to pay costs, but have failed to agree the amount of costs. Either party may make an application under Part 8 for an order for costs. This can therefore include an additional liability.

The claim form under Part 8 must include or be accompanied by a written agreement or written confirmation of agreement as to the issues and the

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matter of which party is to pay costs. The court may make an order for costs or dismiss the claim. If there is an order for costs this will lead to detailed assessment. If the claim is opposed then under this rule the claim must be dismissed. In such circumstances it is open to a party to issue a new claim, under Pt 7 or Pt 8, to enforce the agreement.

The CPR 1998, r 44.12A, Part 8 procedure is not confined to CFAs. However, where there is a CFA with a success fee, a Costs Judge or district judge may take into account the time at which the claim was settled and that it was settled without the issue of proceedings<sup>2</sup>. It is submitted that where a success fee has been properly set in accordance with a risk assessment process, the usual test of the reasonableness of that success fee, in the circumstances reasonably known to the legal representative at that time, should be applied<sup>3</sup>. There are no provisions in the statutory scheme to require that the success fee be reviewed periodically or in response to a change or perceived change in the chances of success. It is therefore at the assessment stage that that an apparent conflict arises between the CPR 1998, r 44.5 and 17.8(2) of the CPD. An explanation of these provisions given by the Senior Costs Judge in *Bensusan v Freedman*<sup>4</sup> was approved by the Court of Appeal in *Halloran v Delaney*<sup>5</sup>:

‘In *Bensusan v Freedman* (20 September 2001, unreported) Master Hurst, the Senior Costs Judge, commented in relation to paragraphs 11.7 and 17.8(2) of the Practice Direction:

“The combined effect of these two paragraphs is to prevent the costs officer from using hindsight in arriving at the appropriate success fee, and to prevent excessive claims for success fees in cases which settle without the need for proceedings when it is clear, or ought to have been clear from the outset, that the risk of having to commence proceedings was minimal.”

We agree.’ [at 13].

From 1 October 2009 CPR 44.12B makes provision in respect of after the event insurance premiums in publication cases:

- ‘(1) If in proceedings to which rule 44.12A applies it appears to the court that—
  - (a) if proceedings had been started, they would have been publication proceedings;
  - (b) one party admitted liability and made an offer of settlement on the basis of that admission;
  - (c) agreement was reached after that admission of liability and offer of settlement; and
  - (d) either—
    - (i) the party making the admission of liability and offer of settlement was not provided by the other party with the information about an insurance policy as required by the Practice Direction (Pre-Action Conduct); or
    - (ii) that party made the admission of liability and offer of settlement before, or within 42 days of, being provided by the other party with that information,

no costs may be recovered by the other party in respect of the insurance premium.

- (2) In this rule, “publication proceedings” means proceedings for—
  - (a) defamation;
  - (b) malicious falsehood; or
  - (c) breach of confidence involving publication to the public at large.’

CFAs after 1 April 2000 and before 1 November 2005 **[102.3]**

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- <sup>1</sup> See para [1185].
- <sup>2</sup> CPR 1998 16th Update, July 2000 Consequential Changes, adding s 8.2 to the Practice Direction About Costs.
- <sup>3</sup> SI 1998/3132, r 44.5, see para [1177] and CPD, s 11.7 at B[2474].
- <sup>4</sup> [2001] All ER (D) 212 (Oct), SC.
- <sup>5</sup> [2002] EWCA Civ 1258, [2003] 1 All ER 775, [2003] 1 WLR 28.

**[102.3]** The Court of Appeal in *Halloran v Delaney*<sup>1</sup> held that the Law Society Model CFA covered costs only proceedings as well as any substantive proceedings. The issue then addressed was whether a success fee would ever be justified in costs only proceedings:

‘While we would not suggest that any great degree of risk is involved, we would reject [counsel for the appellant’s] submission that even at the present time there is no risk in costs only proceedings for which a lawyer acting under a CFA is entitled to seek protection on the principles discussed by this court, and approved by the House of Lords ([2002] UKHL 28, [2002] 1 WLR 2000) in *Callery v Gray*. In May 2000, moreover, those risks were more substantial because of the uncertainties in the law to which we have referred.’<sup>2</sup>

Brooke LJ’s judgment addresses the level of success fee for CFAs entered into after 1 August 2001:

‘. . . judges concerned with questions relating to the recoverability of a success fee in claims as simple as this which are settled without the need to commence proceedings should now ordinarily decide to allow an uplift of 5% on the claimant’s lawyers’ costs (including the costs of any costs only proceedings which are awarded to them) pursuant to their powers contained in CPD 11.8(2) unless persuaded that a higher uplift is appropriate in the particular circumstances of the case.’<sup>3</sup>

On the facts of *Halloran* where the CFA had been entered into in May 2000 the court refused to interfere with the assessment decision to allow a success fee of 20%. The court’s reasoning was that until its decisions in *Callery v Gray* had been made there were significant uncertainties as to the recovery of costs to justify success fees. Brooke LJ subsequently sought to clarify this judgment in *Claims Direct Test Cases*<sup>4</sup>:

‘Subsequent events have shown that I should have expressed myself with greater clarity. The type of case to which I was referring was a case similar to *Callery v Gray* and *Halloran v Delaney* in which, to adopt the “ready reckoner” in Cook on Costs 2003, at page 545, the prospects of success are virtually 100%. The two-step fee advocated by the court in *Callery v Gray (No 1)* is apt to allow a solicitor in such a case to cater for the wholly unexpected risk lurking below the limpid waters of the simplest of claims. It did not require any research evidence or submissions from other parties in the industry to persuade the court that in this type of extremely simple claim a success fee of over 5% was no longer tenable in all the circumstances. The guidance given in that judgment was not intended to have any wider application.’ At [101].

In para 36 of the judgment in *Halloran* (above) Brooke LJ links the level of success fee for costs only proceedings to the level applied in the substantive dispute. If a two-stage success fee<sup>5</sup> is used and the higher success fee is applicable, for example because then threshold for the higher fee is close of the protocol period, this may have led to paying parties arguing that the lower

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figure should be applied to the costs only proceedings. The provision in CPD, s 11.8(2) for different percentages to be allowed for different periods was held in *U (a child) v Liverpool City Council*<sup>6</sup> to be wrong, the Court of Appeal stating that no such power exists. This must lead to the higher of a two stage success fee being allowed in costs only proceedings if it applied to the substantive proceedings. It also appears to mean that the level of success fee allowed for substantive proceedings is applied also to any costs proceedings:

‘As a matter of contract the same single-stage success fee is available throughout the proceedings on the claim, including the detailed assessment of costs.’ At [28].

If a two stage success fee refers to a higher fee if the case does not settle within the protocol period then in such a case where the substantive dispute settles after the protocol period but there are costs only proceedings because no agreement on level of costs is reached the higher level success fee will apply throughout. If a single stage success fee is used then it will apply to the costs only proceedings.

<sup>1</sup> [2002] EWCA Civ 1258, [2003] 1 All ER 775, [2003] 1 WLR 28.

<sup>2</sup> [2002] EWCA Civ 1258, [2002] All ER (D) 30 (Sep) at para [31].

<sup>3</sup> [2002] EWCA Civ 1258, [2002] All ER (D) 30 (Sep) at para [36].

<sup>4</sup> [2003] EWCA Civ 136, [2003] 4 All ER 508, [2003] 2 All ER (Comm) 788.

<sup>5</sup> See para [107.2].

<sup>6</sup> [2005] EWCA Civ 475, [2005] 1 WLR 2657, (2005) Times, 16 May.

### Factors taken into account in an assessment of the success fee

[103] The court will consider the amount of the success fee separately from considering the base costs<sup>1</sup>. The proportionality rule applies then to the success fee and the factors set out in r 44.5 apply in the usual manner<sup>2</sup> but a success fee is not to be reduced simply because when added to the base costs the total appears disproportionate<sup>3</sup>. The assessment is made on the basis of the circumstances as they reasonably appeared to the solicitor at the time the funding arrangement was made or varied<sup>4</sup>. However, in costs only proceedings, the costs judge or district judge should have regard to the time when and the extent to which the claim has been settled and to the fact that the claim has been settled without the need to commence proceedings<sup>5</sup>.

In determining whether a success fee is reasonable the court may take into account<sup>6</sup>:

- (1) The risk that the case may lose, with the effect that no fees will be payable. Here the risk assessment which was made at the time that the success fee was set will be relevant in determining the reasonableness of the success fee<sup>7</sup>.
- (2) The legal representative’s liability for disbursements<sup>8</sup>.
- (3) What other methods of funding the costs were available to the receiving party<sup>9</sup>.

<sup>1</sup> CPD, s 11.5 at B[2474].

<sup>2</sup> CPD, s 11.6. See n 1 above.

<sup>3</sup> CPD, s 11.9. See n 1 above.

<sup>4</sup> CPD, s 11.7. See n 1 above.

<sup>5</sup> CPD, s 17.8(2) at para [1226] and see para [111]. See also para [102.2].

## CFAs after 1 April 2000 and before 1 November 2005 [104]

- <sup>6</sup> CPD, s 11.8(1). See n 1.  
<sup>7</sup> See paras [65]–[69].  
<sup>8</sup> See paras [68]–[69].  
<sup>9</sup> See Part VIII.

**[103.1]** The Court of Appeal in *Motto v Trafigura*<sup>1</sup> had to consider a decision to allow a 58% success fee, each side appealing against that decision. The Court of Appeal arrived at 58% but by a different route to that taken at first instance. The claimant’s solicitors provided an internal assessment of the prospects of success as 50% arrived at by multiplying out the following risks: ‘breach of duty’ 80%, ‘causation – medical’ 90%, ‘causation – other’ 85%, ‘forum’ 82.5%. The claim was therefore for a 100% success fee. The Court of Appeal described that assessment as at least potentially self serving as solicitors have an interest that the success fee is as high as possible. The multiplication method was open to attack in principle, the Court referring to *Chalk on Risk Assessment in Litigation* (2001). Not only was the precision accorded to the prospects somewhat artificial, but the implicit assumption that each of the risks is entirely self-contained, or insulated from all the other risks, was plainly very questionable.

<sup>1</sup> [2011] EWCA Civ 1150, [2012] 2 All ER 181.

### Reasonableness of success fees – *Callery v Gray* and subsequent cases

**[104]** The Court of Appeal in the test case of *Callery v Gray*<sup>1</sup> laid down guidance on the recovery of success fees. The House of Lords<sup>2</sup> dismissed an appeal against that decision. The House expressed certain concerns as to the funding of litigation by CFA and ATE insurance and these are considered below. The Court of Appeal in *Halloran v Delaney*<sup>3</sup> revisited the guidance it gave in *Callery*. *Halloran* made revision in respect of CFAs entered into after 1 August 2001. That revision was later clarified by the Court of Appeal in *Claims Direct Test Cases*<sup>4</sup> by Brooke LJ and further clarification was thought necessary in *Atack v Lee*<sup>5</sup>.

The importance of the original guidance in *Callery* remains in respect of all current CFAs entered into before 1 August 2001. The importance of the original guidance in *Callery* remains in respect of all current CFAs entered into before 1 August 2001 in simple road traffic cases. For subsequent CFAs in cases which are simple road traffic cases the *Callery* guidance is revised by *Halloran* and *Atack v Lee*. The approach to assessment of success fees outside of simple road traffic cases is considered in *Bensusan v Freedman*<sup>6</sup>, *Edwards v Smiths Dock Ltd*<sup>7</sup>, *U (a child) v Liverpool City Council*<sup>8</sup> and *Begum v Klarit*<sup>9</sup>.

<sup>1</sup> *Callery v Gray* [2001] EWCA Civ 1117, [2001] 3 All ER 833, [2001] 1 WLR 2112.

<sup>2</sup> *Callery v Gray* [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000.

<sup>3</sup> [2002] EWCA Civ 1258, [2003] 1 All ER 775, [2003] 1 WLR 28.

<sup>4</sup> [2003] EWCA Civ 136, [2003] 4 All ER 508, [2003] 2 All ER (Comm) 788.

<sup>5</sup> [2004] EWCA Civ 1712, [2005] 1 WLR 2643, [2006] RTR 127.

<sup>6</sup> [2001] All ER (D) 212 (Oct), see para [108].

<sup>7</sup> [2004] EWHC 1116 (QB), [2004] 3 Costs LR 440, [2004] All ER (D) 181 (May), see para [108].

<sup>8</sup> [2005] EWCA Civ 475, [2005] 1 WLR 2657, (2005) Times, 16 May.

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<sup>9</sup> [2005] EWCA Civ 234, (2005) Times, 18 March, [2005] All ER (D) 203 (Mar), see para [108].

### Summary of the Court of Appeal in *Callery v Gray*

[105] To summarise the Court of Appeal's decision in *Callery v Gray*:

- (1) It is reasonable to enter into a CFA with a success fee from the outset.
- (2) The success fee may be set at the beginning and may but need not provide for a two stage fee differing according to whether the case settled within the protocol period or not.
- (3) In road traffic cases it was possible to apply a success fee which reflected an overall success rate for the class of litigation. If such a method was used in road traffic cases the maximum success fee would be 20%.

### Types of success fee

[106] The court's approach to setting success fees in simple road traffic cases is complex and describes three methods. A fourth approach, two or more success fees, was expressly not dealt with in the decision but is addressed below. It must also be kept in mind that the court was considering simple road traffic cases and that the factual basis may well not exist in other types of case to be able to replicate the approach of the court. *Halloran*<sup>1</sup> was also a simple road traffic case. Paragraph [107] sets out *Callery v Gray*<sup>2</sup>. The effect of *Halloran* is considered separately at para [107.5].

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<sup>1</sup> [2002] EWCA Civ 1258, [2003] 1 All ER 775, [2003] 1 WLR 28.

<sup>2</sup> [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000.

### *Type A – standard rate success fee*

[107] The court reached the conclusion that it was possible in RTA cases to take the view that a maximum 20% success fee would be reasonable given the risks in that category of work on a national basis. This approach does not require a consideration of the risks in an individual case but proceeds on the basis that all RTA cases can be viewed as a category. This success fee is set at the outset and does not change during the case.

This result is reached as follows:

‘In the circumstances we think that it is reasonable to proceed on the premise that at least 90% of such claims will settle without the need for proceedings, or will succeed after proceedings have been commenced.’<sup>1</sup>

‘After careful consideration and having reflected on the reasoning in the judgments below in the two appeals, we have concluded that, where a CFA is agreed at the outset in such cases, 20% is the maximum uplift that can reasonably be agreed.’<sup>2</sup>

Whilst this is stated as a maximum there is difficulty in reconciling the reasoning of the global approach to any suggestion that some figure below 20% is appropriate in some RTA cases. To reach such a result must either mean considering the cases individually (thus abandoning the global approach) or producing categories within RTA where success fees below 20% are to be set. The court gives no indication as to this aspect of the use of the 20% as a maximum figure. It may be instructive that *Callery v Gray*<sup>3</sup> concerned an injured passenger<sup>4</sup> and the 20% figure was allowed by the court.

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CFAs after 1 April 2000 and before 1 November 2005 **[107.1]**

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Any attempt to approach success fees in a Type A method outside of RTA cases will be fraught with difficulty given the lack of data as to risk.

This approach was, however, seemingly based on, and arguably confined to, solicitors carrying on litigation business on a large scale who may:

‘seek to ensure that the uplifts agreed result in a reasonable return overall, having regard to his experience of the work done and the likelihood of success or failure of the particular class of litigation.’<sup>5</sup>

Lord Hoffmann in the House of Lords expressed doubt as to the possibility of a costs judge assessing a success fee set on this global method:

‘The costs judge has simply no way of knowing whether the solicitor is carrying on business on a large enough scale to justify such an approach, still less what level of success fees would give him a “reasonable return overall”. Such matters are traditionally outside the consideration of costs judges.’<sup>6</sup>

‘the criteria prescribed by the Civil Procedure Rules for determining whether costs are reasonable are framed entirely by reference to the facts of the particular case. Once one invokes a global approach designed to produce a reasonable overall return for solicitors, one moves away from the judicial function of the costs judge and into the territory of legislative or administrative decision.’<sup>7</sup>

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<sup>1</sup> [2001] EWCA Civ 1117, [2001] 3 All ER 833 at [103], [2001] 1 WLR 2112.

<sup>2</sup> [2001] EWCA Civ 1117, [2001] 3 All ER 833 at [104], [2001] 1 WLR 2112.

<sup>3</sup> [2001] EWCA Civ 1117, [2001] 3 All ER 833, [2001] 1 WLR 2112.

<sup>4</sup> Lord Hoffmann in the House of Lords described the case as being, ‘as certain of success as anything in litigation can be . . .’ ([2002] UKHL 28 at [21], [2002] 3 All ER 417, [2002] 1 WLR 2000).

<sup>5</sup> [2001] EWCA Civ 1117, [2001] 3 All ER 833 at [83], [2001] 1 WLR 2112.

<sup>6</sup> [2002] UKHL 28 at [33].

<sup>7</sup> [2002] UKHL 28 at [35].

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*Type B – non-standard rate success fee*

**[107.1]** It seems that in RTA cases the court is of the view that to depart from the 20% maximum requires a delay in the setting of the success fee and therefore in entering into a CFA. The court referring to the standard 20% success fee said:

‘assumes that there is no special feature that raises apprehension that the claim may not prove to be sound. Where there is such a feature, the appropriate uplift will be higher, but it may not be reasonable to attempt to assess that uplift until further information about the defendant’s response is to hand.’<sup>1</sup>

The court appears to find two other situations where a departure from the standard 20% in RTA cases might be expected. They are where the solicitor chooses to defer entering into a CFA until more is known than that told by the client. The other is where the solicitor does not specialise in litigation but on occasions conducts a piece of litigation for a client. In this latter case the court took the view that the success fee would be set at the level needed to induce the solicitor to take the risk of not recovering fees. Nothing is said in this case of a need to await a response from the defendant. It would seem odd that a non-specialist litigator could depart from the maximum 20% otherwise

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imposed whereas a specialist litigator not specialising in RTA cases must await a response from the defendant or use Type A.

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<sup>1</sup> [2001] EWCA Civ 1117, [2001] 3 All ER 833 at [104], [2001] 1 WLR 2112.

#### *Type C – rebated success fee*

### [107.2]

‘A success fee can be agreed which assumes the case will not settle, at least until after the end of the protocol period, if at all, but which is subject to a rebate if it does in fact settle before the end of that period. Thus, by way of example, the uplift might be agreed at 100%, subject to a reduction to 5% should the claim settle before the end of the protocol period.’<sup>1</sup>

Although it is possible to see that this approach is intended to encourage compliance with the protocol and to lead to early settlement, it is very difficult to see what relation such figures bear to the risk run. For this reason such an approach may prove to be unattractive to claimant firms.

If this method is to be used it must be kept in mind that this is not a two stage fee. It is a single fee set at the outset. If the case does not settle inside the protocol period the higher fee applies to the whole case. If it does settle in the protocol period the lower fee applies to the whole case:

‘We consider there is no need to consider the question of the legality of a two-stage success fee as we see no difficulty in having a . . . success fee calculated by reference to an upper level and a reduced level in specified circumstances.’<sup>2</sup>

Further guidance on the setting of such a success fee is given by Lord Woolf:

‘A two-stage success fee of the type we propose, agreed at the outset, would be likely to be agreed before the merits of the individual claim were apparent. Thus, the uplift would be unlikely to reflect precisely the likelihood of failure of any individual claim that did not settle. The determination of the reasonable figures for the full uplift and the rebated uplift would have to be based on overall claims experience, with the proportion of contested cases which succeed, and the costs earned from such cases, being particularly significant.’<sup>3</sup>

The Court of Appeal in *Claims Direct Test Cases*<sup>4</sup> refers to this type of success fee as a two-step fee apt to cover cases where the prospects of success are virtually 100%. In such cases the court in *Callery* suggested that the lower figure should be 5% and the higher figure 100%. It is with respect difficult to interpret the judgment in *Halloran* as a reference to the two-step success fee.

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<sup>1</sup> [2001] EWCA Civ 1117, [2001] 3 All ER 833 at [107], [2001] 1 WLR 2112.

<sup>2</sup> [2001] EWCA Civ 1117, [2001] 3 All ER 833 at [114], [2001] 1 WLR 2112.

<sup>3</sup> [2001] EWCA Civ 1117, [2001] 3 All ER 833 at [115], [2001] 1 WLR 2112.

<sup>4</sup> [2003] EWCA Civ 136, [2003] 4 All ER 508, [2003] 2 All ER (Comm) 788.

#### *Type D – multiple success fee (two or more success fees for different stages)*

**[107.3]** Paragraph [114] makes it clear that the court was not considering the legality of a success fee arrangement which applies different levels of success fee

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CFAs after 1 April 2000 and before 1 November 2005 **[107.5]**

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to different stages in the case. There was some concern during argument as to whether the statutory scheme permitted of such a method. There can be no difficulty if this staged result is produced by entering into a series of CFAs each to cover specified stages in the litigation. The difficulty seemingly envisaged in argument in the Court of Appeal might arise however where there is a single CFA with more than one level of success fee. The CFA Regulations 2000<sup>1</sup> and the CLSA 1990, s 58 as amended refer only to ‘the percentage’. It would seem pedantic to insist that the singular could not include the plural. Provided the CFA is clear as to what percentage increase applies to what stages of the case the purpose of the statutory provisions will have been achieved.

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<sup>1</sup> SI 2000/692.

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**Factors for costs assessors raised by the House of Lords<sup>1</sup>**

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<sup>1</sup> The numbers in square brackets refer to the paragraph numbers in the judgment of the House of Lords in *Callery v Gray* [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000.

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**[107.4]** The House of Lords raised these factors for costs assessors:

- (1) A danger that base costs will be excessive [5]
- (2) A danger that success fees will be grossly disproportionate to risk [5]
- (3) Court of Appeal’s guidance is provisional and open to review [9] and [30]
- (4) The client has no economic rationality in any agreement to a success fee [25]
- (5) No incentive to compete on success fees set [32]
- (6) Difficulties in determining scale of business justifying global approach [33]

**Further guidance on the reasonableness of success fees – *Halloran v Delaney*<sup>1</sup> and subsequent cases**

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<sup>1</sup> [2002] EWCA Civ 1258, [2003] 1 All ER 775, [2003] 1 WLR 28.

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**[107.5]** The judgment of the Court of Appeal in *Halloran v Delaney*<sup>1</sup> was given by Brooke LJ who also sat in *Callery*. The appeal concerned costs only proceedings arising out of a road traffic passenger claim which settled without the need to issue proceedings. The agreed damages were £1,500. The issue for the Court of Appeal was whether a success fee of 20%, or indeed any success fee at all, was appropriate in costs only proceedings. A success fee of 20% had been allowed in *Callery v Gray* in a passenger road traffic claim. Against that background the court revisited the broader matter of the appropriate level of success fee in ‘simple claims when they are settled without the need for court proceedings’:

‘After taking advice from our assessor, and after considering the arguments in the present case, we consider that judges concerned with questions relating to the recoverability of a success fee in claims as simple as this which are settled without the need to commence proceedings should now ordinarily decide to allow an uplift of 5% on the claimant’s lawyers’ costs (including the costs of any costs only

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proceedings which are awarded to them) pursuant to their powers contained in CPD 11.8(2) unless persuaded that a higher uplift is appropriate in the particular circumstances of the case. This policy should be adopted in relation to all CFAs, however they are structured, which are entered into on and after 1st August 2001, when both Callery judgments had been published and the main uncertainties about costs recovery had been removed.<sup>2</sup> (emphasis added) At [35]

The CFA in *Halloran* used a single stage success fee. The guidance in *Halloran* must now be read in the light of clarification provided by Brooke LJ in *Claims Direct Test Cases*<sup>3</sup>:

‘Subsequent events have shown that I should have expressed myself with greater clarity. The type of case to which I was referring was a case similar to *Callery v Gray* and *Halloran v Delaney* in which, to adopt the “ready reckoner” in Cook on Costs 2003, at page 545, the prospects of success are virtually 100%. The two-step fee advocated by the court in *Callery v Gray (No 1)* is apt to allow a solicitor in such a case to cater for the wholly unexpected risk lurking below the limpid waters of the simplest of claims. It did not require any research evidence or submissions from other parties in the industry to persuade the court that in this type of extremely simple claim a success fee of over 5% was no longer tenable in all the circumstances. The guidance given in that judgment was not intended to have any wider application.’. At 101

The reference to the two-step success fee advocated in *Callery* is a reference to an example given there where the figure of 5% was used for the lower figure and 100% for the higher figure. It is with respect difficult to see how *Halloran* can be explained as referring to that type of success fee given the words ‘however they are structured’ in paragraph [35] and the fact that the success fee in the CFA in *Halloran* was a single stage fee. There is nothing in the judgment in *Halloran* to suggest that the types of success fee dealt with in *Callery* do not survive. The 5% figure appears to be a simple revision of the level at which the Type A standard fee is to be set.

<sup>1</sup> [2002] EWCA Civ 1258, [2003] 1 All ER 775, [2003] 1 WLR 28.

<sup>2</sup> [2002] EWCA Civ 1258, [2002] All ER (D) 30 (Sep) at [35].

<sup>3</sup> [2003] EWCA Civ 136, [2003] 4 All ER 508, [2003] 2 All ER (Comm) 788.

### [107.6] Brooke LJ provided yet further clarification of *Halloran* in *Atack v Lee*<sup>1</sup>:

‘Because there seems to be some lingering uncertainty about the combined effect of *Callery v Gray* and *Halloran v Delaney* we feel that we ought to restate for the benefit of district judges and costs judges the principles in cases governed by the old regime (for the meaning of this phrase see para 12 above). The reasonableness of the success fee has to be assessed as at the time the CFA was agreed. It is permissible for any CFA to include a two-stage success fee, and this is to be encouraged. In other words the success fee may be a higher percentage (up to 100% in an appropriate case) in the event that a claim does not settle within the protocol period, and a lower success fee (down to 5% in the very simplest of cases) in claims which do settle within that period. Further statistical evidence is now available (see paras 11–12 above) to which it will be legitimate for parties to refer in relation to success fees agreed in an old regime case after the date of this judgment.’. At [51]

The guidance in *Atack v Lee* makes reference to statistical evidence now available. That material is contained in reports made to the Civil Jus-

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Justice Council and can be found on the costs debate page of the Civil Justice Council web site at [www.civiljusticecouncil.gov.uk](http://www.civiljusticecouncil.gov.uk).

The reference in the judgment of Brooke LJ to the 'old regime' is to cases not covered by the fixed costs regime:

'It is not permissible simply to adopt the new CPR fixed rates for success fees when assessing the reasonableness of a success fee in an RTA case where the assessment of the CFA is not governed by the new rules. The reason for this is that the new CPR approach (informed by an industry wide agreement) does not take into account the individual facts of each particular case . . .'. At [52]

Nonetheless, in determining the reasonableness of success fees set before 1 August 2001, reference can be made to the statistical material that informed the new rules. The statistics show the level of risk involved according to type of case. There are statistics for road traffic and for employer liability cases.

The Court of Appeal in *U v Liverpool City Council*<sup>2</sup> made reference to other statistical material obtained by the Association of Personal Injury Lawyers (APIL)<sup>3</sup>:

SUCCESS RATES – PERSONAL INJURY CASES CRU STATISTICS				
	RTA	EMPLOYER	PUBLIC	CLIN NEG
2001–2	89%	74%	61%	46%
2002–3	87%	77%	60%	46%

*Attack and Lee* was heard on the same day as *Ellerton v Harris* and judgement in the two appeals was given together. The CFAs in each case were entered into before 1 August 2001 and the decisions in *Callery v Gray*. Accordingly they were not governed by *Halloran*.

*Attack v Lee* was a claim arising from a moving traffic accident not involving a collision. It was alleged that the defendant's driving had caused the claimant motorcyclist to take evasive action which led to his hitting a kerb and suffering serious injuries. The case settled after the first day of a trial on liability where the defendant was found 100% liable. The court allowed a success fee of 50% against the 100% stated in the CFA. The court did not make use itself of the statistical material to which it makes reference and in arriving at a figure of 50% stated that some judges might reasonably have considered a single-stage success fee of up to 67% reasonable on this material but that the 50% allowed by the deputy district judge was within the range available to him.

In *Ellerton* the claim was made by a pedestrian run over in a supermarket car park. The driver left the scene but there were witnesses to the accident. The claim was for a 30% success fee. The court allowed 20%:

'In our judgment the guidance given by this court in *Callery v Gray* can be applied by analogy to this case even though it was allocated to the multi-track and settled for a sum exceeding £15,000. We consider that there are no factors here which could legitimately have taken this success fee over 20%. The uncertainty about the identify of the driver could have been resolved by a single telephone call to the police, which the solicitor could have made before entering into the CFA, and the only significant risk related to the possibility of the claimant accepting her solicitor's advice and then not beating a payment in. This is just one of the rare risks which justified a success fee set as high as 20% in the simplest of claims.' At [49]

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It should be noted that this decision is in relation to a CFA entered into before 1 August 2001 and it cannot be taken as an indication of the level of success fees in CFAs entered into after that date and which are governed by the guidance in *Halloran*. In each case a single stage success fee had been stated in the CFA and although the court again encourages the use of a two stage success fee it cannot depart from the contractual structure of the CFA. The Court of Appeal in the later decision in *KU v Liverpool City Council*<sup>2</sup> held that 11.8(2) of the CPD was wrong and that a court has no power to award different percentage success fees in respect of different items of costs or different periods during which costs were incurred.

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<sup>1</sup> [2004] EWCA Civ 1712, [2005] 1 WLR 2643, [2006] RTR 127.

<sup>2</sup> [2005] EWCA Civ 475, [2005] 1 WLR 2657, (2005) Times, 16 May.

<sup>3</sup> A fuller table is published in Litigation Funding August 2003 – pub. Law Society.

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**[107.7]–[108]** The reasonableness of a success fee in a CFA entered into after 1 August 2001 was considered in *Burton v Kingsley*<sup>1</sup>. The claimants' solicitors entered into a CFA with each of two claimants on 9 September 2001, less than four weeks after an accident in which the claimants were innocent passengers. The agreed single success fee under each agreement was 100%. The first claimant was rendered tetraplegic and the second claimant sustained spinal injuries in the accident. The approach to a single success fee is summarised in the judgment of Richards J:

‘Where a single success fee has been agreed, the solicitors do not have the power or duty to renegotiate the CFA in the light of changed perceptions of the risk as time goes on, nor does the court have power to direct that a success fee is recoverable at different rates for different periods of the proceedings: *KU v Liverpool City Council*, para 49. As Brooke LJ expressed it in that case, at para 42:

“Nowhere in the statute, the regulations, or the rules is there any indication that the court is to have the power to subvert the statutory scheme by determining that although the level of a success fee was reasonable in view of the facts which were or should have been known to the legal representative at the time it was set, he is only entitled to recover a different, much lower, success fee in respect of some later period when different facts were or should have been known to him . . . .”. At [10]

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<sup>1</sup> [2005] EWHC 1034 (QB), [2005] All ER (D) 378 (May).

## Success fees outside of RTA cases

**[108.1]** An early application of the principles laid down in *Callery*<sup>1</sup> is found in the decision of the Senior Costs Judge Master Hurst in *Bensusan v Freedman*<sup>2</sup>. The claimant, an elderly female, swallowed a dental reamer during treatment by a dentist. The claimant suffered shock and anxiety as a result of the incident but surgery was not required. The claimant was represented by specialist dental negligence lawyers on a CFA carrying a 50% success fee. The claimant lived in Kent and her solicitors in Cheshire. She was represented by a grade one fee earner. The claim was settled for £2,000 plus costs five weeks after the letter of claim. The costs were not agreed and the claimant issued Pt 8 costs only proceedings.

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It was held that it was not reasonable to instruct solicitors in Cheshire or specialist dental negligence lawyers in such a case. It was not a case warranting a grade one fee earner. The case could have been handled by a grade two fee earner. The success fee was not appropriate for a straightforward clinical negligence case such as this. The success fee was reduced from 50% to 20%. The court accepted the following factors as contributing to higher risks in this field of litigation but said that none applied in this particular case:

- (1) Professional judgments are less certain in the field of medicine and dentistry than in other fields.
- (2) Defences are more rigorously pursued by medical defence organisations.
- (3) The costs of investigating clinical negligence claims can be extremely high as liability, causation and quantum issues are usually complicated and expert evidence is required in support of such issues.

At para [36] reference is made to success rates in clinical negligence:

‘ . . . judicial notice can be taken of the fact that, of clinical negligence cases which go to trial, the success rate is modest and it may well be that, viewed across the whole spectrum of clinical negligence cases, the success rate is 50%. I have insufficient data to make such a finding.’

The decision in effect grades cases within clinical negligence and even within the field of dentistry so that success fees cannot enable a practice to reflect its workload overall. The danger of this approach for access to justice is that without stronger cases supporting weaker cases solicitors will be unable to take on cases which are weak or carry high cost risks.

The approach of the solicitors in *Bensusan* is likely to be that of the majority who work outside of RTA. The client was offered a CFA from the outset and thus a success fee had to be set before anything could be known from the defendant. No national data exists for a standard success fee to be set outside of road traffic and employer liability claims. Individual factors relating to the perceived risks in the case were recorded and a percentage figure was stated. It is difficult to see what other approach can be taken where there is insufficient data as to a class of case upon which to make a judgment, a judgment which is to be assessed, if at all, on the basis of what was known at the time that decision was made. It is instructive that in these commonly recurring circumstances the Court of Appeal’s guidance on success fees is of little assistance.

<sup>1</sup> [2001] EWCA Civ 1117, [2001] 3 All ER 832, [2001] 1 WLR 2112; affd [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000.

<sup>2</sup> [2001] All ER (D) 212 (Oct), SC.

**[108.2]** In *Begum v Klarit*<sup>1</sup> the Court of Appeal was asked to allow a success fee of 100% for counsel and 70% for solicitors in respect of an appeal from an order concerning a sale of land. In that context Brooke LJ said any responsible lawyer acting for the respondent and reading the limited permission to appeal would have appreciated for all practical purposes that they were on a stone-cold certainty of resisting the appeal and recovering costs. The court concluded that there are always some risks in litigation and allowed 15% for each success fee and in strong terms expressed disapproval of the original figures:

## [108.2] Litigation Funding

‘[5] We find it hard to understand how responsible counsel could have agreed with responsible solicitors a success fee of 100 per cent in respect of this appeal, or how responsible solicitors could have agreed with their client a success fee of 70 per cent. Success fees negotiated, if that is the right word, at that level, discredit and devalue the whole of the arrangements for conditional fee agreements. In *Callery v Gray*, the various members of the House of Lords expressed great concern about the new regime where success fees were, in effect, being negotiated between the parties to the agreement and there was no direct financial incentive to drive the level of the success fee down.’

‘[6] I hope that this is the last occasion on which this court will have to express itself quite so strongly about the level of success fees proffered for approval. In our judgment, there was a small amount of risk in this litigation, which would properly have been provided for by a success fee of 15 per cent. Accordingly, both in relation to counsel and in relation to solicitors’ fees, we reduce the success fee to 15 per cent in each case.’

It is difficult to reconcile the phrase ‘stone-cold certainty’ attracting a success fee of 15% and the phrase used in *Claims Direct Test Cases* by Brooke LJ, ‘the prospects of success are virtually 100%’, which justified a success fee of 5%.

<sup>1</sup> [2005] EWCA Civ 234, (2005) Times, 18 March, [2005] 3 Costs LR 452.

## Staged success fees

[108.3] The Court of Appeal in *U (a child) v Liverpool City Council*<sup>1</sup> considered the reasonableness of a single stage success fee of 100% set in October 2001 in a personal injury claim involving a four year old child who had stepped into a hole in a grass verge. Again Brooke LJ emphasised the use of a two stage success fee:

‘[21] When deciding upon a success fee [the claimant’s solicitor] had two choices. He could have taken the view that this claim would probably settle without fuss at a reasonably early stage, but he wished to protect himself against the risk that the claim might go the full distance and might eventually fail. In those circumstances he could select the two-stage success fee discussed by this court in *Callery v Gray* [2001] EWCA 1117 at [106]–[112], [2001] 1 WLR 2112. In this situation he would be willing to restrict himself to a low success fee if the case settled within the protocol period – or within such other period, perhaps until the service of the defence, as he might choose – and to have the benefit of a high success fee for the cases that did not settle early. As things turned out, he would have benefited on the facts of this case if he had adopted this course: a high two-stage success fee would have been more readily defensible in a case which did not settle until proceedings were quite far advanced.’

‘[22] Alternatively, he could have selected, as he did in fact, a single-stage success fee, being a fee which he would seek to recover at the same level however quickly or slowly the claim was resolved. In those circumstances it would not be possible to justify so high a success fee.’

One factor in the claimant solicitor’s risk assessment was the low value of the claim (as assessed at the time of the CFA) and the risk that no costs would be recovered because the claim fell into the small claims jurisdiction:

‘[24] ‘In a claim as small as this, it is not reasonable that the defendants should have to pay the claimant’s solicitor a higher success fee against the risk that the value of

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the claim was so low that legal costs would not be recoverable at all: this is a risk the solicitor must bear himself if he is willing to act at all.’

The court had been referred to statistical material relating to ‘tripping cases’ contained in a report by Pascoe Pleasance for the Legal Aid Board in 1985 and showing a 77% success rate for legally aided cases categorised as ‘trip slip and fall (Public Authority)’:

[25] ‘In our judgment an appropriate single-stage success fee would have been 50% in this case. On the hypothesis that winning and losing claims are of equal weight, this would reflect a 2:1 chance of success. This, incidentally, represents a figure that is closer to the chances of success shown in the Pascoe Pleasance study . . . .’

A 100% single stage success fee in a clinical negligence case where the CFA was entered into at a very early stage where little could be known of the risk was not upheld in *Barham v Athreya*<sup>2</sup>. This was an appeal from a detailed assessment where the court explained that it may be difficult when before a costs judge to justify the decision to have a high single stage success fee because had the decision been to take a lower profit uplift at the initial stages, with a further uplift if the case proceeded beyond those initial stages, because that was a time when there would be a better risk assessment, then that on the face of it is easier to justify and is more reasonable.

The mere fact a success fee is staged does not remove the need for it also to be reasonable. In *Fortune v Roe*<sup>3</sup> the CFA was entered into after judgment had been entered on liability in a catastrophic injury case. The staged success fee was 100% payable if the case settled within three months of the trial date and 25% for any earlier settlement. The case settled less than a month before trial. The risk assessment identified Part 36 as the major risk. The claimant pointed to the fact that had the case been within the Part 45 scheme a 100% success fee would be recoverable as the fixed success fee at a trial. The court held that at the time of the CFA the claimant had already won in terms of the standard Law Society definition of win. Providing for a 100% success fee as if liability had been in doubt was unreasonable. The risk of failing to beat a Part 36 offer did not justify a 100% success fee. There could only be a risk in respect of costs from the last date for acceptance and that could be accounted for by the 20% success fee that the defendants conceded.

In the defamation case of *Peacock (Matthew) v MGN Ltd*<sup>4</sup> the success fee was in three stages: 100% of the basic charges, where the claim proceeds to 28 days after service of the defence; 50% if the case settles after proceedings are issued but before 28 days after the defence is served; or 25% if the case settles before proceedings are issued. As MGN continued with a reasoned defence to stage three a 100% success fee was allowed.

In the context of construction adjudications in *Redwing v Charles Wishart*<sup>5</sup> Akenhead J held that CFAs and ATE could be used in enforcement proceedings given there was no exemption in the CPR from the usual rules relating to funding arrangements. It needed to be borne in mind however that the large majority of reported cases on adjudication enforcements are successful and are usually perused (as here) via application for summary judgment because there is no realistic defence. It was important that claimants did not use CFAs and ATE insurance primarily as a commercial threat to defendants. It was legitimate for the Court to ask itself whether, in any particular case, a CFA or ATE Insurance was a reasonable and proportionate arrangement to make. The

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100 per cent success fee claimed was reduced to 20 per cent given that in circumstances the claimant was virtually bound substantially to 'win'. Twenty per cent of the ATE premium was also ordered to be paid.

A tendency to set a 100% success fee in all cases was noted by the Court of Appeal in *Drake v Fripp*<sup>6</sup> when reducing such a fee to 50%. The client with whom the fee is negotiated by the lawyer has no interest in the level of success fee (at least in a case such as this, where he has to pay no more than he is entitled to recover from the paying party), and the lawyer has an obvious and strong interest in the success fee being as high as possible. In many cases, it is easy for a lawyer, acting in complete good faith, to persuade himself that the prospects of his client's case succeeding are no better than 50% when it is in his interest to do so, and when he has no negotiations with the party who will or may have to pay the success fee. The court has a particular duty, therefore, to be vigilant in considering the reasonableness of the level of success fee agreed but that does not mean that the court can invoke the wisdom of hindsight or should adopt an unduly harsh approach.

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<sup>1</sup> [2005] EWCA Civ 475, [2005] 1 WLR 2657, (2005) Times, 16 May.

<sup>2</sup> [2007] EW Misc 6 (EWCC) Central London County Court.

<sup>3</sup> [2011] EWHC 2953 (QB), [2011] All ER (D) 91 (Nov).

<sup>4</sup> [2010] EWHC 90174 (Costs).

<sup>5</sup> [2011] EWHC 19 (TCC).

<sup>6</sup> [2011] EWCA Civ 1282.

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**[108.4]** On an appeal to the High Court in *Edwards v Smiths Dock Ltd*<sup>1</sup> a success fee of 87% was upheld in a mesothelioma claim which reached trial on quantum. It was found that at the time of the CFA liability was not certain and there were other issues relevant to quantum. The risk of failing to beat a Part 36 payment was said not to mean that advising on quantum was straightforward. A single success fee must be arrived at where liability and quantum issues arise in the same case. In another High Court appeal it was held in *Cox v MGN Ltd*<sup>2</sup> that the uncertainty of the law in privacy claims in 2001 was such that a decision to allow 40% against a claimed 95% was within the range reasonable assessments such that the appeals on each side failed.

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<sup>1</sup> [2004] EWHC 1116 (QB), [2004] 3 Costs LR 440.

<sup>2</sup> [2006] EWHC 1235 (QB), [2006] All ER (D) 396 (May).

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**[108.5]** The level of success fee in *Benaim (UK) Ltd v Davies Middleton & Davies Ltd*<sup>1</sup> was fixed on a scale up to a maximum of 100% dependent upon the level of damages achieved in favour of the client. This was held to be a valid CFA. In rejecting arguments that the arrangement was champertous the court pointed out that an alternative method would have been to set the success fee at 100% and provide for a rebate according to the level of damages recovered.

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<sup>1</sup> [2004] EWHC 737 (TCC), [2004] NLJR 617.

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*Success fees in costs only proceedings*

[108.6] The Court of Appeal in *Halloran*<sup>1</sup> rejected arguments from the paying party that there were no risks in costs only proceedings to justify a success fee attaching to the costs of those proceedings. The court's guidance for cases where the CFA was entered into after 1 August 2001 lumps together the success fee for substantive claims and the costs only proceedings. This approach to costs only proceedings was repeated in *U v Liverpool City Council*<sup>2</sup> where the Court of Appeal held CPD, s 11.8(2) to be wrong in providing for different percentages to be allowed for different periods. The court stated that no such power exists. It follows that if a two-stage success fee is used and the higher success fee has become applicable, for example because then threshold for the higher fee is close of the protocol period which has passed without settlement, then the higher level will apply to costs only proceedings. A two stage success fee is not a variable success fee. Whichever of the two stages applies it applies to the whole of the litigation. There is only one success fee. The level of success fee allowed for substantive proceedings is also applied therefore to any costs proceedings:

‘As a matter of contract the same single-stage success fee is available throughout the proceedings on the claim, including the detailed assessment of costs.’. At [28]

The basis of paragraph 28 was the contractual nature of the CFA and success fee and the If a two stage success fee refers to a higher fee if the case does not settle within the protocol period then in such a case where the substantive dispute settles after the protocol period but there are costs only proceedings because no agreement on level of costs is reached the higher level success fee will apply throughout, irrespective of the risk at the costs only stage. If a single stage success fee is used then it too will apply to the costs only proceedings again irrespective of the level of risk in those proceedings. Where there is a single stage success fee *Crane v Canons Leisure Centre*<sup>3</sup> confirms the result of *U v Liverpool City Council* to be that the same fee applies to costs only proceedings.

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<sup>1</sup> [2002] EWCA Civ 1258, [2003] 1 All ER 775, [2003] 1 WLR 28.

<sup>2</sup> [2005] EWCA Civ 475, [2005] 1 WLR 2657, (2005) Times, 16 May.

<sup>3</sup> [2007] EWCA Civ 1352, [2008] 2 All ER 931, [2008] 1 WLR 2549.

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## **H After the event insurance**

### **Factors taken into account in assessment of insurance premium**

[108.7] An After the Event (ATE) insurance premium is an ‘additional liability’ for the purposes of CPR Part 44.1.2<sup>1</sup> Where the court makes an order for costs and the receiving party has entered into a funding arrangement the costs payable by the paying party include any additional liability unless the court orders otherwise<sup>2</sup>. As with the success fee the court is to consider the circumstances as they reasonably appeared at the time the insurance policy was taken out<sup>3</sup>.

The following factors may be taken into account in determining whether the cost of insurance is reasonable<sup>4</sup>:

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- (1) Where the insurance cover is not purchased in support of a CFA with a success fee, how its cost compares with the likely cost of funding the case by use of a CFA with success fee and supporting insurance. This calls for a complex comparison in cases where the insurance option selected is for cover of costs on both sides. Here the premium will be higher than in a CFA insurance but there will be no success fee<sup>5</sup>.
- (2) The level and extent of the cover provided. The premium should reflect the limit of indemnity and the headings of cover such as adverse costs only or cover including own disbursements<sup>6</sup>.
- (3) The availability of any pre-existing insurance cover. Pre-existing cover may exist but not be available to the client's chosen solicitor. In RTA claims with a value of less than £5,000 if the client wishes to be represented by their own choice of solicitor and accordingly takes out after the event insurance rather than use the pre-existing insurance no additional liability will be allowed in costs in the absence of exceptional circumstances<sup>7</sup>.
- (4) Whether any part of the premium would be rebated in the event of early settlement. This may lead in cases where there is early settlement but no rebate to the court disallowing a part of the premium. It is less clear how the provision for a rebate will be relevant to a case where there has not been an early settlement.
- (5) The amount of commission payable to the receiving party or his legal representatives or other agents. This may call for complex calculations of the overall difference in the premium level had there been no such commission. It is assumed that by commission is meant a sum referable to the premium actually payable.

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<sup>1</sup> SI 1998/3132, r 43.2.

<sup>2</sup> CPD 2.1 – 'funding arrangement' is defined as including an ATE policy of insurance – CPR 1998, r 43.2.

<sup>3</sup> CPD, s 11.7. See *Sarwar v Alam* [2001] EWCA Civ 1401, [2001] 4 All ER 541, [2002] 1 WLR 125.

<sup>4</sup> CPD, s 11.10 at B[2474].

<sup>5</sup> See Part X.

<sup>6</sup> See Part X.

<sup>7</sup> *Sarwar v Alam* [2001] EWCA Civ 1401, [2001] 4 All ER 541, [2002] 1 WLR 125 – see para [124]. For Before the Event Insurance, see para [202].

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**[108.8]** In *Ashworth v Peterborough United Football Club*<sup>1</sup> on an assessment where it was argued that the premium was disproportionate to the total sum claimed it was held that the issue was one of proportionality to the 'matter in issue'. In *RSA Test Cases*<sup>2</sup> the premiums were disproportionate to the value of the claims but also the costs in respect of which the insurer was at risk:

'The court should look both at the costs risks and at the size of the claim when considering the premium.'. At [261]

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<sup>1</sup> (10 June 2002, unreported) SCCO Ref 021106.

<sup>2</sup> [2005] All ER (D) 88 (Aug).

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**[108.9]** What constitutes premium within the AJA 1999, s 29 was fully considered in *Claims Direct Test Cases*<sup>1</sup>. The Senior Costs Judge held that premium meant:

‘the consideration required of the assured in return for which the insurer undertakes his obligation under the contract of insurance . . . .’ (MacGillivray on Insurance Law)<sup>2</sup>

The test adopted was to consider whether the money paid by a customer of Claims Direct (CDL) was a payment in respect only of insurance or whether it in part related to other services. This test is derived from the Court of Appeal in *Callery v Gray (No 2)*<sup>3</sup>:

‘Section 29 of the 1999 Act permits the recovery of a premium where this is payment for insurance against the risk of liability for costs. If payment of a so-called premium buys a contractual entitlement to other benefits it is, to say the least, arguable that the premium cannot, to that extent, be recovered under s 29. Thus the court has to consider the terms of the contract under which the premium is paid to see whether it is simply a contract of insurance against liability for costs or whether it is something other than, or additional to, that.’<sup>4</sup>

The Senior Costs Judge makes particular reference to the fact that the customer has a contract with CDL and that CDL is not an insurer:

‘When a claimant enters into a contract with Claims Direct he is not exclusively a “party who has taken out an insurance policy”, he is certainly given Evidence of Insurance but that is only part of the package which he has purchased from Claims Direct. In my view the Claimant is entitled to recover the reasonable cost of the insurance element and, in relation to the amount which I find to be properly the insurance premium, I accept [counsel for claimants’] argument that I should not further analyse that figure.’<sup>5</sup>

‘Claims Direct is not the insurer nor even the agent of the insurer. Claims Direct offers to members of the public a package which includes an insurance element.’<sup>6</sup>

‘The true position is that this insurance was provided by the Underwriters through their brokers and coverholder LPL to the Claimant via Claims Direct. The Claimant would if asked almost certainly think he/she was agreeing with Claims Direct not LPL or the Underwriters.

The agreement between the Claimant and Claims Direct is not an agreement with an insurer. The money paid is not all premium. Part of what is provided by Claims Direct under its Protect Scheme is an insurance policy the premium for which is, if reasonable, recoverable. It is therefore necessary to identify the amount attributable to the insurance.’<sup>7</sup>

The thrust of the liability insurer’s argument was that the claims handling provided was not insurance and that the package bought by a customer was in large part not insurance. Enquiry into what the money was paid for was therefore warranted and it led to the conclusion that not all of the money was paid for insurance.

It was found that the following services, although accepted as being of some benefit to the underwriters and indeed required by them, were not insurance services:

- (1) Obtaining information for the solicitor.
- (2) Obtaining witness statements from clients, witnesses and experts.
- (3) Arranging client attendance for medical examination.

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## (4) Review by costs draftsman.

These non-insurance services were categorised as claims handling services. Of the £1,250 (not including tax) paid by a Claims Direct client, it was found that £591.55 was premium within s 29. The decision refers to the possibility that at least some of the non-insurance services could be recovered as solicitor's costs.

<sup>1</sup> [2003] EWCA Civ 136, [2003] 4 All ER 508, [2003] 2 All ER (Comm) 788.

<sup>2</sup> [2002] EWHC 9002 (Costs) at para [14].

<sup>3</sup> [2001] EWCA Civ 1246, [2001] 4 All ER 1, [2001] 1 WLR 2142.

<sup>4</sup> [2001] EWCA Civ 1246 at [12], [2001] 4 All ER 1, [2001] 1 WLR 2142.

<sup>5</sup> [2002] EWHC 9002 (Costs) at [173].

<sup>6</sup> [2002] EWHC 9002 (Costs) at [178].

<sup>7</sup> [2002] EWHC 9002 (Costs) at [180].

**[108.10]** A similar exercise to that conducted in the *Claims Direct Test Cases* was used in *The Accident Group Tranche 2 Issues Sharratt v London Central Bus Co*<sup>1</sup>. The TAG scheme was challenged in similar fashion to Claims Direct mainly on the basis of the level of premium sought to be recovered under the AJA 1999, s 29. The Senior Costs Judge held that the payment of £310 + VAT to AIL was a referral fee and not recoverable from the client nor from an opponent. Between £425 and £480 was premium for the purposes of s 29. The AIL payment was almost identical in function to the MLSS fees in *Claims Direct*. TAG solicitors were committed to paying the fee before they had a client. Accordingly it could not be a disbursement. It was also a fee that was charged for the solicitor to get the case and was therefore a referral fee. A referral fee is contrary to the Law Society Rules. The amount allowed as 'premium' for s 29 purposes and therefore recoverable from the opponent was arrived at by looking at how the amounts charged to clients were made up. Again this is a similar exercise to that carried out in the *Claims Direct Test Cases* where £630 was allowed. In a later decision<sup>2</sup> the Senior Costs Judge reviewed the amount allowable as premium for the Lloyd's policies written in 2001 in the light of evidence as to premium adjustments made by underwriters. The amounts allowed varied as to date and underwriter as follows: for the 2000 year £450 including IPT; for 2001 Lloyds £525 including IPT; and for 2001 NIG £425 including IPT.

<sup>1</sup> (Case No PTH 0204771) [2003] EWHC 9020 (Costs).

<sup>2</sup> 2003 SCCO Case No: PTH 0204771 30 July.

**Reasonableness of premium – Callery v Gray (No 2)**<sup>1</sup>

<sup>1</sup> [2002] UKHL 28, [2001] 4 All ER 1, [2001] 1 WLR 2142.

**[109]** The Court of Appeal gave guidance on ATE insurance having deferred its decision to enable a report to be prepared by Master O'Hare. The House of Lords<sup>1</sup> did not interfere with the court's decision as to ATE premiums and confirmed the court's interpretation of the AJA 1999, s 29 that the words 'the risk of incurring a costs liability' meant a costs liability that cannot be passed

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to the opposing party<sup>2</sup>. Lord Scott dissented from the majority decision to allow the recovery of the premium on the facts of *Callery*<sup>3</sup>.

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<sup>2</sup> [2001] EWCA Civ 1246 at paras [59] and [60], [2001] 4 All ER 1, [2001] 1 WLR 2142.

<sup>3</sup> [2001] EWCA Civ 1246, [2001] 4 All ER 1, [2001] 1 WLR 2142.

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### **Reasonableness of premium – RSA Test Cases**

**[109.1]** The Senior Costs Judge addressed the question of the reasonableness of premium in the *RSA Pursuit Test Cases*<sup>1</sup>. There were five test cases included in the hearing. The insurance policy in each case was the RSA Pursuit policy. The assessment of recoverable premium was made in the context of having found that the insurance company's method of calculating premium was inherently and seriously flawed such that the actual premiums set by the insurer could not be recovered.

The decision that the premium paid in each test case was disproportionate relied upon *Lownds v Home Office*<sup>2</sup> and the principle that if the costs as a whole, or a single item of costs, are or appear to be disproportionate, the test of necessity must be used:

‘The premiums in respect of Anthony Baker, Clarke and Farr have the appearance of disproportionality. For the reasons I have already given the premium in the case of Anthony Baker is disproportionate and fails the test of necessity. In the cases of Clarke and Farr, given that I propose to allow reasonable and proportionate premiums, the disproportionality point disappears. The premiums which I allow in respect of the remaining Test Cases are those which I consider to be reasonable and proportionate.’. At [452]

Given then that the premiums paid were not proportionate they could be reduced for the purposes of a costs assessment and an order that the paying party pays a premium. Court of Appeal in *Callery v Gray (No 2)* had held that in so far as the court finds that the premium is not reasonable it can and should reduce it:

‘In my judgment it cannot be reasonable to require the paying party to pay a premium based on costs claimed which may be higher than those which the court has found to be reasonable and proportionate. It must follow that if the costs claimed have been found to be unreasonable and disproportionate, the premium calculated on the basis of those costs must itself be unreasonable and disproportionate.’. At [347]

In assessing how much the losing party should be required to contribute to the premium which the ATE insurers had chosen to set the court should look both at the costs risks and at the size of the claim when considering the premium.

The premiums had been set using a formula applied to estimates of costs and which was found to be flawed. In assessing the premium to be allowed the Senior Costs Judge considered the actual level of costs to which the insurer had been exposed:

‘Provided that the premium rate has been calculated by a method which is not flawed . . . I can see no reason why the calculation of the premium itself should not be based on the Claimant's actual, reasonable and proportionate costs as assessed or agreed with the opposing party.’. At [260]

**[109.1]** Litigation Funding

The premiums allowed, based on the insurer's costs exposure, were therefore seen as proportionate to the risk involved. It had not been argued that the costs themselves were disproportionate.

	Actual Costs risked	Damages obtained	Premium Claimed	Premium Allowed
Deborah Baker	£24,708	£400,000	£52,048.92	£13,695
Anthony Baker	£5,752	£1250	£8962	£787.50
Clarke	£15,267	£20,000	£32,392.38	£11,666
Sandiford	£29,885	£44,000	£16,986	£16,986
Farr	£80,233	£250,000	£153,378	£41,708

In one of the five cases (Anthony Baker) the value of the claim itself was an important factor:

‘ . . . estimates were reasonably accurate save that he significantly under estimated his own costs. The prospect of success at 60% appears reasonable given the failure of the claim to CICA and the union solicitors' refusal to take the case any further. Had the claim been for a significant amount of damages the premium might have been justified. In fact this claim was never anything other than a fast track claim and before the policy proposal was accepted counsel had advised that the maximum damages would be £5,000. Even if [the solicitor's] estimate of his normal costs had been accurate, this would still have produced a premium in excess of the potential damages. On any reading the premium was clearly going to be disproportionate and the use of the Pursuit Policy not justified. [Council of the defendant] says, given the finding that £798 premium was disproportionate in the case of Samonini (a £2,000 case) “no more than £750 should be allowed, if a premium is allowed at all”. I allow £750 plus IPT.’. At [460]

<sup>1</sup> [2005] All ER (D) 88 (Aug).

<sup>2</sup> [2002] EWCA Civ 365, [2002] 4 All ER 775, [2002] 1 WLR 2450.

**Time of taking out ATE insurance**

**[110]** The House of Lords in *Callery*<sup>1</sup> upheld the decision of the Court of Appeal that an ATE premium can be recovered where the insurance has been purchased at the outset of the case before any reference has been made to the defendant. The House emphasised that all of the court's guidance was being given at an early stage in the new funding environment and that the guidance was to be reviewed as knowledge and experience developed.

On this point the approach of the House in not interfering with the decision of the Court of Appeal is summed up by Lord Hope:

‘These and the other practical considerations relied on by the Court of Appeal seem to me to point clearly in favour of allowing the ATE insurance policy to be taken out at the outset when the claimant first consults his legal representative.’<sup>2</sup>

Lord Scott's dissenting judgment is at [63]–[136] and does not accept the need for ATE insurance at the outset of a case. In *RSA Pursuit Test Cases*<sup>3</sup> the

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Senior Costs Judge rejected an argument that a delay in taking out ATE insurance was unreasonable:

‘In my judgment the Court of Appeal in *Callery v Gray (No 2)* did not state that ATE insurance ought not to be taken out late because this would have the result that premiums would be unnecessarily high, since the many were no longer paying for the few. The court in fact stated that it was not unreasonable for ATE insurance to be taken out early. The correct test is whether the individual claimant has acted reasonably in taking out ATE insurance when he or she did so. That is a decision which can only be taken having regard to the individual facts in each case.’. At [374]

In *Claims Direct Test Cases, Re*<sup>4</sup> the Senior Costs Judge sets out the principle to be applied where ATE insurance is taken out after an admission of liability has been made by the opponent:

‘Where an incident occurs, particularly a minor road traffic accident causing slight injury (Maxine Kelly’s claim was settled for £2,500 general damages) and where the liability insurer has from the outset accepted liability for the occurrence, it will generally be disproportionate and unreasonable to take out an ATE policy. There may however be circumstances surrounding the incident, particularly if there is likely to be a live issue as to causation (which on the facts of *Kelly v Larkin* there did not appear to be) which would make it reasonable to take out ATE insurance.’<sup>5</sup>

The Court of Appeal in *Halloran*<sup>6</sup> accepts that there are risks in costs only proceedings, sufficient to justify from 1 August 2001, a 5% success fee<sup>7</sup>. There will also be argument as to what constitutes an admission of liability and the risk as to adverse costs orders arising under Pt 36.

An ATE policy was purchased in respect of a quantum only dispute in *Wooldridge v Hayes*<sup>8</sup> where the matter had been dealt with under a before the event (BTE) policy until the limit of indemnity under that policy had been exhausted. The ATE premium of £7,469 (excluding tax) was for cover of £60,000 over and above the BTE cover. The premium was allowed on assessment on the basis that the purchase of that cover was reasonable given the risks on Part 36 and on the basis that the premium itself was reasonable.

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<sup>1</sup> [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000.

<sup>2</sup> [2002] UKHL 28, [2002] 3 All ER 417 at [60], [2002] 1 WLR 2000.

<sup>3</sup> [2005] All ER (D) 88 (Aug).

<sup>4</sup> [2003] EWCA Civ 136, [2003] 4 All ER 508, [2003] 2 All ER (Comm) 788.

<sup>5</sup> [2002] EWHC 9002 (Costs) at para [231].

<sup>6</sup> [2002] EWCA Civ 1258, [2003] 1 All ER 775, [2003] 1 WLR 28.

<sup>7</sup> See para [108.1].

<sup>8</sup> (SCCO Case No 0100072) [2005] EWHC 90007 (Costs).

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### Benefits obtained

[111] The Court of Appeal decided that reasonableness was to be judged by the benefits obtained for the premium and not the use made of the premium by the insurer<sup>1</sup>. AJA 1999, s 29 refers to the benefit of insuring against a costs risk. As to whether s 29 could extend to other benefits the court regarded that question as arguable<sup>2</sup>. The reference to the use made of the premium by the insurer deals with and rejects arguments that the make-up of the premium ought to be examined:

## [111] Litigation Funding

‘It is important in this context to draw a distinction between two separate matters. The first is the nature of the benefits to which the litigant is contractually entitled in exchange for the payment of the premium. This falls to be determined from the terms of the contract under which the premium is paid. Section 29 of the 1999 Act permits the recovery of a premium where this is payment for insurance against the risk of liability for costs. If payment of a so-called premium buys a contractual entitlement to other benefits it is, to say the least, arguable that the premium cannot, to that extent, be recovered under s 29. Thus the court has to consider the terms of the contract under which the premium is paid to see whether it is simply a contract of insurance against liability for costs or whether it is something other than, or additional to, that.’<sup>3</sup>

‘The contractual benefits purchased by the premium must be distinguished from the use made by the insurer of the premium. An insurer will necessarily look to premium income to meet the costs of the business. The primary costs are likely to be those of meeting claims, but the costs will also include matters such as commissions, advertising and, indeed, refurbishing the insurer’s premises. The court will not be directly concerned with how, or on what, the insurer spends the premium income. The court will, however, be concerned with the question of whether the premium is a reasonable price to pay for the benefits that it purchases. Ultimately, this should be a question to be considered having regard to experience, or evidence, of the market. If an insurer is conducting his business in a manner which incurs extravagant, extraneous or otherwise unnecessary expenditure, which has to be covered by the premiums, those premiums are likely to be uncompetitive. To pay such a premium where other more reasonable premiums are available may disentitle the litigant from making a full recovery of the costs of the premium.’<sup>4</sup>

It was by an application of these principles in the *Claims Direct Test Cases*<sup>5</sup> that the Senior Costs Judge concluded that if the whole of the amount paid by a Claims Direct client constituted premium under s 29, then not all of the benefits so purchased constituted insurance. Accordingly the costs of the non-insurance benefits was disallowed. This was an alternative to the finding that not all of the amount paid constituted premium – see above at para [108.4].

<sup>1</sup> [2001] EWCA Civ 1246 at [12], [2001] 4 All ER 1, [2001] 1 WLR 2142.

<sup>2</sup> [2001] EWCA Civ 1246 at [13], [2001] 4 All ER 1, [2001] 1 WLR 2142.

<sup>3</sup> [2001] EWCA Civ 1246 at [12], [2001] 4 All ER 1, [2001] 1 WLR 2142.

<sup>4</sup> [2001] EWCA Civ 1246 at [13], [2001] 4 All ER 1, [2001] 1 WLR 2142.

<sup>5</sup> [2003] EWCA Civ 136, [2003] 4 All ER 508, [2003] 2 All ER (Comm) 788.

**[111.1]** Similarly in *The Accident Group Tranche 2 Issues Sharratt v London Central Bus Co*<sup>1</sup> the Senior Costs Judge heard extensive evidence as to the benefits purchased by the gross premium and concluded that not all of those benefits constituted insurance. Accordingly only part of the sum paid by a client was recoverable under the AJA 1999, s 29. The Senior Costs Judge addressed the issue of the use of extensive actuarial evidence in challenges to premiums:

‘The court will not normally be prepared to receive such evidence. Evans J in *Johnson v Reed Corrugated Cases Ltd* [1992] 1 All ER 169 at 183 stated:

‘[Presenting] such figures requiring non expert analysis, ie by persons who are not accountants, is misconceived as a means of assisting the court in a particular case. Assessing costs is not an exact science; neither is accountancy. Treating the latter as if it were so that the results of an accountancy exercise can be used as a basis for the former, seems to me to achieve the worst of both worlds. The [Costs Judges] general

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knowledge and experience of local conditions and circumstances remains the only firm basis for reliable and consistent [assessment].” At 272

The Court of Appeal in *Claims Direct Test Cases*<sup>2</sup> considered that a court would only conduct a deconstruction of premium in exceptional cases:–

‘In my judgment, in this quite exceptional case, it was inevitable that the Master should adopt this [deconstruction] approach in order to identify what should truly be treated as the premium.’ Brooke LJ at 87

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<sup>1</sup> (Case No PTH 0204771) [2003] EWHC 9020 (Costs)..

<sup>2</sup> [2003] EWCA Civ 136, [2003] 4 All ER 508, [2003] 2 All ER (Comm) 788.

### Extent of cover

#### *Adverse costs*

[112] The court set out a number of circumstances where a court order might be made (judgment for defendant; CPR 1998, Pt 36; claimant losing one or more issues; discretionary power). The policy in this case further provided cover where the parties agreed that the insured should pay costs. The court held that a premium in respect of each of these circumstances was recoverable under the AJA 1999, s 29.

#### *Own costs*

[113] Paragraphs [34]–[62] of the judgment deal with this issue. The court outlined the circumstances in which a litigant might be left to bear own costs:

‘A litigant may be left to bear his own costs in a number of different circumstances. The costs incurred may be excessive or otherwise unreasonable, so that they will in no circumstances be recoverable from the litigant’s opponent. Reasonable costs will be recoverable only under a settlement agreement or an order of the court. A litigant may fail to obtain a court order for payment of costs for a number of reasons. His claim may fail, so that costs are ordered against him, rather than in his favour. He may fail on a particular issue at an interlocutory stage or at the final hearing and, in consequence, fail to obtain a costs order in relation to that issue. If he is successful the costs order made in his favour will not necessarily cover his solicitor and client costs.’<sup>1</sup>

Having reviewed material from the Lord Chancellor’s Department consultation papers, the explanatory notes to the Access to Justice Bill and submissions as to the overall scheme, the court reached its conclusions on this issue by dealing with the relevant parts of the CPR 1998 and the CPD.

In particular, reference is made to CPD, s 11.10 which provides in part:

‘In deciding whether the cost of insurance cover is reasonable, relevant factors to be taken into account include:

- (1) where the insurance cover is not purchased in support of a conditional fee agreement with a success fee, how its cost compares with the likely cost of funding the case with a conditional fee agreement with a success fee and supporting insurance cover;’

The court reached the conclusion that own costs cover is within the AJA 1999, s 29:

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‘The provisions of Practice Direction 11.10 clearly anticipates that insurance cover that falls within the ambit of section 29 may provide alternative protection to that provided by a CFA coupled with insurance. Such cover will necessarily include own cost insurance. The Practice Direction cannot, of course, confer on the court a jurisdiction that falls outside that conferred by section 29. The question is whether section 29 can and should be interpreted so as to treat the words “insurance against the risk of incurring a costs liability” as meaning “insurance against the risk of incurring a costs liability that cannot be passed on to the opposing party”.’<sup>2</sup>

‘We have concluded that section 29 can and should be interpreted in this way. We believe that such an interpretation will do no more than give the words the meaning that would be attributed to them by the reasonable litigant. It will also give the words a meaning that accords with the legislative intention and with the overall scheme for the funding of legal costs.’<sup>3</sup>

Here again, however, the court restricted itself to the facts of the case and has left it open for challenges to be made on the degree of own costs cover granted by other cases:

‘The circumstances in which and the terms on which own costs insurance will be reasonable, so that the whole premium can be recovered as costs, will have to be determined by the courts, when dealing with individual cases, assisted, if appropriate, by the Rules Committee.’<sup>4</sup>

This conclusion must however be set against the court’s decision as to the meaning of AJA 1999, s 29 in terms of the risk of being unable to pass a liability to an opposing party. Lord Scott in the House of Lords in *Callery*<sup>5</sup> also addressed the own costs element of a premium:

‘If it is reasonable for a claimant to take out ATE insurance cover in order to protect himself against incurring a costs liability in litigation, whether in respect of the other side’s costs or his own costs, I can, for my part see no reason why any distinction should be drawn between the types of adverse costs orders that might be made or the circumstances in which the orders might be made. If the claimant becomes entitled to costs and the expenditure has been reasonably incurred and is reasonable in amount, the expenditure, in my opinion, ought in principle to be included in the costs to be paid.’ At 130

In *Ashworth v Peterborough United Football Club*<sup>6</sup> the cost of a policy covering both sides’ costs was allowed in full on an assessment.

<sup>1</sup> [2001] EWCA Civ 1246 at [39], [2001] 4 All ER 1, [2001] 1 WLR 2142.

<sup>2</sup> [2001] EWCA Civ 1246 at [59], [2001] 4 All ER 1, [2001] 1 WLR 2142.

<sup>3</sup> [2001] EWCA Civ 1246 at [60], [2001] 4 All ER 1, [2001] 1 WLR 2142.

<sup>4</sup> [2001] EWCA Civ 1246 at [61], [2001] 4 All ER 1, [2001] 1 WLR 2142.

<sup>5</sup> [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000.

<sup>6</sup> (10 June 2002, unreported), SCCO 0201106.

#### Premium cover

[114] The policy in *Callery* included a commonly provided cover for the premium itself in the event that the claim failed. The court<sup>1</sup> concluded that as an item of own costs cover this was within the AJA 1999, s 29:

‘The cover provided by the Temple policy, as is usual, includes cover against the risk of being unable to recover the premium as a consequence of losing the action . . . We can see no reason, in principle, why this should not form part of the cover

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provided under insurance that falls within section 29, provided always that any part of the premium attributable to it is reasonable in amount.’. At [63]

The court here however expressly states that the level of premium charged for this part had to be reasonable. This item by item approach is not reflected in the rest of the judgment. It is submitted that given the court has decided that this benefit is within s 29 it is the overall cost of obtaining all of the s 29 benefits which should be considered rather than any attempt to apportion parts of premium to each or any benefit. This head of cover was also allowed in *Claims Direct Test Cases*<sup>2</sup>.

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- <sup>1</sup> *Callery v Gray (No 2)* [2001] EWCA Civ 1246, [2001] 4 All ER 1, [2001] 1 WLR 2142; affd [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000.  
<sup>2</sup> [2003] EWCA Civ 136, [2003] 4 All ER 508, [2003] 2 All ER (Comm) 788.
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#### *Deferred premium*

[115] The policy purchased in this case provided for the premium to be paid at the conclusion of the case. The issue of the cost within the premium representing a delay in payment was not raised in the appeal and the court therefore said that this issue would be addressed if and when it arose<sup>1</sup>. Deferral of premium was later addressed in *RSA Pursuit Test Cases*<sup>2</sup> where the Senior Costs Judge made no deduction from premiums for the fact of deferral. It had been argued that some reduction in premium ought to take place because there must be hidden in the premium a cost that in effect amounts to an irrecoverable cost of funding the litigation. The alternative method of funding premiums which many insurers provide is by way of a loan to the client. The interest on that loan would not be recoverable on the basis of the general principle of not inquiring into how a litigant has funded their costs<sup>3</sup>.

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- <sup>1</sup> In *Tilby v Perfect Pizza* [2002] NLJR 397, Senior Costs Judge Hurst held that a deferred premium did not constitute credit for the purposes of the Consumer Credit Act 1974.  
<sup>2</sup> [2005] All ER (D) 88 (Aug).  
<sup>3</sup> See *Hunt v RM Douglas (Roofing) Ltd* (1987) 132 Sol Jo 935, [1988] 3 LS Gaz R 33, CA; revsd [1990] 1 AC 398, [1998] 3 All ER 823, HL.
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#### *Unrecovered premium/ring fencing of damages*

[116] Some policies give cover designed to protect damages from unrecovered costs and in particular from any unrecovered premium. The effect on the premium level in *Callery* itself was regarded as minimal or non-existent. The cover there provided was limited to any un-recovered premium. This leaves therefore the question of recovery where the cover is greater although the court did question whether it was the Lord Chancellor’s intention that such cover would be paid for by an opponent:

‘We have seen nothing to suggest that it was the intention that claimants should be entitled to pass on to defendants the cost of insuring against failure to be awarded costs on the ground that the costs had been unreasonably incurred or were otherwise objectionable.’<sup>1</sup>

In *Claims Direct Test Cases*<sup>2</sup> the Senior Costs Judge was clear that an additional premium paid exclusively to cover unrecovered premium was itself not recoverable:

## [116] Litigation Funding

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‘The Defendants object to paying this additional premium, firstly because they say it was brought about by the poor claims performance of Claims Direct, which is ultimately due to bad management, for which they should not have to pay. Secondly, they argue that in any event the cover purchased by the additional premium does not fall within the ambit of Section 29. The Court of Appeal in *Callery v Gray (No 2)* explained the position in this way:

“38. Insurance is the purchase of an indemnity against the risk of loss caused by a fortuity. A contract that provides for the payment of a sum of money upon the occurrence of a fortuitous event will not be insurance unless the sum in question is intended to indemnify against a consequence of that event. When considering the nature of ‘own costs insurance’, it is necessary to identify the fortuity that triggers liability and consider the extent to which this fortuity exposes the insured to the loss against which cover is provided.” The fortuity here is not the inability to recover costs but the event of claiming too much’.<sup>3</sup>

‘In my view, since the cover purchased for £245 plus IPT was a discrete add on to the existing insurance for which the Claimant paid separately, and since the cover provided does not fall within the strict limits of Section 29, no part of the £245 plus IPT is recoverable. Had the Claimant taken out a policy which included ring fencing at the outset it still seems to me that this element of cover and therefore its cost should be excluded from what is recoverable from the paying party.’<sup>4</sup>

It is important to note that the above extract from the decision relates to an additional premium paid by Claims Direct clients to provide cover against un-recovered premium.

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<sup>1</sup> [2001] EWCA Civ 1246 at [54], [2001] 4 All ER 1, [2001] 1 WLR 2142. In *Re Claims Direct Test Cases* [2002] EWCA Civ 428, [2002] PIQR Q 152, (2002) Times, 4 April Lord Phillips MR stated that *Callery* does not give an answer to the issue of ring-fencing – at para [29]. This was an appeal from a case management decision and not an appeal from the substantive case.

<sup>2</sup> [2002] All ER (D) 76 (Sep).

<sup>3</sup> [2002] EWHC 9002 (Costs) at [213].

<sup>4</sup> [2002] EWHC 9002 (Costs) at [214].

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## *Collateral benefits*

[117] The court here refers to benefits provided by the insurance other than cover for legal costs and at para [33] expressly leaves this question open. Master O’Hare’s report gave examples of collateral benefits such as claims negotiation and handling, counselling and other practical help. On the facts of the case there were no collateral benefits given by the policy. In *Claims Direct Test Cases*<sup>1</sup> a number of collateral benefits were identified and their cost was disallowed as premium<sup>2</sup>. It was however possible that some of those benefits could be claimed as solicitor’s costs. Similar benefits were included in the gross premium in the TAG Test Cases<sup>3</sup> and that part of gross premium was not recoverable under the AJA 1999, s 29.

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<sup>1</sup> [2003] EWCA Civ 136, [2003] 4 All ER 508, [2003] 2 All ER (Comm) 788.

<sup>2</sup> See above at paras [108.9] and [111].

<sup>3</sup> SCCO 2003 Case No: PTH 0204771.

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*Both sides costs policies*<sup>1</sup>

<sup>1</sup> [2001] EWCA Civ 1246 at [61], [41], [51], and [54], [2001] 4 All ER 1, [2001] 1 WLR 2142.

**[118]** The court was not considering a policy which provided both sides' costs (BSI) other than the limited extent of own disbursements. There are passages in the judgment, however, which refer to the issues which will arise where the cover is for own costs in a fuller extent:

'Mr Callery's cover does not make it a condition of the recoverability of his disbursements in the event of the failure of his claim that these would have been recoverable had his claim succeeded. In the case of BSI this question is likely to be much more significant.'<sup>2</sup>

The point being made here is that where a policy provides cover for all of the insured's own costs in the event that the case fails, that cover may well extend to items which would not have been recovered had the claim succeeded. It will be a difficult exercise however to try to apportion premium to this hypothetical amount since the cover given will be in terms of an overall limit of indemnity.

Where a CFA is used the risk on own costs, including items that would not be recovered from an opponent, is taken by the legal representative. The cost of that risk is included in the success fees of cases that win. By analogy if a both sides' costs policy is used the insurance will cover all own costs including those that would not themselves be recoverable.

Lord Scott in the House of Lords in *Callery*<sup>3</sup>, whilst dissenting from the decision on the facts to allow recovery of the premium, saw no reason to treat a both sides' policy any differently to an adverse costs only policy:

'If it is reasonable for a claimant to take out ATE insurance cover in order to protect himself against incurring a costs liability in litigation, whether in respect of the other side's costs or his own costs, I can, for my part see no reason why any distinction should be drawn between the types of adverse costs orders that might be made or the circumstances in which the orders might be made. If the claimant becomes entitled to costs and the expenditure has been reasonably incurred and is reasonable in amount, the expenditure, in my opinion, ought in principle to be included in the costs to be paid.'<sup>4</sup>

In *Ashworth v Peterborough United Football Club*<sup>5</sup> the premium for a both side's costs policy was allowed in full.

<sup>2</sup> [2001] EWCA Civ 1246 at [41], [2001] 4 All ER 1, [2001] 1 WLR 2142.

<sup>3</sup> [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000.

<sup>4</sup> [2002] UKHL 28, [2002] 3 All ER 417 at para [130], [2002] 1 WLR 2000.

<sup>5</sup> (10 June 2002, unreported) SCCO 0201106.

**The actual cost in *Callery***<sup>1</sup>

<sup>1</sup> [2001] EWCA Civ 1246, [2001] 4 All ER 1, [2001] 1 WLR 2142.

**[119]** The premium paid in the case was £350 plus tax. The court was asked by the appellant to reduce that figure to near £160. The court held that the

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price paid was not manifestly disproportionate to the risk. The premium paid was not however the lowest available in the market:

‘So far as alternatives are concerned, Mr Callery was able to choose, with the assistance of his solicitors, cover at a premium near the bottom of the range of what was available. The premium was one tailored to the risk and the cover was suitable for Mr Callery’s needs. The policy terms also had the attractive feature that they gave his solicitors control over the conduct of the proceedings on his behalf, without any involvement by a claims manager until a settlement offer was made.’<sup>2</sup>

Having allowed this premium the court was clearly concerned for the future effect on premiums:

‘Just as in the case of our decision on the CFA uplift, we should emphasise that this judgment should not be treated as determining once and for all that a premium of £350 is reasonable in a case such as this. As further information and experience about the market becomes available it will be possible to found conclusions as to whether premiums are reasonable on a sounder basis.’<sup>3</sup>

It will remain to be seen how coherent the market becomes in the future and what information about products and claims will be made available. Not all insurers will gather the same experience at the same time and they will not all review their products at the same time. This at the very least will make it difficult to take a snap shot of the market at any given time with a view to setting benchmarks.

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<sup>2</sup> [2001] EWCA Civ 1246 at [70], [2001] 4 All ER 1, [2001] 1 WLR 2142.

<sup>3</sup> [2001] EWCA Civ 1246 at [00], [2001] 4 All ER 1, [2001] 1 WLR 2142.

### Master O’Hare’s Report

[120] The court annexed the report to its judgment without approving the views expressed within the Report. The object is to make available to those who have to make decisions on recoverability in the future:

‘His views may prove of assistance to those faced with the task of ruling on the recoverability of ATE premiums, but they cannot be treated as definitive.’<sup>1</sup>

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<sup>1</sup> [2001] EWCA Civ 1246 at [4], [2001] 4 All ER 1, [2001] 1 WLR 2142.

### *Guidance for assessment*

[121] Set out below in Table I is a summary of the Report’s analysis of premiums based upon a list of benefits additional to adverse costs cover. Master O’Hare was giving guidance as to the percentage of premium which could be attributed to these items, information which will be needed only where on assessment it is considered that that part of the premium ought not to be recovered. The effect of the court’s judgment on each item is therefore given since not all items can be treated in the same way as to recoverability.

Table II sets out Master O’Hare’s guidance for the conduct of detailed assessments in RTA cases. Again the effect of the court’s judgment is given alongside the Report’s conclusions.

## CFAs after 1 April 2000 and before 1 November 2005 [123]

Table I What does the premium cover?

**[122]**

Item	Court of Appeal recoverable*	Report
Own counsel's fees	Yes	Allow in full
Other disbursements	Yes	Allow in full
Cover for appeals	Not considered	Negligible
Costs of Part 36	Yes	Substantial but not quantified
Top up cover option	Not considered	Not quantified
Interest foregone on deferred premiums	No decision – see [65] **	Allow in full
Premium cover in event case loses	Yes	Allow in full
Unrecovered premium	Doubted – see [54] and [62]	Not quantified
Claims record of solicitor	Not considered	Not quantified
Interest on disbursement loans if claim fails	Not considered	Consider: likely rate of interest, size of loan, likely duration of proceedings, risk of loss
Advice and assistance of claims managers	Arguably not see	Not quantified

\* The court's decision is as to recoverability and not the question of the cost of that cover which might be found nonetheless to be unreasonable.

\*\* All paragraph numbers are references to the judgment of Lord Phillips MR.

Table II Guidance for detailed assessment – RTA

**[123]**

	Guidance	Court of Appeal
(a)	No benchmarking – develop benchmarks through experience	
(b)	High limit of indemnity does not itself indicate unreasonable premium	
(c)	Block risk policies not unreasonable	May be difficult to justify see – [23]
(d)	[rejected by court]	There is no presumption that the premium is reasonable
(e)	Allowed premium is total not the pure underwriting risk premium	Do not look to how the premium is used by the insurer.
(f)	Assessment fees and profit costs of complying with policy recoverable	Not considered

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(g)	Receiving party need not have made the best choice – must be reasonable choice	Premium actually allowed was not lowest available.
(h)	Paying party to provide evidence from ‘Litigation Funding’ or similar source	ATE insurer to provide evidence of reasonableness – see [16]
(i)	Can be reasonable to insure before sending letter to opponent	Yes
	Also reasonable to wait until defendant’s reaction known	Not considered
(j)	If premium at or above top of range of other policies – purchaser must explain	Not specifically addressed but judgment generally consistent
(k)	High cost premium easier to justify where high success fee has been allowed	Not considered
(l)	Consider reductions for irrecoverable elements [Table I]	See Table I
(m)	Value deductions by broad brush	Not considered

The issue of block rated policies arose in *Claims Direct Test Cases*<sup>1</sup>:

‘Such evidence as there is on the topic of block rating is to the effect that the level of recoverable premium would have been altered to a minimal extent. Accordingly, in the context of these test cases, I make no deduction in respect of block rating. As Master O’Hare stated in paragraph 15 of his Report the issue may arise again in cases where there is sufficient evidence to decide whether block rated policies are more expensive than individually rated policies and if so whether the premium of such a policy is reasonably recoverable.’<sup>2</sup>

Reliance on material published in the Law Society publication Litigation Funding (see (h) in the above table) has since been disapproved by the Senior Costs Judge in *re RSA Pursuit Test Cases* and by the Court of Appeal in *Rogers v Merthyr Tydfil County Borough Council*<sup>3</sup>.

<sup>1</sup> [2003] EWCA Civ 136, [2003] 4 All ER 508, [2003] 2 All ER (Comm) 788.

<sup>2</sup> [2002] EWHC 9002 (Costs) at para [222].

<sup>3</sup> [2006] EWCA Civ 1134, [2007] 1 All ER 354, [2007] 1 WLR 808. See paras [141]–[144].

### The effect of before the event insurance on recovery of after the event insurance premiums<sup>1</sup>

<sup>1</sup> *Sarwar v Alam* [2001] EWCA Civ 1401 [2001] 4 All ER 541, [2002] 1 WLR 125.

**[124]** An ATE premium is recoverable as an additional liability if it was reasonable to take out such a policy. The Court of Appeal in *Sarwar*<sup>1</sup> addressed a number of issues with regard to the use of ATE insurance where a before the event (BTE) policy of insurance is in existence. This decision concerned only the recovery of the additional liability. In the later case of *Samonini v London*

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*General Transport Services Ltd*<sup>2</sup> the Senior Costs Judge considered the effect of pre-existing legal expenses insurance on the validity of entering into a CFA. The Court of Appeal in *Myatt v National Coal Board*<sup>3</sup> held a CFA to be invalid where insufficient enquiry had been made as to the existence and extent of BTE insurance. In *Richards v Davis*<sup>4</sup>, where the client was represented under the TAG scheme, no enquiry at all was made as to existing insurance or any other form of funding. The CFA was accordingly invalid. Importantly, that does not decide the recoverability of the ATE premium. It was held that there should, be no recovery of premium in this case as to enter into such arrangements without any enquiry as to alternatives was itself unreasonable. As with *Callery*, the decision in *Sarwar* concerned RTA cases involving personal injury and the court's decision is expressed to be confined to that class of case with a value below £5,000<sup>5</sup>. The *Sarwar* guidance as to using BTE where it exists was held in *Woolley v Haden Building Services*<sup>6</sup> not to apply other than relatively small personal injury claims in road traffic cases and certainly did not apply to industrial disease claims.

<sup>1</sup> *Sarwar v Alam* [2001] EWCA Civ 1401 [2001] 4 All ER 541, [2002] 1 WLR 125.

<sup>2</sup> [2005] EWHC 90001 (Costs), [2006] NLJR 457. See para [152.5].

<sup>3</sup> [2006] EWCA Civ 1017, [2007] 1 All ER 147, [2007] 1 WLR 554.

<sup>4</sup> (2005) unreported: SCCO Ref: PTH 0504722.

<sup>5</sup> *Sarwar v Alam* [2001] EWCA Civ 1401, [2001] 4 All ER 541 at para [41], [2002] 1 WLR 125.

<sup>6</sup> SCCO 0705738 [2008] EWHC 90097 (Costs).

### The level of inquiry about BTE cover

#### *Inquiry of the client*

[125] The court's approach in *Sarwar* to checking BTE cover begins at para 45 with the assumption that the client will be attending a face to face interview with the solicitor. In the context of road traffic personal injury claims that assumption would be wrong in a large number of cases. It was recognised in *Myatt v National Coal Board*<sup>1</sup> that it is necessary to adapt the court's approach for clients who will be interviewed by telephone and who will not meet their solicitor. The general guidance given in *Sarwar*:

'In our judgment, proper modern practice dictates that a solicitor should normally invite a client to bring to the first interview any relevant motor insurance policy, any household insurance policy and any stand-alone BTE insurance policy belonging to the client and/or any spouse or partner living in the same household as the client. It would seem desirable for solicitors to develop the practice of sending a standard form letter requesting a sight of these documents to the client in advance of the first interview. At the interview the solicitor will also ask the client, as required by paragraph 4(j)(iv) of the client care code (see para 14 above), whether his/her liability for costs may be paid by another person, for example an employer or trade union.'<sup>2</sup>

The essence of the guidance is that proportionate and early inquiry should be made of the client and that the solicitor should obtain sight of insurance policies.

In *Myatt* the court stressed that the test was one of reasonableness in all the circumstance. In the context of a finding that the CFA was invalid for breach of reg 4(2)(c) the court explained its guidance given in *Sarwar*:

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‘ . . . regulation 4(2)(c) duty does not require solicitors slavishly to follow the detailed guidance given by this court in *Sarwar*. In particular, the statement at para 45 [of *Sarwar*] that a solicitor should normally invite a client to bring to the first interview any relevant policy should be treated with considerable caution. It has no application in high volume low value litigation conducted by solicitors on referral by claims management companies. As the *Myatt* cases show, the clients will often live far from the solicitor’s offices, and face to face interviews may well not take place.’ [70]

As to the enquiry to be made of a client the court identified five factors of relevance:

First, the nature of the client. If the client is evidently intelligent and has a real knowledge and understanding of insurance matters, it may be reasonable for the solicitor to ask him not only (i) whether he has credit cards, motor insurance or household insurance or is a member of a trade union, (ii) whether he has legal expenses insurance, but also (iii) the ultimate question of whether the legal expenses policy covers the proposed claim and, if so, whether it does so to a sufficient extent. Litigants such as the *Myatt* claimants and Ms Garrett plainly do not fall into this category: few litigants will. If the solicitor does ask such questions, he will have to form a view as to whether the client’s answers to the questions can reasonably be relied upon. [72.]

Secondly, the circumstances in which the solicitor is instructed may be relevant to the nature of the enquiries that it is reasonable to expect the solicitor to undertake in order to establish the BTE position. A good example of the application of this factor is to be found in *Pratt v Bull*, which was one of the five cases that was heard together with *Hollins v Russell*. In that case, the 80-year old claimant was injured in a road accident. A solicitor visited her while she was in hospital and a CFA was made. At the assessment of her costs, it was argued on behalf of the defendant that the possibility of legal expenses insurance under her home insurance policy had not been fully explored. At para 138, the court said that there were limits to what can reasonably be expected of the interchange between solicitor and client in such circumstances: “It would be ridiculous to expect a solicitor dealing with a seriously ill old woman in hospital to delay making a CFA while her home insurance policy was found and checked.” It was sufficient that the solicitor had discussed it with her and formed a view on the funding options. [73]

Thirdly, the nature of the claim may be relevant. If the claim is one in respect of which it is unlikely that standard insurance policies would provide legal expenses cover, this may be a further reason why it may be reasonable for the solicitor to take fewer steps to ascertain the position than might otherwise be the case. [74]

Fourthly, the cost of the ATE premium may be a relevant factor. This is the point made at para 50 of *Sarwar*. In our judgment, it is as relevant to a question of breach of regulation 4(2)(c) as to a question of the reasonableness of the premium for the purposes of an assessment of costs pursuant to CPR 44.4. [75]

Fifthly, if the claim has been referred to solicitors who are on a panel, it may be relevant that the referring body has already investigated the question of the availability of BTE. Whether it is reasonable to rely on any conclusion already reached will be a matter on which the panel solicitor must exercise his own judgment.’ [76]

The court then considered the question of whether a solicitor must always request sight of insurance documents:

‘ . . . in our judgment a solicitor is not required in every case to ask the client who says that he has a home, credit card or motor insurance or is a member of a trade

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union to send him the policy or trade union membership document . . . In some circumstances, it is reasonable for the solicitor to ask the further question whether the insurance covers legal expenses and to rely on the answer given by the client without further ado. In yet other cases, it is even reasonable to ask the client to answer what we have called the ultimate question. [77]

We acknowledge that to require the solicitor to ask the client to send the policies in all cases has the merit of certainty and would minimise the risk of satellite litigation. In *Adair v Cullen*, Judge Holman said that the *Sarwar* approach should be adopted to breach of regulation cases and that it “suggests a question along the lines of “Do you have motor insurance” and if the answer is “Yes”, the next question is “can I see the policy document please?” “ In some cases, such an approach is reasonable and necessary to enable the solicitor to discharge his regulation 4(2)(c) duty. But for the reasons that we have given, we do not accept that it is required in all cases. [78]

In *White v Revell*<sup>3</sup> the CFA was held to be valid where the solicitor relied upon the educated professional client’s answers to questions of alternative legal expenses insurance or other means of funding his action. Specifically mentioned was the possibility of using an insurance policy that the client’s parents may have had. The reliance on the client to check for such insurance was acceptable in the circumstances.

The guidance given in *Myatt* was in the context of compliance with the now revoked CFA Regulations and therefore it has direct application only to cases where a CFA was entered into before those regulations were revoked. *Myatt* was not a case falling into the category of low value simple road traffic claims considered in *Sarwar*. Compliance with reg 4 is required in all cases of whatever tripe, complexity or value, subject to the third of the five factors outlined above. For the purposes of recovery of an ATE premium even after the revocation of the regulations it is submitted that the guidance is applicable to the extent that it explains the court’s decision in *Sarwar*. Recovery of premium is not automatically decided by a finding that the CFA is invalid although in many cases it is likely to have been unreasonable to have used ATE<sup>4</sup>. BTE has caused particular difficulties in cases involving busses with no consistency in the lower courts as to whether a solicitor before 2005 could have been expected to check the bus company’s insurance to see if it covered injured passengers. A decision in favour of the paying party is *Tranter v Hansons*<sup>5</sup>, and a decision in favour of the receiving parties is *Dole v ECT*<sup>6</sup>.

There seems nothing in principle that prevents adequate inquiry by telephone albeit that the costs in terms of time are likely to be significant if a questionnaire has to be administered by telephone. The following questionnaire is suitable for client use before first interview or administration by telephone. If as a result of this inquiry it appears that the client has insurance policies that may include legal expenses cover then the solicitor will need to see those policies before making a decision as to a CFA and ATE insurance. Failure to obtain sight of the policies may render the CFA invalid and will preclude any recovery of the ATE premium.

<sup>1</sup> [2006] EWCA Civ 1017, [2007] 1 All ER 147, [2007] 1 WLR 554.

<sup>2</sup> *Sarwar v Alam* [2001] EWCA Civ 1401 at [45], [2001] 4 All ER 541, [2002] 1 WLR 125.

<sup>3</sup> (2006) unreported SCCO Ref: CW0508940 [2006] EWHC 90054 (Costs).

<sup>4</sup> See for example *Richards v Davis* (2005) unreported: SCCO Ref: PH 0504722 [2005] EWHC 90014 (Costs) at para [124].

<sup>5</sup> [2009] EWHC 90145.

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<sup>6</sup> (unreported SCCO 17 September 2007) [2007] EWHC 90086 (Costs).

*BTE enquiry and Part 45 fixed costs*

**[125.1]** CPR Part 45 provides for fixed recoverable fees including a success fee in specified types of case. Part 45 provides for recovery of an ATE premium as a disbursement but does not fix the recoverable premium by amount. The availability of BTE in cases covered by the fixed costs regime cannot affect the recovery of base costs and a success fee. The fixed costs regime was considered by the Court of Appeal in *Kilby v Gawith*<sup>1</sup> which held that Part 45 did not confer any discretion on a court and accordingly the availability of BTE insurance was not a factor where the fixed costs regime applied. A success fee of 12.5% was due irrespective of whether BTE insurance could have been used. This decision does not address the recovery of an ATE premium in such a case. ATE premiums are not a fixed recovery under Part 45 and therefore reasonableness is an issue. This decision may inadvertently put pressure on solicitors to run cases uninsured or it may lead to solicitors paying the ATE premium rather than allow cases to go to a panel firm.

<sup>1</sup> [2008] EWCA Civ 812, [2009] 1 WLR 853, [2009] RTR 8.

*Client questionnaire*

**[126]** Please answer each question YES or NO or NOT KNOWN by putting a tick in the box next to each question:

	Yes	No	Not known
1 Do you, or a partner living with you, own (with or without a mortgage) your home?			
2 Do you, or a partner living with you, have home contents insurance?			
3 Have you, or a partner living with you, purchased Legal Expenses insurance?			
4 Are you, or a partner living with you, employed?			
5 Are you, or a partner living with you, a member of a trade union?			
6 Were you driving a car when the accident occurred?			
7 If you were a passenger do you know the name of the driver of the car you were in?			
8 If you were a passenger, is the driver related to you?			
9 In your opinion was the accident the fault of your driver?			
10 Are you likely to be able to find any insurance policies that you have?			

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## Using the above questionnaire

[127]–[128] The questionnaire is intended to enable a risk assessment to be made of the likelihood of a client having BTE cover. This approach avoids the assumption that a client will have accurate knowledge of their past and existing insurance cover. Questions 1–3 where answered YES indicate a likelihood that BTE will exist. Negative answers indicate a likely absence of BTE. Questions 6–9 indicate the suitability of BTE and deal particularly with passenger clients. Question 10 addresses the practical difficulty of asking a client to bring with them all policy documents. An accompanying letter should stress the importance of existing insurance cover and the need to provide the documents. In passenger cases the client should be asked to contact the driver to obtain a copy of the driver's policy. Questions 4 and 5 comply with the Client Care Code in exploring alternatives other than insurance.

## The questions

- (1) YES = Likely to be buildings insurance which may have an add-on BTE cover (but may exclude road traffic claims.)  
NO = No buildings insurance is likely to exist giving cover to the client.
- (2) YES = BTE may exist as an add-on to the contents policy (but may exclude road traffic claims.)  
NO = Not a source for BTE
- (3) YES = This is specifically purchased as a stand-alone BTE policy.  
NO = No stand-alone likely to exist.
- (4) YES = Possible that the employer provides BTE.  
NO = Not a source of BTE
- (5) YES = May provide legal assistance though not BTE.  
NO = Not a source of funding.
- (6) YES = Client ought to have liability insurance – it may include a BTE add-on (see likelihood – below).  
NO = Client's own motor policy BTE add-on will not provide cover\*.
- (7) YES = Client to request copy of driver's BTE policy and seek consent to use it (see Suitability of BTE cover – below).  
NO = Unlikely to be cost effective to pursue this source.
- (8) YES = Potential conflict of interest may make this BTE unsuitable..  
NO = No conflict of interest arising from family relationship.
- (9) YES = Likely conflict of interest may make this BTE unsuitable.  
NO = Need to assess nonetheless the possibility that blame will eventually attach to own driver.
- (10) YES = Indicates information provided will be accurate.  
NO = indicates that information will be incomplete and some unavailable.

\*If the client was a passenger but had a motor policy of their own covering the driver as a named driver or where the policy covers all drivers, there may be BTE cover available to the client under such a policy. For example where a husband is driving his wife's car and the wife's policy covers the husband as a named driver, both are likely to be covered in any add-on BTE policy. If in such a case there were to be multiple claims, for example, husband wife and other passenger, the situation becomes complex, certainly in terms of advice to the client as to the suitability of cover.

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In *Dole v ECT Recycling*<sup>1</sup> the costs judge accepted the clear conclusion from uncontradicted evidence that the state of knowledge of solicitors specialising in the personal injury field in the summer of 2004 was not that the defendants to a claim against a bus company might have passenger cover, and in particular that such cover would be dealt with independently of any claim made against them by the passenger. Accordingly failure to enquire of the defendant was not unreasonable.

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<sup>1</sup> [2007] EWHC 90086 (Costs).

### *Investigating documents*

[129] The court in *Sarwar*<sup>1</sup> as explained in *Myatt*<sup>2</sup> anticipates that the BTE policy wording will be available and that the client's solicitor will in suitable cases read through it to determine its availability and suitability. *Myatt* emphasised that in many cases it will not be sufficient to rely on the client's own knowledge and understanding and it will be insufficient merely to ask whether the client has legal expenses insurance and be content with a negative answer. Determining the existence of BTE can be achieved if the client has a renewal notice, a certificate of insurance or an invoice/receipt – the latter may come from a broker or from the insurer. Suitability of cover cannot be determined except from the policy wording applicable to the insurance. Where the client does not produce a policy wording it would be necessary for the client to obtain the wording before suitability of cover can be assessed and any decision as to how to fund the case is taken. The court gave no guidance as to what further steps should be taken or any time scale for such steps. Failing to have sight of policy wordings can also affect the validity of a CFA<sup>3</sup>. The enquiries made by the solicitor in *Puksis v Brumby*<sup>4</sup> revealed that the client did not have household contents insurance, did not drive and did not have credit cards and the solicitor concluded that there was no legal expense cover. The court was satisfied on the evidence that the solicitor checked the building insurance policy that the client did have. Those enquiries covered the realistic possibilities in the circumstances of this case.

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<sup>1</sup> *Sarwar v Alam* [2001] EWCA Civ 1401 [2001] 4 All ER 541, [2002] 1 WLR 125.

<sup>2</sup> [2006] EWCA Civ 1017, [2007] 1 All ER 147, [2007] 1 WLR 554.

<sup>3</sup> See para [152.5].

<sup>4</sup> [2008] EWHC 90095 (Costs).

### *The effect of inaccurate information*

#### **Client risk**

[130] Where BTE cover is available and suitable in a road traffic case valued at less than £5,000 it is clear that an ATE premium will not be recovered in costs. Where a client mistakenly concludes that they have no such cover it is not clear what the result will be for the ATE premium. The court suggests the sort of inquiry which the above questionnaire facilitates. A solicitor must also have sight of any insurance policies that may have legal expenses cover. If after such inquiry it is mistakenly concluded that the client has no BTE cover then the reasonableness of purchasing ATE cover and entering into a CFA with

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success fee ought to be judged in the light of the steps which have been taken. A client in such circumstances will rely on the CPD s 11.7:

‘Subject to paragraph 17.8(2), when the court is considering the factors to be taken into account in assessing an additional liability, it will have regard to the facts and circumstances as they reasonably appeared to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the arrangement.’

In *Samonini v London General Transport Services Ltd*<sup>1</sup> a failure on the part of a solicitor to carry out this level of inquiry was a breach of the CFA Regulations with the consequence that the entire funding arrangement was invalid<sup>2</sup>.

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<sup>1</sup> [2005] EWHC 90001 (Costs), [2006] NLJR 457.

<sup>2</sup> See para [152.5].

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### Solicitor risk

[131] The court in *Sarwar*<sup>1</sup> addressed only the question of fault in terms of a solicitor’s duty of care. The court said that any advice given will necessarily be based on the information provided by the client and that advice based upon inadequate or inaccurate information, whilst unsound, will not indicate fault<sup>2</sup>.

There are, however, serious questions as to risk which this does not answer. Where a client has purchased ATE insurance on the mistaken basis that there is no BTE, the client has a liability for the premium. In many cases the premium will be deferred or funded so that there is still a real question as to payment (or repayment of a loan). There will be circumstances in which the solicitor will in some form or other be carrying the premium as a disbursement liability. In these circumstances clearly there is a real risk of financial loss irrespective of the matter of negligence.

Equally a solicitor who has entered into a CFA with a success fee may be faced later with evidence of available and suitable BTE which the early inquirer did not discover. As with the client’s position as to premium, such a solicitor will seek to rely upon CPD, s 11.7 as to the reasonableness of entering into such a funding arrangement. In *Samonini v London General Transport Services Ltd*<sup>3</sup> and in *Myatt v National Coal Board*<sup>4</sup> a failure on the part of a solicitor to carry out the *Sarwar* level of inquiry was a breach of the CFA Regulations, with the consequence that the entire funding arrangement was invalid, notwithstanding the fact that the client did not have BTE cover<sup>5</sup>. Where inadequate enquiry is made it may lead to a pre November 2005 CFA being unenforceable and to a failure to recover the premium. From 1 November 2005 the CFA will be valid but the success fee will be at risk as well as the ATE premium where it can be argued that BTE was available. In fixed costs cases under Part 45 the success fee is fixed and not vulnerable to such a challenge but the premium is still vulnerable.

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<sup>1</sup> *Sarwar v Alam* [2001] EWCA Civ 1401 [2001] 4 All ER 541, [2002] 1 WLR 125.

<sup>2</sup> *Sarwar v Alam* [2001] EWCA Civ 1401 at [51].

<sup>3</sup> [2005] EWHC 90001 (Costs), [2006] NLJR 457.

<sup>4</sup> [2006] EWCA Civ 1017, [2007] 1 All ER 147, [2007] 1 WLR 554.

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<sup>5</sup> See para [152.5].

### The terms of the BTE policy in Sarwar

[132] The BTE was with DAS, with the following important provisions highlighted by the court<sup>1</sup>:

- (1) Driver and passengers covered.
- (2) Passenger claims require the consent of the driver.
- (3) Limit of indemnity £50,000.
- (4) DAS entitled to 'full conduct and control of any claim or legal proceedings'.
- (5) Insured's right to choose a lawyer only if proceedings are issued or there is a conflict of interest.

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<sup>1</sup> *Sarwar v Alam* [2001] EWCA Civ 1401 at para [6], [2001] 4 All ER 541, [2002] 1 WLR 125.

### Suitability of BTE cover

[133] The court's approach was to refer to available and suitable cover in road traffic claims valued at less than £5,000. It is a matter for judgment therefore as to whether in any particular case the available BTE is suitable for the particular client. The court gives no guidance here except with regard to passenger claims where the BTE available is possessed by the defendant.

The court summarised the position of a passenger faced with using this DAS policy taken out by the defendant driver whom he is suing:

'representation arranged by the insurer of the opposing party, pursuant to a policy to which the claimant had never been a party, and of which he/she had no knowledge at the time it was entered into, and where the opposing insurer through its chosen representative reserves to itself the full conduct and control of the claim, is not a reasonable alternative.'<sup>1</sup>

There are, however, difficult circumstances other than this example. Whenever a claimant is a passenger in a vehicle involved in an accident there is a possibility that at some stage it will turn out to be necessary to blame, at least in part, the claimant's own driver. The court gives no guidance for these situations as to how to assess suitability where the only BTE cover available is that of the driver. The court refers to the limit of indemnity where there is more than one claimant on the policy as being a possible factor rendering use of the BTE unsuitable. A low limit together with multiple claims on that limit is likely to leave a client in the difficult position of looking for top up cover with an ATE insurer.

On an individual basis, the suitability of BTE cover will depend also on ensuring that cover was in place at the relevant time (date of accident, not date of claim) and that the type of claim to be pursued is covered by the policy. A household policy may for example exclude any claims for injuries sustained whilst a driver or passenger a car. It is also necessary to consider whether the conditions laid down in the policy have been complied with, such as the time limit for notification of claims. BTE policies will give cover only where the insurer takes the view that there are reasonable prospects of success. It is difficult to see from the judgment how this factor can be accommodated in the

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question of suitability at the time the decision has to be made as to the use of ATE insurance. The Insurance Ombudsman Bureau's Bulletin 16 states: 'Disagreements over reasonable prospects make up a fair proportion of the legal expenses cases we consider every year.'<sup>2</sup>

<sup>1</sup> *Sarwar v Alam* [2001] EWCA Civ 1401 at para [58], [2001] 4 All ER 541, [2002] 1 WLR 125.

<sup>2</sup> IOB Bulletin 16.2 (1998).

**Use of ATE where BTE exists**

[134] *Sarwar*<sup>1</sup> is concerned with claims for additional liabilities, in the form of insurance premiums, against losing opponents. Where BTE cover is available and suitable in a road traffic case valued at less than £5,000, any ATE premium will be irrecoverable. By implication a success fee under a CFA would also be un-recovered where a BTE policy could have been used and in *Samonini v London General Transport Services Ltd*<sup>2</sup> and in *Myatt v National Coal Board*<sup>3</sup> the CFA was held to be invalid as a result of a failure properly to consider whether the client had existing legal expenses cover. It is difficult to advise a client in these circumstances to not avail themselves of the BTE cover but instead to choose an ATE route at their own expense or to take the case without insurance cover at all.

The Solicitors' Costs Information Client Care Code 1990, 4(j) provided:

'The solicitor should discuss with the client how, when and by whom any costs are to be met, and consider:

. . .

- (iii) whether the client's liability for another party's costs may be covered by pre-purchased insurance and, if not, whether it would be advisable for the client's liability for another party's costs to be covered by after the event insurance . . . '

The SRA Code of Conduct applicable from 1 July 2007 at 2.03(1)(d)(ii) provides:

- '(d) discuss with the client how the client will pay, in particular: [ . . . ]
- (ii) whether the client's own costs are covered by insurance or may be paid by someone else such as an employer or trade union;'

As to running a case without insurance 2.03(1)(g) provides:

- '(g) discuss with the client whether their liability for another party's costs may be covered by existing insurance or whether specially purchased insurance may be obtained.'

The arrangements in *Dix v Townend and Frizzell*<sup>4</sup> were that there was a CFA under which the claimant's solicitors undertook to indemnify their client against adverse costs should the claim fail. That risk was uninsured. The claim did not fail but the opponent then challenged the retainer as being champertous. The challenge succeeded on the grounds of public policy. The public policy behind the law of champerty was not confined to cases where there was a division of the spoils but extended to any arrangement that placed even a potential temptation in front of the solicitors to act under the influence of their own risk of having to make substantial payments. A different view of similar arrangements was taken by the Court of Appeal in *Sibthorpe v London*

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*Borough of Southwark*<sup>5</sup>. These were housing disrepair cases that had succeeded but the local authority challenged the validity of the CFA on the basis of champerty because the solicitors had provided an indemnity against adverse costs. The court held that the provision by the solicitors of an indemnity for adverse costs was not champertous since the modern case law on champerty suggested a restriction in the scope of the doctrine rather than the necessary extension of it to cover cases where the solicitor simply ran a risk of loss but with no prospect of a gain. The arrangement was also held not to constitute insurance.

Although the *Sarwar* decision is confined to insurance premiums, it is difficult to see that a CFA success fee would be recoverable where BTE insurance was available and suitable. If adequate consideration has been given to the availability of BTE before entering into a CFA and taking out ATE insurance then the CFA will be valid. Recovery of an additional liability in the form of a success fee and/or an ATE premium must depend upon proportionality and the reasonableness, in the context of recovering costs from a paying party, of the decision not to use the BTE route. The court in *Sarwar* made it clear that in the context of recovery of an ATE premium it would not be reasonable to use ATE if the BTE is suitable in road traffic claims below £5000. That does not preclude the use of a CFA and ATE where BTE is available and suitable but it does preclude the recovery of the additional liabilities. Where BTE is available and suitable, a CFA with a nil success fee would in theory not add to the opponent's costs. It may be argued that a BTE insurer's costs claimed would be at a lower level. During the Court of Appeal hearing in *Sarwar* the court was shown a letter from DAS which stated that the insurer would not pay own costs in any event. On that basis there is a CFA, presumably with a nil success fee. It is at least arguable therefore that even where BTE is available and suitable, a client who chooses not to use that cover should be able to recover own solicitor costs but no success fee and no ATE premium. Whether such a position will be attractive to a client and the solicitor must be a question for them. It is clear from the experience of ATE insurers that many CFA cases are run without taking insurance. This appears to be done on the basis that the case is likely to settle without the need for the issue of proceedings. *Sarwar* may be seen to encourage this approach where a client does not wish to use their BTE insurer but this will cause difficulty when such a case does unexpectedly issue.

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<sup>1</sup> *Sarwar v Alam* [2001] EWCA Civ 1401 [2001] 4 All ER 541, [2002] 1 WLR 125.

<sup>2</sup> [2005] EWHC 90001 (Costs), [2006] NLJR 457.

<sup>3</sup> [2006] EWCA Civ 1017, [2007] 1 All ER 147, [2007] 1 WLR 554.

<sup>4</sup> (SCCO CCD 0706942) [2008] EWHC 90117 (Costs).

<sup>5</sup> [2011] EWCA Civ 25.

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### ATE in fixed costs cases

**[134.1]** CPR Part 45 provides for fixed recoverable fees including a success fee in specified types of case. Part 45 provides for recovery of an ATE premium as a disbursement but does not fix the recoverable premium by amount<sup>1</sup>.

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<sup>1</sup> See para [125.1].

CFAs after 1 April 2000 and before 1 November 2005 [135]

### Freedom of choice of lawyer/use of panels

[135] A common feature of BTE insurance is that the insurer will seek to control the choice of lawyer to be used. This level of control ensures that the costs liability of liability insurers is kept to a minimum hence the connection between liability insurers and the providers of BTE insurance. If the DAS letter referred to in Sarwar (see para [134]) is accurate the control over choice is also effective in ensuring that the BTE insurer incurs no own costs.

The issue of freedom of choice of lawyer was addressed by the Insurance Ombudsman in 1993 in the context of the Insurance Companies (Legal Expenses Insurance) Regulations 1990<sup>1</sup>:

‘6

- (1) Where under a legal expenses insurance contract recourse is had to a lawyer (or other person having such qualifications as may be necessary) to defend, represent or serve the interests of the insured in any inquiry or proceedings, the insured shall be free to choose that lawyer (or other person).
- (2) The insured shall also be free to choose a lawyer (or other person having such qualifications as may be necessary) to serve his interests whenever a conflict of interests arises.
- (3) The above rights shall be expressly recognised in the policy.

The Ombudsman ruled that under the Regulations there is no freedom of choice of lawyer until commencement of proceedings unless there is a conflict of interest<sup>2</sup>. More recently the Financial Ombudsman Service has addressed choice where a non-panel solicitor already has charge of the case –

‘We consider that insurers should take a pragmatic approach. Where one firm is already familiar with all the background and is dealing satisfactorily with the case, it will generally not be sensible for the insurer to involve another firm unless, for example, the new firm has superior expertise. Otherwise, insurers risk alienating their policyholders to little or no advantage.’<sup>3</sup>

The court was addressed on the issue of freedom of choice but there is little in the judgment that reflects the arguments. In particular the court fails to address the crucial matter of when proceedings are to be considered commenced. The CPR 1998 provides for legal consequences to flow from pre-action conduct. There is nothing in the judgment, however, which could be said to lead to a conclusion other than that proceedings commence when a claim is issued in a court. There is indeed no analysis of the Council Directive 87/344/EEC nor of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 which implement the Directive. The court having given a description of the relevant provisions of the Regulations concludes its treatment at para [26]<sup>4</sup>:

‘It appears that the Insurance Ombudsman has consistently interpreted regulation 6(1) as meaning that the obligation to permit the insured to select a lawyer of his choice is triggered at the time when efforts to settle a claim by negotiation have failed and legal proceedings have to be initiated.’

Brooke LJ has considered obiter the meaning of ‘proceedings’ in paragraph 4A.2 of the Practice Direction: Protocols:

‘4A.2

Paragraph 4A.1 applies to all proceedings whether proceedings to which a pre-action protocol applies or otherwise.’

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In *Crosbie v Munroe*<sup>5</sup> Brooke LJ, in the absence of argument, took the view that for instance—

‘ . . . the dealings between the parties which lead up to the disposal of a clinical negligence claim are to be treated as “proceedings” for the purposes of that paragraph even if the dispute is settled without the need to issue a claim form.’ At [37]

In *Sarwar*<sup>4</sup> at para [44] the court refers to a letter leaving the court uneasy about the terms on which a non-panel solicitor would be permitted to act under the DAS BTE policy. The letter stated that the solicitor would not be reimbursed for costs or disbursements in the event that the case failed. Such terms amount in effect to a conditional fee agreement with no success fee. It was not clear whether DAS enters into a CFA within the CLSA 1990 and the Conditional Fee Agreements Regulations 2000<sup>6</sup>. It would seem that following the judgment and thus publicity to this arrangement, a solicitor entering into an arrangement of this kind must ensure that the funding agreement complies with the above provisions and that a written CFA is entered into. A failure to comply would leave the solicitor vulnerable on an assessment in a case that is successful. Arrangements for paying opponent’s costs where a claim fails were not referred to in the DAS letter but it is necessary to ascertain whether the BTE insurer will meet this liability or whether it is expected that the solicitor will do so.

In *Brown-Quinn v Equity Syndicate Management Ltd*<sup>7</sup> in a series of test cases the High Court made a ruling on the charging rates where, under the Insurance Companies (Legal Expenses Insurance) Regulations 1990, a BTE insurer cannot insist on its panel solicitors being used if proceedings are issued. Where a non-panel solicitor can be used by the insured the costs level of that non-panel solicitor will be assessed against a comparator of the fixed rate that the BTE insurer sets out for non-panel firms. The BTE insurer’s rate can be exceeded on such an assessment. The comparison is one factor in assessing the reasonableness of the charging rate. A court assessing the costs should take into account the availability of any other suitable firms on lesser rates negotiated with the insurers, and the following factors identified by the Court of Appeal in *Wraith v Sheffield Forgemasters Ltd*<sup>7</sup>:

- (i) the location of the chosen solicitors;
- (ii) their specialisation, and in particular any special qualifications for taking on the instant claim;
- (iii) the complexity of the claim;
- (iv) the importance of the claim to the insured;
- (v) the substance and strength of the proposed defendant to such claim;
- (vi) the nature of the work required to be carried out, in particular whether it should sensibly be carried out by senior solicitors or partners, whose rates would inevitably be likely to be greater than the hourly rate provided for in the non-panel costs.

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<sup>1</sup> SI 1990/1159.

<sup>2</sup> Insurance Ombudsman Annual Report 1993, paras 6.56–6.65.

<sup>3</sup> Ombudsman News (April 2001).

<sup>4</sup> *Sarwar v Alam* [2001] EWCA Civ 1401, [2001] 4 All ER 541, [2002] 1 WLR 125.

<sup>5</sup> [2003] EWCA Civ 350, [2003] 2 All ER 856, [2003] 1 WLR 2033.

<sup>4</sup> *Sarwar v Alam* [2001] EWCA Civ 1401, [2001] 4 All ER 541, [2002] 1 WLR 125.

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CFAs after 1 April 2000 and before 1 November 2005 [138]

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- <sup>6</sup> SI 2000/692.  
<sup>7</sup> [2011] EWHC 2661(Comm).  
<sup>7</sup> [1998] 1 WLR 132.
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*Use of panels*

[136] There are several references in the *Sarwar* judgment<sup>1</sup> to the use by BTE insurers of recommended panels of solicitors. At para [29] the court describes the practice of a major LEI insurer and repeats that insurer's view that the use of panels enables it to control the costs incurred by the paying party. At para [37] the court refers to the arrangements of DAS in using 52 panel firms with 60 offices. As with much of the judgment there is again no analysis and it is assumed therefore that the court accepts all of these arrangements.

The court raises some concern at para [44] about the size of some BTE insurer's panels and refers also to the post-Woolf days as making it perhaps inappropriate to restrict choice of lawyer at the time the procedures in a pre-action protocol come to be activated. The court concludes however that these issues need not be decided in the current appeal.

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<sup>1</sup> *Sarwar v Alam* [2001] EWCA Civ 1401, [2001] 4 All ER 541, [2002] 1 WLR 125.

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**The House of Lords in Gallery**

[137] The following observations were made in the judgments<sup>1</sup>:

- (1) Danger that ATE available only at an unreasonably high price [5]
- (2) Clients have no incentive to keep down premiums [14]
- (3) Costs judges have no criteria by which to judge the reasonableness of premiums [44]
- (4) Delay in taking out ATE policies would adversely affect the market [57]

Lord Scott gave a dissenting judgment in respect of ATE insurance in which his Lordship says that ATE insurance is not needed unless there is going to be litigation and that the correct approach to any assessment of costs is to consider the circumstances of the individual case.

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<sup>1</sup> The numbers in square brackets refer to the paragraph numbers in the judgment of the House of Lords in *Callery v Gray* [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000.

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*Reasonableness of the choice of insurance policy*

[138] One basis for challenging the recovery of an ATE premium is that the choice of the particular type of policy is itself unreasonable, irrespective of the level of premium. This was considered in the *RSA Pursuit Test Cases*<sup>1</sup>, *Tyndall v Battersea Dogs Home*<sup>2</sup> and in *Rogers v Merthyr Tydfil County Borough Council*<sup>3</sup>. In *RSA* the policy chosen calculated premium on a case by case basis with premiums significantly higher than those for standard off the peg policies. The policy in each case was chosen because of difficulty in insuring the case at the stage at which insurance was sought. Of the six test cases it was found that the decision to use this policy was unreasonable in one case due to the significant lack of proportionality between the value of the claim and the

### [138] Litigation Funding

likely premium. In *Tyndall v Battersea Dogs Home* the insurance was taken at a late stage and the policy had a stepped or staged premium meaning that if the case reached trial, which it did, a much increased premium was payable than had the case settled pre-trial. It was found that it had not been shown that an alternative policy (without a stepped approach) was actually available to that client at the time the decision was taken to insure. Accordingly the choice of policy was not itself unreasonable.

The Court of Appeal in *Rogers v Merthyr Tydfil County Borough Council* approved a staged premium totalling £4860 in a personal injury claim settled for £3105. The choice of such a policy is a separate issue to that of using a stepped approach to premium calculation. It is unclear to what extent this aspect of the decision is dependent on the factual background of the claimant solicitor's arrangements with the insurer whereby most cases were not ever insured so that although the defendant in this particular case was faced with a high stage three premium, many other defendants would not be paying a premium at all:

'If the court concludes that it was necessary to incur the staged premium, then as this court's judgment in *Lownds* shows, it should be adjudged a proportionate expense. Necessity here is, we think, not some absolute litmus test. It may be demonstrated by the application of strategic considerations which travel beyond the dictates of the particular case. Thus it may include, as we are persuaded it does, the unavoidable characteristics of the market in insurance of this kind. It does so because this very market is integral to the means of providing access to justice in civil disputes in what may be called the post-legal aid world.' [105]

The court gave more general guidance on the approach to be taken at assessment:

"District Judges and Costs Judges do not as Lord Hoffmann observed in *Callery v Gray (Nos 1 and 2)* [2002] 1 WLR 2000 para 44 have the expertise to judge the reasonableness of a premium except in very broad brush terms and the viability of the ATE market will be in peril if they regard themselves (without the assistance of expert advice) as better qualified than the underwriter to rate the financial risk the insurer faces. Although the Claimant very often does not have to pay the premium himself this does not mean that there are no competitive or other pressures at all in the market. The evidence before this court shows it is not in an insurer's interest to fix a premium at a level which will attract frequent challenges." Brooke LJ at [117]

The above passage was relied upon in the judgment of Simon J in *Kris Motor Spares Ltd v Fox Williams*<sup>4</sup> who provided the following guidance:

' . . . challenges must be resolved on the basis of evidence and analysis, rather than by assertion and counter-assertion. The issue should be identified promptly and, where necessary, there should be directions for the proper determination of specific issues. This may involve the Costs Judge looking at the Proposal; and in the Receiving Party providing a note for a one-off ATE premium and not just for a staged premium.' [46]

The requirement for 'a note' is a reference to the decision in *Rogers v Merthyr Tydfil County Borough Council*.

<sup>1</sup> [2005] All ER (D) 88 (Aug).

<sup>2</sup> (2005, unreported (SCCO Ref: 0500466)) [2005] EWHC 90011 (Costs).

<sup>3</sup> [2006] EWCA Civ 1134, [2007] 1 All ER 354, [2007] 1 WLR 808.

## CFAs after 1 April 2000 and before 1 November 2005 [140]

<sup>4</sup> [2010] EWHC 1008 (QB).

*Staged premiums*

[139] The Court of Appeal approved the use of staged premiums in the test case *Rogers v Merthyr Tydfil County Borough Council*<sup>1</sup>. The premium was divided into three stages: outset – £400, Issue of proceedings £900, 60 days before trial – £3510 giving a total premium of £4860 in a personal injury claim where damages were agreed at £3105. The first two stages were fixed block rated sums. The third stage was individually underwritten taking account of the merits of the case and the estimated maximum loss to the insurer if the case fails. The total costs allowed were £16,821 including the full staged premium. In approving the stepped approach the court said that there is in principle no difference between a two-staged success fee, whose merits the court had consistently endorsed, and a staged ATE premium.

If an issue arises about the size of a second or third stage premium, it will ordinarily be sufficient for a claimant's solicitor to write a brief note for the purposes of the costs assessment explaining how he came to choose the particular ATE product for his client, and the basis on which the premium is rated – whether block rated or individually rated. Where a staged premium in a £120,000 personal injury claim came in the form of an initial stage at £551 with an additional £9,550 if the case reached service of a defence a challenge failed on the basis that without expert evidence the court was in no position to second guess the underwriter<sup>2</sup>.

<sup>1</sup> [2006] EWCA Civ 1134, [2007] 1 All ER 354, [2007] 1 WLR 808.

<sup>2</sup> *Parker v Seixo* [2010] EWHC 90162 (Costs).

*Reasonable level of premium*

[140] The second basis for challenging the premiums in *RSA Test Cases*<sup>1</sup>, *Tyndall v Battersea Dogs Home*<sup>2</sup> and in *Rogers v Merthyr Tydfil County Borough Council*<sup>3</sup> was the level of the premium itself where the choice of the type of policy was itself reasonable. In the one case in *RSA Test Cases* where the choice of policy itself was not reasonable a premium was allowed based on the level of premium that would have been paid for an off the peg policy. In the remaining test cases and in the two staged premium cases of *Tyndall v Battersea Dogs Home* and *Rogers v Merthyr Tydfil County Borough Council* the level of premium permitted was determined by reference to the method by which it had been calculated by the insurer. In the *RSA* cases the method was flawed. The court applied a method based on the insurer's method but removing the flawed element. This still calculated premium on a case by case basis rather than on actuarial methods covering all of the cases taken on by the insurer. A significant element in the calculation permitted in the decision of the Senior Costs Judge is the subjective estimate of the prospects of success in the individual case. That estimate is expressed as a percentage figure which is then incorporated in the arithmetic used to arrive at a premium. It is submitted that that is the most significant finding in the *RSA* cases and is applicable to other policies offered by other insurers. In *Tyndall* and *Rogers* the court accepted the assumptions that the insurer had made in calculating its staged approach.

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In *Winmill v Doncaster Metropolitan Borough Council*<sup>4</sup> a block rated staged premium of £6,950, consisting of £950 stage 1 and an additional £6,000 at allocation, was reduced on the basis that the premium claimed was in the view of the court higher than was strictly necessary in all the circumstances.

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<sup>1</sup> [2005] All ER (D) 88 (Aug).

<sup>2</sup> (2005, unreported (SCCO Ref: 0500466)) [2005] EWHC 90011 (Costs).

<sup>3</sup> [2006] EWCA Civ 1134, [2007] 1 All ER 354, [2007] 1 WLR 808.

<sup>4</sup> Unreported 2007 SCCO Refs: 0700826 and 0700689 [2007] EWHC 90092 (Costs).

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### *Evidence justifying the ATE premium claimed*

[141] The Court of Appeal in *Rogers*<sup>1</sup> had the benefit of evidence from the insurer that had not been available to the judge below who had relied on information contained in the Law Society publication *Litigation Funding*. The court in *Rogers* endorsed the view of Senior Master Hurst expressed at paragraph [235] in the *RSA Test Cases*<sup>2</sup> decision:

‘As to the information contained in *Litigation Funding* and *The Judge* website, this is no more than an indication of policies which might be available in certain circumstances. As [counsel] points out, the premiums on his website are “indicative only” and the website contains further warnings. *Litigation Funding* has similar warnings and reservations. I can derive no firm data from these sources.’

The court in *Rogers* went on to consider the approach to be taken at a costs assessment:

‘District judges and costs judges do not, as Lord Hoffmann observed in *Callery v Gray* (Nos 1 and 2) [2002] UKHL 28 at [44]; [2002] 1 WLR 2000, have the expertise to judge the reasonableness of a premium except in very broad brush terms, and the viability of the ATE market will be imperilled if they regard themselves (without the assistance of expert evidence) as better qualified than the underwriter to rate the financial risk the insurer faces.’ [117]

The approach taken in *Winmill* above [140]–[144] seems difficult to reconcile with this advice. The Senior Costs Judge in *David Smith v Interlink Express Parcels*<sup>3</sup> was faced with an absence of evidence as to the calculation of premium and reduced the first stage from £750 to £450 on the basis that it appeared unjustifiably high. The absence of evidence was however crucial.

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<sup>1</sup> [2006] EWCA Civ 1134, [2007] 1 All ER 354, [2007] 1 WLR 808.

<sup>2</sup> [2005] All ER (D) 88 (Aug).

<sup>3</sup> Unreported (2007) SCCO Ref: 0702192

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### *ATE obtained by misrepresentation*

[142] In *Charmaigne England v Burnley Healthcare*<sup>1</sup> a county court refused an application under s 51 of the Supreme Court Act 1981 for a third party costs order against an ATE insurer that had avoided a policy on the grounds of misrepresentation by the policyholder. The judge held that such an order following well known authorities<sup>2</sup> required exceptional circumstances such as an insurer having direct control of a case. No exceptional circumstances existed here. It was noted that defendant would be well aware that a deliberate misrepresentation would lead to a policy being avoided.

## CFAs made before 2 April 2000 [145]

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<sup>1</sup> 2007 – Preston County Court ZP200075.

<sup>2</sup> See *Murphy v Young & Co's Brewery plc and Sun Alliance and London Insurance plc* [1997] 1 All ER 518, [1997] 1 WLR 1591, CA and *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2005] 4 All ER 195, [2005] 4 All ER 195.

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*ATE and security for costs*

[143] The use by claimants in a libel action of a CFA and ATE policy is not generally relevant to an application for security for costs although where the ATE cover was suitable its existence may be a basis for resisting an order for security. In *Al-Koronky v Time-Life Entertainment Group Ltd*<sup>1</sup> the ATE policy was voidable where liability for costs arose due to untruthfulness. In the context of the libel action there was no real cover that could be relied upon to resist an order.

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<sup>1</sup> [2006] EWCA Civ 1123, [2007] 1 Costs LR 57.

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*ATE policies and third party rights*

[144] In *Persimmon Homes Ltd v Great Lakes Reinsurance (UK) plc*<sup>1</sup> a claim succeeded under the Third Parties (Rights against Insurers) Act 1930 where an insured under an ATE policy had become insolvent. The Third Parties (Rights against Insurers) Act 2010 will replace the 1930 Act and s 16 of the 2010 Act, which refers to voluntary contractual liabilities, will reflect the current practice of including legal expenses insurance within the 1930 Act – see also *Re OT Computers*<sup>2</sup>.

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<sup>1</sup> [2010] EWHC 1705 (Comm), [2010] All ER (D) 114 (Jul).

<sup>2</sup> [2004] EWCA Civ 653.

### III Conditional fee agreements made before 2 April 2000

[145] Before the AJA 1999 came into force on 1 April 2000, the statutory scheme governing CFAs was the CLSA 1990, s 58, the CFA Regulations 1995<sup>1</sup> and the CFA Order 1998<sup>2</sup>. This scheme is preserved after the coming into force of the 1999 Act in respect of CFAs and insurance policies pre-dating 2 April 2000<sup>3</sup>. It is necessary to have reference to the provisions of the statutory scheme as it existed at the time the CFA was made<sup>4</sup>. The success fee is not recoverable from the losing opponent<sup>5</sup>. No insurance premium is recoverable from the losing opponent in respect of policies taken out before 1 April 2000<sup>6</sup>. The non-statutory position for CFAs is covered in Part I.

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<sup>1</sup> SI 1995/1675. Set out at para [1031].

<sup>2</sup> SI 1998/1860. Set out at para [1041].

<sup>3</sup> Access to Justice Act 1999 (Transitional Provisions) Order 2000, SI 2000/900. Set out at para [1071].

<sup>4</sup> CFA Regulations 1995, SI 1995/1675, reg 3. See para [1031].

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<sup>5</sup> Access to Justice Act 1999 (Transitional Provisions) Order 2000, SI 2000/900, art 2.

<sup>6</sup> SI 2000/900, art 3.

## **A Proceedings**

[146] All proceedings other than criminal and family proceedings are capable of being proceedings in respect of which an enforceable CFA can be made<sup>1</sup>. 'Proceedings' is defined as 'proceedings in any court', 'court' includes any tribunal, court-martial or statutory inquiry<sup>2</sup>.

<sup>1</sup> CLSA 1990, s 58(1)(a) and (10) and the CFA Order 1998, SI 1998/1860, art 3. The proceedings specified in the CFA Order 1995, SI 1995/1674 were limited to the specific cases of personal injury, insolvency and European Convention of Human Rights cases.

<sup>2</sup> CLSA 1990, s 119.

## **B Requirements for a CFA**

[147] A written CFA is made enforceable by s 58 of the 1990 Act provided it complies with the CFA Regulations 1995. The Regulations require the agreement to state<sup>1</sup>:

- (a) the proceedings or parts of them covered by the CFA (including specifically whether it covers any counterclaim, appeal or enforcement proceedings);
- (b) the circumstances in which fees and expenses or part of them are payable;
- (c) what payment is due:
  - (i) upon partial failure of the specified circumstances in which the fees would be payable,
  - (ii) irrespective of the occurrence of the specified circumstances,
  - (iii) upon termination for any reason; and
- (d) the amount payable or method of calculating the amount payable in (b) and (c) and whether the amount payable is limited by reference to damages.

<sup>1</sup> CFA Regulations 1995, SI 1995/1675, reg 3 at para [1021].

[148] Further requirements exist as to information given to the client. The CFA must state that the legal representative drew the client's attention to<sup>1</sup>:

- (a) client's entitlement to legal aid;
- (b) client's liability to pay fees and expenses;
- (c) client's liability for adverse costs; and
- (d) client's taxation rights.

<sup>1</sup> CFA Regulations 1995, SI 1995/1675, reg 4. See para [1021].

## **C The success fee**

[149] The maximum percentage increase permitted as a success fee is 100%<sup>1</sup>. The Law Society produced a Model CFA for use in personal injury cases. This

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#### CFAs on or after 1 November 2005 [150]

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model recommended that the success fee should be limited to 25% of the damages recovered by the client. This device became known as ‘the cap’. The limiting of the success fee by way of a cap has at no time been a requirement of law.

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<sup>1</sup> Conditional Fee Agreements Order 1998, SI 1998/1860, art 4 at para [1041].

#### **D Assessment of the success fee**

**[149.1]** A client is entitled to detailed assessment of the success fee and or the base costs<sup>1</sup>. If the client challenges the success fee the reasons for reduction must be set out in writing as must the level of the success fee which it is claimed ought to be applied<sup>2</sup>.

The factors which are taken into account on an assessment are:

- (a) the risk that the circumstances in which the fees or expenses would be payable might not occur;
- (b) the disadvantages relating to the absence of payment on account;
- (c) whether the amount which might be payable under the CFA is limited to a certain proportion of any damages recovered by the client;
- (d) whether there is a CFA between the solicitor and counsel; and
- (e) the solicitor’s liability for disbursements<sup>3</sup>.

The assessment is to be conducted with regard to the circumstances as they reasonably appeared to the solicitor when the CFA was made or varied<sup>4</sup>.

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<sup>1</sup> SI 1998/3132, r 48.9 at B[2303].

<sup>2</sup> CPR PD 48, para 2.14.

<sup>3</sup> CPR PD 48, para 2.15.

<sup>4</sup> CPR PD 48, para 2.16.

## **IV CFAs on or after 1 November 2005**

**[150]** From 1 November 2005 all of the Regulations relating to CFAs and CCFAs are revoked so that for a CFA made on or after that date there are no Regulations. The revocation is brought about by the Conditional Fee Agreements (Revocation) Regulations 2005<sup>1</sup>. The requirements of the CLSA 1990, s 58 continue to apply so that for example the failure in *Oyston v Royal Bank of Scotland*<sup>2</sup> to adhere to the statutory maximum success fee of 100% will post 1 November 2005 still render the CFA invalid. It was the revocation of the regulations that provided the opportunity in *Forde v Birmingham City Council*<sup>3</sup> to replace a potentially invalid CFA governed by the 2000 CFA Regulations with a retrospective CFA not governed by any regulations. There is a new Law Society Model CFA<sup>4</sup>, which can be used also from that date. The Solicitors’ Practice (Client Care) Amendment Rule 2005 makes additions to the information that must be given under the Law Society Solicitors’ Costs Information and Client Care Code 1999 in accordance with Rule 15 of the Solicitors’ Practice Rules 1990. Responsibility for the regulation of CFAs has therefore been transferred to the Law Society by these changes. The legal status of Law

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Society Rules and their potential effect on the recovery of costs has been considered in *Awwad v Geraghty & Co (a firm)*<sup>5</sup> and *Garbutt v Edwards*<sup>6</sup> and in each case *Swain v Law Society*<sup>7</sup> was relied upon as authority for holding that the Rules of Professional Conduct have the force of subordinate legislation. In *Garbutt* however the effect of a breach of those rules was held to depend on the particular rule rather than on any overriding principle to be taken from *Swain*. On the particular wording of the Code issued under Rule 15 the court held that the Code gave a discretion to the solicitor as to whether to provide a client with an estimate. And was not written in terms that are consistent with breach rendering a retainer unenforceable. This decision leaves the question of the effect of breaches of the Professional Rules open and dependent on interpretation of individual rules. It is unclear therefore to what extent failure to comply with the professional Rules concerning CFAs may lead to an unenforceable retainer.

<sup>1</sup> SI 2005/2305.

<sup>2</sup> [2006] EWHC 90053 (Costs).

<sup>3</sup> [2008] EWHC 90105 (Costs).

<sup>4</sup> See para [1320].

<sup>5</sup> [2001] QB 570, [2000] 1 All ER 608.

<sup>6</sup> [2005] EWCA Civ 1206, [2006] 1 All ER 553, [2006] 1 WLR 2907.

<sup>7</sup> [1983] 1 AC 598, [1982] 2 All ER 827.

**[150.1]** The main effect of the revocation of the CFA Regulations, including the Collective CFA Regulations, is to greatly reduce the effect of s 58(1) of the CLSA 1990 in terms of the unenforceability of a CFA. From 1 November 2005 a CFA will be unenforceable only if s 58 itself has not been complied with.

Section 58 provides:

- (3) The following conditions are applicable to every conditional fee agreement—
- (a) it must be in writing;
  - (b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and
  - (c) it must comply with such requirements (if any) as may be prescribed by the Secretary of State.
- (4) The following further conditions are applicable to a conditional fee agreement which provides for a success fee—
- (a) it must relate to proceedings of a description specified by order made by the Secretary of State;
  - (b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and
  - (c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Secretary of State.’

There are no requirements now created that fall under s 58(3)(c). Accordingly where a CFA satisfies all of the above requirements of s 58 it is not unenforceable under that section. Where under the pre-1 November 2005 rules CFAs have been held unenforceable that outcome will no longer be possible under s 58 were the same conduct to be repeated on or after 1 November 2005. It is however open to a court in assessing costs and in making any order for costs to consider the reasonableness of the party

CFAs on or after 1 November 2005 **[150.3]**

claiming costs. It is also possible that paying parties will argue that breaches of the Law Society Client Care Code can render the CFA unenforceable.

**[150.2]** The Solicitors' Practice (Client Care) Amendment Rule 2005 came into force on 1 November 2005 and made the following additions to the Client Care Code which under Practice Rule 15 had to be followed:

'Clients represented under a conditional fee agreement (including a collective conditional fee agreement)

- (d) Where a client is represented under a conditional fee agreement, the solicitor should explain:
- (i) the circumstances in which the client may be liable for their own costs and for the other party's costs;
  - (ii) the client's right to assessment of costs, wherever the solicitor intends to seek payment of any or all of their costs from the client; and
  - (iii) any interest the solicitor may have in recommending a particular policy or other funding.'

From 1 July 2007 these requirements are contained in Rule 2 of the Solicitors Regulation Authority Code of Conduct. For the legal status of Law Society Rules and their potential effect on the recovery of cost, see cases noted below<sup>1</sup>. In *Thomas v Butler T/A Worthington's Solicitors*<sup>2</sup> the defendant firm took over a case that had run with a different firm under a CFA. The first firm had declined to continue because of poor prospects. The client thought the new firm was acting under a CFA and that adverse costs were covered by BTE insurance. There had been discussion with the new firm about a CFA but the matter was not confirmed either way. This was the main failing of the firm and was a breach of the Solicitors' Costs Information and Client Care Code 1999 (similar provisions are contained in the current SRA Code). The client had become liable for own costs on a private paying basis and was left with an adverse costs bill not covered by the BTE. The court had power to deal with the own cost side and assessed it at nil on the basis that those costs had been 'unreasonably incurred'.

<sup>1</sup> *Awwad v Geraghty & Co (a firm)* [2001] QB 570, [2000] 1 All ER 608 and *Swain v Law Society* [1983] 1 AC 598, [1982] 2 All ER 827.

<sup>2</sup> [2009] EWHC 90153 (Costs).

**[150.3]** The revocation of the CFA Regulations does not prevent a CFA made after 1 November taking the form of what was a simplified CFA under those revoked regulations. The provisions of the CPR 1998 permitting recovery of costs where a simplified CFA is used continue in force after 1 November<sup>1</sup>.

The disclosure requirements for CFAs also continue to apply on and after 1 November 2005 – see para [73].

<sup>1</sup> For simplified CFAs see para [61].

## [150.3] Litigation Funding

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# V Matters affecting CFAs generally

## A Unenforceable CFAs

[151] Section 58(1) of the CLSA 1990 as inserted by the AJA 1999, s 27 provides:

- (1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.’

For these purposes a CFA means ‘an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances;’<sup>1</sup>.

From 1 April 2000, therefore, a CFA for the provision of advocacy or litigation services is unenforceable unless it satisfies all of the conditions of the statutory regime. That regime includes the CFA Regulations 2000<sup>2</sup> and the Collective Conditional Fee Agreements Regulations 2000<sup>3</sup>.

The position before 1 April 2000 is governed by the CLSA 1990, s 58 as originally drafted. There was no express provision then to render unenforceable a CFA which did not comply with the statutory scheme. The decision in *Thai Trading Co (a firm) v Taylor*<sup>4</sup> recognised that the statute gave one method of funding which was lawful, the court concluding that the common law also enabled such funding. Thus the CFA Regulations 1995<sup>5</sup> provided the rules as to a statutory CFA without at all impinging upon the common law. That approach was firmly rejected by the Court of Appeal in *Awwad v Geraghty & Co (a firm)*<sup>6</sup>.

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<sup>1</sup> CLSA 1990, s 58(2)(a).

<sup>2</sup> SI 2000/692.

<sup>3</sup> SI 2000/2988.

<sup>4</sup> [1998] QB 781, [1998] 3 All ER 65. See para [4] ff.

<sup>5</sup> SI 1995/1675. See para [1031].

<sup>6</sup> [2001] QB 570, [2000] 1 All ER 608.

### [151.1] Invalid CFAs and disbursements

In *Tandara v Weightmans Solicitors*<sup>1</sup> [2008] EWHC 90101 (Costs) Master O’Hare considered the question of the status of disbursements under an invalid CFA. *Aratra Potato Co Ltd v Taylor Joynson Garet (a firm)*<sup>2</sup> was said to apply only to executed contracts where the litigation had been completed. It is submitted that in *Tandara*, where the retainer had been terminated and the solicitors had come off the record before the conclusion of the litigation, the contract was not executory (even though the litigation was continuing) and that *Aratra* ought to apply. The argument that CLSA 1990, s 58 rendered unenforceable not only the agreement as to fees but also as to expenses was rejected. *Hollins v Russell*<sup>3</sup> was applied with the result that disbursements that had already been paid were not recoverable from the client’s own solicitors. It follows that if the client went on to succeed in the litigation the losing opponent would be liable to indemnify for those disbursements. *Tandara* does not address the question of disbursements funded by the solicitors where it

## Matters affecting CFAs generally [152]

would seem necessary to argue that the disbursement arrangement is not tainted by the invalidity of the retainer.

<sup>1</sup> [2008] EWHC 90101 (Costs).

<sup>2</sup> [1995] 4 All ER 695, [1995] NLJR 1402. See para [3].

<sup>3</sup> [2003] EWCA Civ 718, [2003] 4 All ER 590, [2003] 1 WLR 2487. See para [152.1].

[152] The difficulties presented where a funding agreement fails to comply with the statutory regime ought to differ therefore, according to whether the agreement was made prior to or after 1 April 2000. In *Woods v Chaleff*<sup>1</sup> little was made of that distinction. Solicitors in a non-personal injury matter had made an agreement which incorporated the Law Society Conditions attached to its Model CFA for use in personal injury cases. The CFA itself however, failed to comply with the CFA Regulations 1995<sup>2</sup>, in particular regs 3(d) and 4. On an assessment of costs this agreement was held to be unenforceable, it having been accepted by the claimant's solicitors that to be enforceable the agreement had to comply with the Regulations. No argument was offered as to the common law position with regard to the solicitor client agreement. In the result no fees at all were recoverable. There was also a CFA between counsel and the solicitors which failed to comply with the Regulations, in particular reg 3(a)–(c). It was here argued in the alternative that the agreement with counsel was valid at common law. That argument was rejected on the basis that the judgments in *Awwad v Geraghty & Co (a firm)*<sup>3</sup> led to the conclusion that the common law did not permit such agreements in 1999, the date of this agreement. Again in the result no fees at all were recovered.

The failure to comply with the relevant statutory provisions as to CFAs can therefore lead to a failure to recover any fees at all, including base costs, either from the losing opponent or from the client. This gives rise to the question of the possibility of replacing an unenforceable agreement with a new CFA which does comply with the statutory regime. Assuming there to be no possibility of any restitutionary liability on the part of the client as to work done under an unenforceable CFA, there seems to be no reason to preclude a new CFA taking over from the unenforceable agreement and providing for work done thereafter. It is unclear as to whether such a new CFA could have retrospective effect to govern work already done under an unenforceable agreement. A deed of rectification was used in *Brennan v Associated Asphalt Ltd*<sup>4</sup> but its effectiveness was not tested in the decision of the Senior Costs judge given the decision that the CFA was in fact valid. The possibility of a retrospective CFA was accepted in *Holmes v Alfred McAlpine Homes (Yorkshire) Ltd*<sup>5</sup> provided the CFA expressly states that it is to have retrospective effect. That was not however a decision concerned with an attempt to replace an invalid CFA with a retrospective replacement. In *Oyston v Royal Bank of Scotland*<sup>6</sup> severance of the words of the CFA that constituted a breach of the Regulations was refused on the ground that it would be contrary to public policy to permit such avoidance of the need to comply with the Regulations. A deed of rectification in that case also failed because it had been made after judgment and would, contrary to *Kellar v Williams*<sup>7</sup>, have imposed on the paying party a greater liability in costs than had existed at the time of judgment. Seeking any replacement agreement by a solicitor is likely also to involve the need for a warning as to independent legal advice given the apparent conflict of interest.

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Finally, it is submitted that an attempt to avoid the problems encountered in *Woods v Chaleff*<sup>8</sup> by use of wordings in the CFA to the effect that provisions necessary to comply with the Regulations are deemed to be incorporated, must be wholly ineffective in curing the defects.

<sup>1</sup> [2002] All ER (D) 414 (Jul), SC.

<sup>2</sup> SI 1995/1675.

<sup>3</sup> [2001] QB 570, [2000] 1 All ER 608.

<sup>4</sup> [2005] EWHC 90052 (Costs). An appeal was later allowed by consent and the case cannot be followed on the invalidity point.

<sup>5</sup> [2006] EWHC 110 (QB), [2006] 3 Costs LR 466.

<sup>6</sup> [2006] EWHC 90053 (Costs).

<sup>7</sup> [2004] UKPC 30, 148 Sol Jo LB 821, [2005] 4 Costs LR 559.

<sup>8</sup> [2002] All ER (D) 414 (Jul), SC.

**B *Hollins v Russell*<sup>1</sup> and subsequent cases**

<sup>1</sup> [2003] EWCA Civ 718, [2003] 4 All ER 590, [2003] 1 WLR 2487.

**[152.1]** It was in the above context with the prospect for paying parties avoiding all liability that the Court of Appeal heard conjoined appeals as a test case in *Hollins v Russell*. The Court of Appeal held that breaches of the CFA Regulations 2000 did not mean a failure to satisfy the conditions applicable to CFAs under the CLSA 1990, s 58(1) if the breaches were immaterial. The court expressed itself in the form of a question to be asked by costs judges:

‘Has the particular departure from a regulation pursuant to section 58(3)(c) of the 1990 Act or a requirement in section 58, either on its own or in conjunction with any other such departure in this case, had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice?’. At 107

Where the answer to that question is ‘no’ then the breach does not mean that s 58(1) has not been satisfied.

The breaches dealt with in *Hollins*:

- The Law Society Model April 2000 – refers to the success fee as not limited by reference to damages whereas reg 2(d) refers to all costs. *Held*: if the CFA as a whole was looked to it was clear that there was no limitation on the costs.
- An absence of any reference to any costs limited by damages. *Held*: as with the April Model, it was clear from the agreement as a whole that the liability in costs was not limited.
- The CFA stated none of the success fee related to postponement of payment. The accompanying risk assessment stated that 5% was attributable to delay. Was there a breach of reg 3(1)(b)? *Held*: a court would not in those circumstances permit a solicitor to recover such a figure from the client and therefore there was no material breach.
- The existence of legal expenses insurance had been raised but not fully pursued with a client who was ill and in hospital (reg 4(2)(c)). *Held*: it was sufficient that the use of existing insurance had been discussed with the client.

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- The solicitor had not stated that he had no interest in recommending the use of insurance (reg 4(2)(e)). *Held*: it was only necessary to state where there is such an interest.
- Use of the Law Society two part model CFA to comply with the requirement to explain the effect of a CFA (reg 4(3)). *Held*: the two-part CFA was sufficient compliance.
- The giving of oral explanation by an unqualified agent (reg 4 requires the giving of information by the legal representative). *Held*: Such advice could be given by such an agent. Whether the advice was adequate was a question of fact. (This was the issue in The Accident Group test case – a further hearing to determine the facts will be necessary.)

**Cases applying *Hollins v Russell***

**[152.2]** CFAs made between 1 April 2000 and 1 November 2005 have the potential for a paying party to discover one or more breaches of the CFA Regulations with the result that no costs at all are payable. From 1 November 2005 that result is only possible where there is a breach of the Courts and Legal Services Act 1990, s 58, such as where the statutory maximum success fee of 100% is exceeded.<sup>1</sup> Section 58 requires that the CFA be in writing but it makes no requirement as to signature. Cases where the CFA has been challenged on validity grounds will, therefore, continue to arise for some time to come. The Court of Appeal in *Spencer v Gordon Wood t/a Gordons Tyres (a firm)*<sup>2</sup> rejected the argument that to hold the CFA entirely unenforceable was disproportionate to the mischief. There had been a breach of reg 3(1)(b). The judge applied the test stated in *Hollins* and held that the breach had materially adverse effects upon the protection afforded to the claimant, in that he did not know which part of the 75% success fee would not be recoverable from the defendant so that he would be obliged to pay it himself. In those circumstances the judge held that the CFA generally was unenforceable. The Court of Appeal held that the words in the CLSA 1990, s 58(1) ‘shall be unenforceable’ mean what they say. The applicability of *Hollins* to post 1 November 2005 CFAs was considered in *Findlay v Cantor Index Ltd*<sup>3</sup> where disclosure was sought of the CFA, the reasons for the success fee and counsel’s opinion. Master Campbell held that Costs Practice Direction 32.5 could have no application to post 1 November 2005 CFAs (where there is no requirement to state reasons for the success fee) and thus the paying party has no right to information concerning the setting of the success fee. As to the CFA, *Hollins* still required it to be disclosed at the costs stage. Counsel’s opinion was privileged albeit referred to in a disclosed risk assessment.

<sup>1</sup> See *Oyston v Royal Bank of Scotland* [2006] EWHC 90053 (Costs) and *Jones v Caradon Catnic Ltd* [2005] EWCA Civ 1821; [2006] 3 Costs LR 427.

<sup>2</sup> [2004] EWCA Civ 352, 148 Sol Jo 356, (2004) Times, 30 March.

<sup>3</sup> [2008] EWHC 90116 (Costs).

**[152.3]** The Law Society Model CFA produced in April 2000 to meet the CFA Regulations coming into force on 1 April 2000 was found in *Ghannouchi v Houni Ltd*<sup>1</sup> not to comply with reg 3(2)(c) in that it failed to state the client’s liability for base costs where costs are agreed between the parties. It was held that this breach did not have a materially adverse effect under the *Hollins* test. Because it is necessary for solicitors to apply to the court if they

### [152.3] Litigation Funding

wish to recover from their client any shortfall in base costs and success fee where there has been a settlement on costs the client was protected notwithstanding the failure of the CFA wording. The Senior Costs Judge has not followed the *Ghanouchi* analysis of reg 3(2)(c) in *Oyston v Royal Bank of Scotland*<sup>2</sup>. In *Oyston* the breach was in providing for a 100% success fee with a further sum of £50,000 in the event that damages in excess of £1 million were recovered. The total success fee would therefore exceed the statutory maximum of 100%. The CFA was invalid and there was a materially adverse effect on the administration of justice. The Law Society Model was replaced in June 2000 with wording that differs from the model dealt with in *Ghanouchi*. The decision in *Brennan v Associated Asphalt Ltd*<sup>3</sup> that a breach of reg 3(1)(b) had no material effect on the protection afforded to the client where the CFA failed to specify what part (if any) of the stated success fee related to the postponement of payment of costs was subsequently the subject of an appeal by consent and on this point cannot be followed. The reasoning in the original decision by the Senior Costs Judge that the client would not be liable for any sum in respect of postponement and therefore there was no adverse effect appears to have run counter to the correct test for material effect, applied by the Senior Costs Judge in *Samonini v London General Transport Services*<sup>4</sup>, which is not dependent upon showing actual detriment.

<sup>1</sup> (SCCO Ref: TSB 0307009) [2004] EWHC 9002 (Costs).

<sup>2</sup> [2006] EWHC 90053 (Costs).

<sup>3</sup> [2005] EWHC 90052 (Costs).

<sup>4</sup> [2005] EWHC 90001 (Costs), [2006] NLJR 457. See para [152.7].

[152.4] The Court of Appeal in *Hollins*<sup>1</sup> said that at the stage when the agreement has been made, acted upon, and success for the client has been achieved, it is most unlikely that any minor shortcoming which the paying party might discover in the agreement or the procedures leading up to its making will amount to a material breach of the requirements or mean that the applicable conditions have not been sufficiently met. The court later held in *Myatt v National Coal Board*<sup>2</sup> that the materiality of breach is to be judged at the time that the CFA is made. Accordingly the question whether the protection afforded by the Regulation has been materially affected is not answered by reference to whether there has been any actual detriment in a particular case and the absence of such detriment does not mean that the departure from the Regulation is not material.

<sup>1</sup> [2003] EWCA Civ 718, [2003] 4 All ER 590, [2003] 1 WLR 2487.

<sup>2</sup> [2006] EWCA Civ 1017, [2007] 1 All ER 147, [2007] 1 WLR 554. The decisions in *Ghanouchi v Houni* (SCCO Ref: TSB 0307009) [2004] EWHC 9002 (Costs) and *Hussain v Leeds County Council* (2005) unreported (SCCO 0501930) were based on absence of actual detriment and should not be followed.

[152.5] In *Myatt v National Coal Board*<sup>1</sup> the Court of Appeal clarified the *Hollins* test and held that the materiality of a breach is not judged by its consequences:

‘The importance of *Hollins v Russell* is that it dealt a fatal blow to challenges that were being made by defendants’ insurers to the enforceability of CFAs on the grounds of minor technical breaches of the statutory requirements. The court

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Matters affecting CFAs generally [152.6]

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explained that Parliament did not intend that such breaches should render CFAs unenforceable. The breaches had to be material in the sense that they had a materially adverse effect on the protection afforded to the client or on the proper administration of justice. The primary statutory purpose of the requirements was to provide protection to claimants. In these circumstances, it seems to us that it would be extraordinary if the court were required to hold that, however egregious the breach, it was not material if it had not in fact caused the client to suffer any loss. The solicitor might have been guilty of serious negligence or even have acted deliberately to further his own interests at the expense of those of his client. In such cases, on the argument advanced on behalf of the Law Society, there would be no material breach unless the court concluded that the client had actually suffered loss as a result of the breach. That would be a startling result in view of the plain language in which the 1990 Act and the Regulations are expressed, and the purpose that they were intended to serve. [38]

. . . in most cases the court should focus its attention principally on the terms of the CFA and the advice and information given by the solicitor and other relevant circumstances which existed at the date of the CFA and make a judgment as to whether, in the light of that material, the departure from the requirement in question had a material adverse effect on the protection afforded to the client.' [39]

The breach in *Myatt* was of reg 4(2)(c) and the failure to make adequate enquiry of the client as to the existence and extent of legal expenses insurance. The fact that the clients did not in fact have such insurance did not mean that the breach of the Regulations was not material.

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<sup>1</sup> [2006] EWCA Civ 1017, [2007] 1 All ER 147, [2007] 1 WLR 554.

[152.6] In *Myatt* enquiry of the client as to the existence and extent of BTE insurance was made by telephone to clients bringing industrial disease claims. A check list used by the solicitor included the question. Does the client have an existing contract of insurance that would cover him/her for bringing this claim? According to a witness statement the client was actually asked whether he had an insurance policy 'which would entitle him to legal expenses insurance in respect of the contemplated claim i.e. a claim for noise-induced hearing loss'. The Court of Appeal held that such a question meant that the client was being asked to interpret what could well have been a complex document. Being unsophisticated clients this was an inadequate inquiry and not compliant with reg 4(2)(c). The breach had a materially adverse effect on the level of protection afforded by the Regulation and accordingly the CFA was invalid.

Enquiry of a client's existing legal expenses insurance was the subject of the Court of Appeal decision in *Sarwar v Alam* in the context of the recovery of an ATE premium in a low value road traffic claim. *Sarwar* was not concerned with the CFA Regulations but in *Myatt* the court stressed that *Sarwar* did not propound a rigid test and emphasis that the overriding principle is that the claimant and his solicitor should act reasonably. The duty to act reasonably is also implicit in reg 4(2)(c) and what is reasonably required of a solicitor depends on all the circumstances of the case. The court in *Myatt* in giving retrospective guidance as to compliance with reg 4 identified five factors relevant to what can reasonably be expected of a solicitor<sup>1</sup>.

The decision of the Senior Costs Judge in *Samonini v London General Transport Services*<sup>2</sup> is an early application of *Hollins* endorsed by the

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explanation given in *Myatt*<sup>3</sup>. Here a claimant in a road traffic matter was referred to a solicitor by a claims management company. It was found that the solicitor did not carry out any separate enquiry as to LEI, did not consider whether the claimant's risk of incurring liability for costs was insured against, but relied entirely upon the enquiries made by the claims company. The claimant did not have BTE legal expenses cover under his motor policy. The claimant was never asked about any policy other than his motor policy. The Senior Costs Judge held that irrespective of whether there had been proper delegation to the claims company there had been insufficient inquiry and therefore there was a breach of reg 4(2)(c) of the CFA Regulations 2000. There was a materially adverse effect upon the protection afforded to the client and the proper administration of justice:

'In my judgment the failure, properly to consider whether the client's risk of incurring a liability for costs in respect of the proceedings to which the CFA relates, is insured against under an existing contract of insurance, has had a materially adverse effect upon the protection afforded to the client, in that the client has entered into a CFA, a loan agreement and an ATE insurance policy costing £798. In circumstances where the Claimant's damages were never going to exceed £2,000, a premium of this magnitude is, on its face, disproportionate. The Court of Appeal in *Sarwar* referred to: "the availability of ATE at a modest premium . . ." This is not such a policy. If it is appropriate for the Claimant to have agreed to take on a policy with a premium of this size, the solicitor is clearly under a duty to carry out a careful investigation as to alternative sources of insurance.' At [65]

'As to the proper administration of justice I accept [Counsel for the defendant's] submission that if solicitors are permitted to skimp on the proper investigation of LEI the administration of justice will be badly served since there will be no improvement in the way in which solicitors conduct proceedings of this type, added to which the client will have been badly served. In addition this breach has led to costly satellite litigation.' At [66]

The CFA in *Oduwbu v Dualeh*<sup>4</sup> was entered into in 2000, before *Sarwar* and *Hollins* but the issue as to compliance with the CFA Regulations arose in 2006 when costs were disputed. The client was represented by a firm at some distance from his home and there was no evidence that solicitor had seen any policies. However, the claimant had been knocked from a pedal cycle and was an impecunious client. It was accepted that in the context of what was reasonable to do in 2000 sufficient had been done to satisfy the Regulations. It will remain to be seen as to how far the court's retrospective guidance in *Myatt* is applied in cases where the compliance was required even before the decision in *Sarwar*.

<sup>1</sup> See para [125].

<sup>2</sup> [2005] EWHC 90001 (Costs), [2006] NLJR 457.

<sup>3</sup> [2006] EWCA Civ 1017, [2007] 1 All ER 147, [2007] 1 WLR 554.

<sup>4</sup> (2006) unreported: SCCO Ref: 0600886 [2006] EWHC 90059 (Costs).

**[152.7]** The defect in *Jones v Caradon Catnic Ltd*<sup>1</sup> in respect of a collective CFA was with the risk assessment. The CFA itself provided for a 100% success fee but an annexed risk assessment provided for a fee of 120%, the figure actually claimed. The court held that there could be no detriment to the client since in no circumstances would the client have to pay a fee above 100% but there was a detrimental affect on the administration of justice. Preliminary

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issues may arise in such circumstances and in any event if this were not a material breach no breach would be material.

<sup>1</sup> [2005] EWCA Civ 1821, [2006] 3 Costs LR 427.

**[152.8]** The breach in *Garrett v Halton Borough Council*<sup>1</sup> was of reg 4(2)(e). The CFA stated that the solicitor had no interest in recommending the particular ATE insurance. The client had been referred to the solicitor by a claims management company under an arrangement requiring the solicitor to recommend a particular ATE policy. The court held that such an arrangement did amount to an interest for the purposes of the regulation. The firm gained a financial benefit from referrals to it and was at risk of the arrangement being cancelled if it did not recommend the insurance. Informing the client that the firm was on the CMC's panel was not sufficient. The client could not have known from what she was told that the firm were recommending the policy because this was dictated by their financial interests. There has been a series of conflicting decisions in the lower courts concerning compliance with this regulation in cases where solicitors have used Accident Line and the CFA states the solicitor has no interest in recommending the insurance. The Court of Appeal in *Tankard v John Fredricks Plastics Ltd*<sup>2</sup> distinguished *Garrett* and held that Accident Line Protect did not give rise to an interest. The main reason for solicitors choosing membership of ALP was the quality of the product endorsed by the Law Society. For the purposes of reg 4, a solicitor has an interest if a reasonable person with knowledge of the relevant facts would think that the existence of the interest might affect the advice given by the solicitor to his client. There was nothing that would lead a reasonable person with knowledge of the facts to think that the solicitors had an interest in the scheme that might affect their advice. Further cases where a CFA has been declared invalid for this breach have involved claims management companies where the firm of solicitors has been dependent upon referrals of cases<sup>3</sup>.

<sup>1</sup> [2006] EWCA Civ 1017, [2007] 1 All ER 147, [2007] 1 WLR 554.

<sup>2</sup> [2008] EWCA Civ 1375, [2009] 4 All ER 526, [2009] 1 WLR 1731.

<sup>3</sup> See *Janman v Timber Store* (2007 – Reigate County Court No: 5RHO 1797); *Lowerson v Nissan Motor Manufacturing* (2007 – Newcastle County Court No: 6PL00093); *Foord v American Airlines* [2007] EWHC 90076 (Costs); *Jones v Wrexham Borough Council* [2007] EWCA Civ 1356, [2008] 1 WLR 1590, (2008) Times, 21 January; *Andrews v Harrison Taylor Scaffolding* [2007] EWHC 90071 (Costs).

**BTE enquiry cases**

**[152.9]** In *Richards v Davis*<sup>1</sup>, where the client was represented under the TAG scheme, no enquiry at all was made as to existing insurance or any other form of funding. The CFA was accordingly invalid. In *White v Revell*<sup>2</sup> the CFA was held to be valid where the solicitor relied upon the educated professional client's answers to questions of alternative legal expenses insurance or other means of funding his action. Specifically mentioned was the possibility of using an insurance policy that the client's parents may have had. The reliance on the client to check for such insurance was acceptable in the circumstances. The claimant in *Choudhury v Kingston Hospital NHS Trust*<sup>3</sup> was a consultant anaesthetist whose solicitor took the view could understand insurance. The

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client informed the solicitor in writing that she did not have legal expenses insurance. That was held to be sufficient enquiry in the circumstances. The CFA in *Oduwbu v Dualeh*<sup>4</sup> was entered into in 2000, before *Sarwar* and *Hollins*, but the issue as to compliance with the CFA Regulations arose in 2006 when costs were disputed. The client was represented by a firm at some distance from his home and there was no evidence that solicitor had seen any policies. However, the claimant had been knocked from a pedal cycle and was an impecunious client. It was accepted that in the context of what was reasonable to do in 2000 sufficient had been done to satisfy the Regulations. In *Bevan v Power Panels Electrical Systems Limited*<sup>5</sup>, the *Myatt* point was that to ask merely whether the client or family member has any insurance at all was an inadequate question. In *Andrews v Dawkes*<sup>6</sup>, where the solicitors knew their client's mother had engaged a firm already and then assumed, but did not check, that their client was unlikely to have access to BTE, the CFA was invalid. In *Berry v Spousals*<sup>7</sup>, the client had an arrangement with a CMC and then moved to a firm of solicitors that after 14 months offered a CFA but did not at any time check the CMC arrangement to see if it would cover costs, the result being an invalid CFA. *Myatt* featured in *Choudhury v Kingston Hospital Trust*<sup>8</sup> but there the client consultant anaesthetist wrote to the solicitors confirming she had no BTE – a sophisticated client answering the *Myatt* ultimate question. The same result occurred in *Kashmiri v Ejaz*<sup>9</sup> with a commercial client able to provide all the *Myatt* answers himself. In *Foulkes v Loxton*<sup>10</sup> failure to by the solicitors to demand proof or otherwise from the client as to existing legal expenses insurance did not render the CFA invalid given the intelligence of the client and her heavy involvement in the case before instructing the solicitors. *Cochrane v Chauffeurs of Birmingham*<sup>11</sup> explained in a case where the client passenger of a chauffeured car that the issue is not whether the client would have used the driver's policy but whether the obligation upon the solicitor to take reasonable steps to ascertain the true position so that they could inform the client about the matters contained in the regulations had been fulfilled. In *Barlow v Perks*<sup>12</sup> the client had been represented under a BTE policy but was then transferred to a different firm not on the BTE panel. The CFA with the new firm was invalid because the firm had not informed the client that it might be possible to find another panel firm. The *Sarwar* guidance as to using BTE where it exists was held in *Woolley v Haden Building Services*<sup>13</sup> not to apply other than relatively small personal injury claims in road traffic cases and certainly did not apply to industrial disease claims. It will remain to be seen as to how far the court's retrospective guidance in *Myatt* is applied in cases where the compliance was required even before the decision in *Sarwar*.

<sup>1</sup> (2005) unreported: SCCO Ref: PTH 0504722 [2005] EWHC 90014 (Costs).

<sup>2</sup> (2006) unreported SCCO Ref: CW0508940 [2006] EWHC 90054 (Costs).

<sup>3</sup> [2006] EWHC 90057 (Costs).

<sup>4</sup> (2006) unreported: SCCO Ref: 0600886.

<sup>5</sup> [2007] EWHC 90073 (Costs).

<sup>6</sup> (2006) unreported: (BM 370235 – QBD Birmingham).

<sup>7</sup> (2007) unreported: (BM 309007 – Birmingham County Court).

<sup>8</sup> [2006] EWHC 90057 (Costs).

<sup>9</sup> [2007] EWHC 90074 (Costs).

<sup>10</sup> Leeds CC No: 5SE30035.

<sup>11</sup> (22 June 2007, unreported), Central London CC 5CL16141.

## Matters affecting CFAs generally [152.11]

<sup>12</sup> SCCO 0606555 [2007] EWHC 90087 (Costs).

<sup>13</sup> SCCO 0705738 [2008] EWHC 90097 (Costs).

**[152.10]** In *Jenkins v Young Brothers Transport Ltd*<sup>1</sup> it was argued that as a result of the client's solicitor moving to a different firm (on two occasions) there must be a new CFA with each successive firm<sup>2</sup>. No attempt had been made to enter into a new CFA or to comply with the CFA Regulations 2000. The court did not interfere with the cost judge's decision<sup>3</sup> as to material departure from the Regulations:

'In my judgment, [counsel for the claimant] is correct and it would have been unnecessarily heavy handed had Ms Pierce trawled through CFA Regulation 4 not just once, but twice or three times. Where, as here, the client has been given the Regulation 4 information at the outset, I consider he has received the protection to which he is entitled and it is not a material breach if the same Solicitor omits to go through the same regulations a second time, solely on account of his having changed firms in circumstances where the client has consented in writing to a new retainer on identical terms as the old. On the contrary, in a detailed assessment context one would anticipate that a paying party would argue that it was wholly unreasonable for the cost of such an exercise to be claimed against him more than once.' At [52]

The High Court held that a contract for personal skills could be assigned with the burden of the contract at least where the individual solicitor continued to represent the client through each move of firm. Where, as here, there was a valid assignment there was no requirement to repeat the advice required by the Regulations. It was held that in any event the failures with respect to the Regulations, had there not been a valid assignment, had not had a materially adverse effect within the *Hollins* test.

<sup>1</sup> [2006] EWHC 151 (QB), [2006] 2 All ER 798, [2006] 1 WLR 3189.

<sup>2</sup> In *Haines v Sarnar* (2005, unreported (SCCO Case No: 0407816)) [2005] EWHC 90009 (Costs) where a solicitor moved firm, a new CFA was made with the new firm.

<sup>3</sup> *Jenkins v Young Brothers Transport Ltd* (2005) SCCO Ref: CC0501190 [2005] EWHC 90008 (Costs).

**C CFAs where legal aid is available**

**[152.11]** In *Bowen v Bridgend Borough Council*<sup>1</sup> and *Hughes v London Borough of Newham*<sup>2</sup> it was held that in failing properly to inform clients of the availability of legal aid, solicitors had departed from what was required of them by reg 4(2)(d) and that the departure had a materially adverse effect upon the protections afforded to their clients. Both cases were housing disrepair matters and the CFA and attendant other arrangements with various agencies and for ATE insurance were all held invalid. Also in housing disrepair in *Hussain v Leeds City Council*<sup>3</sup> costs were disallowed in respect of clients eligible for legal aid with a nil contribution but allowed where clients would have been liable to make a contribution, it being clear that in the latter situation the clients would not have agreed that method of funding. Housing disrepair claims also featured in *Crook v Birmingham City Council*<sup>4</sup> where wrong advice as to the legal help scheme was held not to be a material breach under the *Hollins* test.

<sup>1</sup> (2004) SCCO Ref: 0309853 [2004] EWHC 9010 (Costs).

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<sup>2</sup> (2005) SCCO Case Numbers: 0502314, 0502887 and 0502315 [2005] EWHC 90019 (Costs).

<sup>3</sup> 2005 unreported: SCCO No 0501930 Master O'Hare.

<sup>4</sup> [2007] EWHC 1415 (Admin), [2007] NLJR 939, [2007] 5 Costs LR 732.

### D Retrospective CFAs

[153] On the basis of the ordinary rules of contract it is possible for a CFA to have retrospective effect and to become the charging agreement in respect of work already done at the time the CFA is made. This assumes, however, that the work done was done under a lawful and enforceable agreement, in which case there is ample consideration for abandoning rights and liabilities under the former agreement in return for those under the new agreement. The only limitation appears to be that the CFA must be made before the conclusion of the case in order to comply with CLSA 1990, s 58 which envisages an agreement before the specified circumstance in which payment would be due have occurred<sup>1</sup>. Following the decision of the Court of Appeal in *Hollins v Russell*<sup>2</sup> a question may arise as to the replacement of a CFA which may have failed to comply with the statutory requirements. Given the nature of the test laid down in *Hollins* it will in many cases be the replacement of a doubtful agreement rather than one that it is known will be unenforceable. In those circumstances the replacement is likely to be valid.

It may be argued that the consumer protection provisions of the CFA Regulations 2000 would be evaded if retrospective CFAs were permitted. It is submitted that that is not the case. The consumer protection provisions will apply at whatever stage a CFA is being considered and they require that before a CFA is entered into guidance is given to the client. The fact the CFA in contemplation will cover fees for which the client already has a liability does not, it is submitted, detract from the purpose of the Regulations or compliance with them.

With the revocation of the Regulations from 1 November 2005 the possibility arises for a CFA made after that date to be retrospective to a date prior to the revocation. The possibility of a retrospective CFA was accepted in *Holmes v Alfred McAlpine Homes (Yorkshire) Ltd*<sup>3</sup> provided the CFA expressly states that it is to have retrospective effect. The CFA in *Holmes* was entered into prior to 1 November 2005 but the principle of retrospective effect is not in theory affected by removal of the Regulations. The position in respect of the replacement of an invalid CFA with a new retrospective CFA is dealt with at para [152].

The CFA in *Holmes* was not however a retrospective agreement but one that had simply been backdated. The agreement was made in August but had been dated July. That was not a permissible means of providing retrospective effect. It may also be argued that there should be no liability on a paying party in respect of a success fee relating to work done prior to the giving of notice of funding. A similar argument in respect of an ATE premium failed in *Ashworth v Peterborough United Football Club*<sup>4</sup>.

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<sup>1</sup> See Colman J in *Arkin v Borchard Lines Ltd* [2001] CP Rep 108, [2001] NLJR 970 – where it was held that the statute clearly referred to ‘circumstances which have not eventuated at the time when the agreement is entered into’.

<sup>2</sup> [2003] EWCA Civ 718, [2003] 4 All ER 590, [2003] 1 WLR 2487, see para [152.1].

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Matters affecting CFAs generally [154.1]

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<sup>3</sup> [2006] EWHC 110 (QB), [2006] 3 Costs LR 466.

<sup>4</sup> (10 June 2002, unreported) SCCO 0201106.

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**E Withdrawal from a CFA – *Less v Benedict***<sup>1</sup>

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<sup>1</sup> [2001] All ER (D) 242 (Feb).

**[154]** A CFA is likely to provide for the withdrawal by the solicitor in certain circumstances, including where the solicitor takes the view that the case is not likely to win<sup>2</sup>. Where such withdrawal occurred a few weeks before trial with solicitors asking their client to put them in funds in order to continue, and eventually applying to come off the record, an adjournment sought by the client was refused<sup>3</sup>. In *Kris Motor Spares Ltd v Fox Williams LLP*<sup>4</sup> the firm acted under a discounted CFA arrangement (30% of the fees being conditional). The litigation failed at a very late stage due to the client misleading the solicitors as to the independence of an expert witness whose evidence was crucial. The solicitors terminated the CFA on terms that they would continue to provide services to conclude the case on ordinary fee terms, the opponents having offered a “drop hands” outcome. The CFA provided for full fees to be paid in the event of such termination. Had the solicitors not terminated at that stage the case would have concluded as a loss under the CFA and the solicitors would have only recovered 70% of their fees. The costs issue reached the High Court by way of appeal from Master Roger’s decision to refuse detailed assessment. Held: the solicitors had validly terminated the CFA. The CFA had not provided for any notice provision and none was to be implied. The retainer was still in place so the client had not been left unrepresented at a late stage.

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<sup>2</sup> See for example Law Society Model CFA for use in personal injury cases, see para [1262].

<sup>3</sup> [2001] All ER (D) 242 (Feb).

<sup>4</sup> [2009] EWHC 2813 (QB), [2009] All ER (D) 156 (Nov).

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**F Moving a CFA to a different firm**

**[154.1]** Where a solicitor moves from one firm to another or where an existing firm converts from a partnership to LLP status consideration must be given to the effect of that change on the existing CFA where the client wishes to continue to be represented by the same solicitor. It is unlikely that the CFA will have provided for termination in this event. In *Haines v Sarnier*<sup>1</sup> a new CFA was entered into by the firm to which the solicitor moved taking her client with her. In *Jenkins v Young Brothers*<sup>2</sup> there was deed of transfer between the two firms and the client signed a letter agreeing to the transfer but no new CFA was entered into and no attempt to comply with the CFA Regulations was made at the time of the change although there had been full compliance at the time of the original CFA. The High Court held that a contract for personal skills could be assigned with the burden of the contract at least where the individual solicitor continued to represent the client through each move of firm. Where, as here, there was a valid assignment there was no requirement to repeat the advice required by the Regulations. It was held that in any event the failures with respect to the Regulations, had there not been a valid assignment, had not

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had a materially adverse effect within the *Hollins* test. A change of legal status from an unincorporated partnership to an LLP raises the same issues as a change from one firm to another. It is submitted that the entering into of a new CFA is the better approach.

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<sup>1</sup> (2005) SCCO Case No: 0407816 [2005] EWHC 9009 (Costs).

<sup>2</sup> [2006] EWHC 151 (QB), [2006] 2 All ER 798, [2006] 1 WLR 3189.

### **G The indemnity principle where the CFA provides for payment of recovered costs only**

[155] Where a CFA provides that a client shall have a liability for own costs only to the extent that costs are recovered from the opponent, there is a circular argument under the indemnity principle. In *Woods v Chaleff*<sup>1</sup> a CFA between counsel and solicitor was in terms that the latter accepted no liability for counsel's fees 'unless we are put in funds by the defendants following a taxation or other settlement of costs'. The argument that therefore an order of no costs would produce a nil liability was accepted. The exact wording of any agreement is likely however to be significant in this respect. In *Arkin v Borchard Lines Ltd*<sup>2</sup> the wording of the CFA in respect of interim applications was called into question. The CFA provided 'winning' included 'where you recover costs or sums on account or interim awards . . .'. It was argued that the claimant under such an agreement only 'recovers' costs if they are actually paid to him. Accordingly it was said that there was a circularity in the provision with the result that no costs should be awarded. Colman J held<sup>3</sup> that 'recover' meant obtain an order – it did not mean satisfaction of an order. The use of the phrase 'monetary recoveries' in a letter from counsel's clerk also did not mean that counsel was agreeing to an entitlement based upon the solvency of the opponent.

Such wordings are of particular relevance when the client is impecunious and it is submitted that the meaning attributed to these words by such a client is more likely to reflect that contended for by the defendant in *Arkin* than that given by the decision<sup>4</sup>.

The circularity argument was not addressed in the *TAG Test Cases*<sup>5</sup> where the Chief Costs Judge held that a CFA stated that the panel solicitor will in successful cases limit his fees to those recovered from the paying party is not a breach of the indemnity principle. A CFA is an agreement to receive fees in 'specified circumstances' and there appears to be no reason why the circumstances specified should not be the recovery of those costs and/or disbursements from the paying party.

From 2 October 2003 a simplified CFA can provide for a costs liability to be limited to sums recovered in the litigation. See para [31].

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<sup>1</sup> (30 April 2000, unreported). See para [152].

<sup>2</sup> [2001] NLJR 970.

<sup>3</sup> *Arkin v Borchard Lines Ltd* [2001] CP Rep 108, [2001] NLJR 970.

<sup>4</sup> See para [13] – Impecunious Clients.

<sup>5</sup> 2003 SCCO Case No: PTH 0204771 15 May.

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### **H Interim costs awards and the terms of the CFA**

[156] The decision in *Arkin*<sup>1</sup> dealt with a set-off issue in interim applications where costs orders had been made at various stages in favour of each side. The claimant sought at the interim stage to set off sums due to him against those ordered to be paid by him. It was argued that until the conclusion of the case a client under a CFA had no liability to pay own costs and therefore no interim order could be used in set off. It was held that the terms of the CFA gave rise to liability to pay own costs where an order for costs was made at an interim stage. The wording of the CFA was as follows:

“‘Winning’ means where a court or arbitrator decides the case in your favour or an agreement or settlement is reached under which you are paid damages. It also includes where you recover costs or sums on account or interim awards during the litigation.’

Other clauses of the CFA provided the client liability to pay costs ‘if you win’. The combination of clauses therefore enabled the court to conclude that there was a liability to pay at the interim stage and that such liability could be set off against adverse costs orders.

<sup>1</sup> *Arkin v Borchard Lines Ltd* [2001] CP Rep 108, [2001] NLJR 970, see para [155].

### **I Termination of a CFA**

[157] The Law Society Model CFA is dealt with at paras [42] to [48] and provides for termination in a number of circumstances. The definition of ‘win’ may also give rise to termination issues. In *Milne v David Price Solicitors and Advocates*<sup>1</sup> the client accepted an offer of settlement that did not satisfy the definition of win provided in the CFA. It was held that the acceptance of that offer amounted to a termination of the CFA and gave rise to a liability to pay the base costs of the solicitor.

<sup>1</sup> [2005] EWHC 9002 (Costs).

### **J Rectification**

[158] It is unclear as to whether a new CFA can have retrospective effect to govern work already done under an unenforceable agreement. A deed of rectification was used in *Brennan v Associated Asphalt Ltd*<sup>1</sup> but its effectiveness was not tested in the decision of the Senior Costs judge given the decision that the CFA was in fact valid<sup>2</sup>. The possibility of a retrospective CFA was accepted in *Holmes v Alfred McAlpine Homes (Yorkshire) Ltd*<sup>3</sup> provided the CFA expressly states that it is to have retrospective effect. That was not however a decision concerned with an attempt to replace an invalid CFA with a retrospective replacement. In *Oyston v Royal Bank of Scotland*<sup>4</sup> severance of the words of the CFA that constituted a breach of the Regulations was refused on the ground that it would be contrary to public policy to permit such avoidance of the need to comply with the Regulations. A deed of rectification in that case also failed because it had been made after judgment and would, contrary to *Kellar v Williams*<sup>5</sup>, have imposed on the paying party a greater liability in costs than had existed at the time of judgment.

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<sup>1</sup> [2005] EWHC 90052 (Costs).

<sup>2</sup> This case was later the subject of an appeal by consent and cannot be relied upon as to the validity point.

<sup>3</sup> [2006] EWHC 110 (QB), [2006] 3 Costs LR 466.

<sup>4</sup> [2006] EWHC 90053 (Costs).

<sup>5</sup> [2004] UKPC 30, 148 Sol Jo LB 821, [2005] 4 Costs LR 559.

## Replacing an invalid CFA

**[158.1]** Whether a new CFA can have retrospective effect to govern work already done under an unenforceable agreement was considered at length in *Forde v Birmingham City Council*<sup>1</sup>. CFA 1 was thought to be invalid and once the CFA Regulations 2000 were revoked the solicitors decided to enter into a retrospective replacement CFA (CFA 2) to govern all the work already done and work yet to be done to complete the case. It was held that CFA 2 could validly replace CFA 1 following *Holmes v Alfred McAlpine Homes (Yorkshire) Ltd*<sup>2</sup> although that was not a decision concerned with an attempt to replace an invalid CFA with a retrospective replacement. The court found good consideration for CFA 2 in the undertaking of the future work. The court did not allow a retrospective success fee.

<sup>1</sup> [2008] EWHC 90105 (Costs).

<sup>2</sup> [2006] EWHC 110, [2006] 3 Costs LR 466.

## K CFAs and costs capping

### Defamation and group litigation cases

**[159]** *King v Telegraph Group Ltd*<sup>1</sup> established the discretionary power to cap costs on a prospective basis under the Supreme Court Act 1981, s 51 and the CPR 1998, r 3.1(2)(m). In the context of high cost defamation actions the Court of Appeal stated that there were three weapons available to control excessive costs: a costs-capping order; a retrospective assessment and a wasted costs order. In defamation cases run on a CFA with no ATE an order should be made at allocation capping the total amount including any additional liability (success fee). In *Henry v BBC*<sup>2</sup> a capping order was refused because the application was made only six weeks prior to trial. It is clear that the cost capping power related to setting a cap on future costs and does not act retrospectively, a point accepted by the court in *Tierney v New Group Newspapers*<sup>3</sup> where a cap was imposed in defamation proceedings being run on an uninsured CFA basis. In money terms this was a low value claim where costs on each side when added together were already estimated as being likely to exceed the value by a multiple of five or more. The High Court left to a costs judge the determination of the appropriate level of the cap and the court was mindful of the danger of that exercise itself increasing the costs of the litigation. It was suggested that limited written submissions be used with limited oral argument.

In the context of Group Litigation Orders costs capping was considered by the Senior Costs Judge in *AA v Tui*<sup>4</sup> where personal injury claims were being brought by over 800 claimants. At the time of the application for a costs

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capping order the claimants' costs had reached £1.6m with an estimate of future costs of £1.4m. It was held that the cap ought not to be retrospective and would not include any success fee, *King v Telegraph* being distinguished on that point as being confined to defamation. Any ATE premium was also excluded from the cap on future costs which was set at £881,250 with liberty to apply for variation. In *Claimants appearing on the Register of the Corby Group Litigation v Corby Borough Council v Corby Borough Council*<sup>5</sup> both sides had entered into CFAs and the claimants had ATE insurance. The costs cap arrived at ignored any uplift on the CFAs and the premium.

<sup>1</sup> [2004] EWCA Civ 613, [2005] 1 WLR 2282, [2004] 25 LS Gaz R 27.

<sup>2</sup> [2005] EWHC 2503 (QB), [2006] 1 All ER 154.

<sup>3</sup> [2006] EWHC 3275 (QB), [2006] All ER (D) 321 (Dec).

<sup>4</sup> *The Claimants set out in Schedule 1 to the Order of the Senior Master dated 17.1.05 v Tui UK Ltd* 2005 unreported – SCCO Case Nos: HQ04X03737, HQ04X03648, HQ04X03645, HQ04X03646, HQ04X03647 [2005] EWHC 90017 (Costs).

<sup>5</sup> [2008] EWCA Civ 463, [2009] QB 335, [2009] 4 All ER 44.

**Other cases**

**[159.1]** *King v Telegraph*<sup>1</sup> was distinguished in *Tui*<sup>2</sup> and again in *Knight v Beyond Properties Pty Ltd*<sup>3</sup> as being of no application in non-defamation litigation. In *Knight* a passing off action was brought using an uninsured CFA with 100% success fee. The defendant's application for a costs cap failed. Mann J held that *King v Telegraph* laid down no generally applicable principles, Outside of defamation and group litigation the test set out by Gage J in *Smart v East Cheshire NHS Trust*<sup>4</sup> was to be applied:

'a real and substantial risk that without such an order costs will be disproportionately or unreasonably incurred;

and that this risk may not be managed by conventional case management and a detailed assessment of costs after a trial;

and it is just to make such an order'. [22]

<sup>1</sup> [2004] EWCA Civ 613, [2005] 1 WLR 2282, [2004] 25 LS Gaz R 27.

<sup>2</sup> See para [159] fn 4. 2005 unreported – SCCO Case Nos: HQ04X03737, HQ04X036–48, HQ04X03645, HQ04X03646, HQ04X03647.

<sup>3</sup> [2006] EWHC 1242 (Ch), [2007] 1 All ER 91, [2007] 1 WLR 625.

<sup>4</sup> [2003] EWHC 2806 (QB), 80 BMLR 175.

**L CFAs and group litigation**

**[160]** The Law Society Model CFA<sup>1</sup> is intended for use in personal injury and clinical negligence claims but is often sued either with minor amendment or none at all in other forms of litigation and in group litigation where its suitability may be a matter of doubt. In *Brown v Russell Young & Co*<sup>2</sup> six lead claimants represented under a CFA identical in terms to the Law Society model sought to claim a proportion of generic costs having settled their claims under Part 36. The CFA made no reference to generic costs, no group litigation order was in place and there was no other costs sharing order. The issue therefore arose under the indemnity principle that the claimants had no

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liability for such costs and could therefore not recover them from their opponents. On appeal the Senior Costs Judge held that the wording of the CFA was wide enough to include generic costs and the CPR 1998, r 36.13 could also be relied upon. Where claims are settled before a GLO is made. Difficulties over apportionment of generic costs could be avoided by suitable wording in any settlement agreement.

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<sup>1</sup> See paras [42]–[48] and [1261].

<sup>2</sup> (2006) – unreported: SCCO Ref: 53R/2005; CW0406715/720 [2006] EWHC 90055 (Costs).

## **M Solicitor agents**

[161] Where a client was represented under a CFA whose terms provided that basic charges included work done by a solicitor agent the client was liable for work done by such agent even though that work was done under a separate CFA between the client's solicitor and the agent under which instructions were given by the client's solicitor as principal. So held Ramsay J in *Sharratt v London Central Bus Co Ltd*<sup>1</sup>. There was accordingly no breach of the indemnity principle. The Court of Appeal in *Crane v Canons Leisure Centre*<sup>2</sup> considered the question of whether charges of an outside agency could be treated as work done by a fee earner rather than as a disbursement. The court concluded in the context of an independent costs draftsman that the fee could be charged as their own fee and a success fee could therefore be levied on it. The distinction was drawn between charges by solicitors for work which they themselves do or are directly responsible for and expenses which they incur for a client for other people's work for which they are not directly responsible and in respect of which they simply pass on the cost to the client.

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<sup>1</sup> [2005] EWHC 3018 (QB), [2006] 4 Costs LR 584.

<sup>2</sup> [2007] EWCA Civ 1352, [2008] 2 All ER 931, [2008] 1 WLR 2549.

## **N Well resourced litigants**

[162] The House of Lords in *Campbell v Mirror Group Newspapers Ltd (No 2)*<sup>1</sup> held that a claimant who can demonstrably afford to fund litigation is nonetheless entitled to use a CFA with a 100% success fee. Parliament had been entitled to lay down a general rule that CFAs were open to everyone and to put in place a regime whereby unsuccessful defendants contributed to the funding of other litigation. The defendant's rights under Article 10 of the European Convention for the Protection of Human Rights were not thereby infringed. This decision does not affect any of the court's powers in respect of the assessment of reasonable costs but does exclude from consideration the 'need' to use a CFA. No ATE insurance had been put in place in *Campbell* and the point was not considered. It is open to argument as to whether the use of ATE insurance is also Parliament's proportionate response to the need to provide access to justice. In *MGN v UK*<sup>2</sup> the European Court of Human Rights by a unanimous decision held that the recoverability of success fees had led to a violation of Art 10 (the right to freedom of expression). There are several aspects to the decision that limits it to publication cases: the court focussed on proposals to reform success fees specifically in publication cases as strong evidence that the existing regime was unreasonable; Art 10 was available in

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## Matters affecting CFAs generally [162.2]

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publication cases as a counter to access to justice; there was a very high level of base costs in such cases; MGN had submitted that publication cases can be treated differently to other cases.

Outside of publication cases and in similar vein to the House of Lord's MGN decision is the decision in *Sousa v Waltham Forest London Borough*<sup>3</sup>. The defendant contended that the claimant should not recover a success fee under his CFA because he was never at risk as to costs because he was indemnified under his insurance policy. The Court of Appeal held it is inherent in the concept of subrogation that an insurer is entitled to benefit from the same rights as the insured. The defendant could not rely on the fact of the insurer funding the claim as a defence to the policy holder's claim for a success fee when the claim succeeded: the insurer would be in a worse position than the policy holder would have been. Not to reach that decision would lead to an anomaly that an insurer with an assigned cause of action could take advantage of a CFA but an insurer with a subrogated claim could not.

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<sup>1</sup> [2005] UKHL 61, [2005] 4 All ER 793, [2005] 1 WLR 3394.

<sup>2</sup> (Application no 39401/04) [2011] ECHR 66.

<sup>3</sup> [2011] EWCA Civ 194.

### **O CFAs and interest on costs**

**[162.1]** The question of interest on costs where there is a CFA arose in the Court of Appeal in *Crema v Cenkos Securities plc*<sup>1</sup>. Even though there was a CFA and the court assumed that the claimant had not borrowed to fund the action, interest at 5% above base rate was awarded. A differently constituted Court of Appeal in *Simcoe v Jacuzzi UK Group plc*<sup>2</sup> held the starting point under CPR 40.8 is the same as the rule under the County Courts (Interest on Judgment Debts) Order 1991 that costs run from the date ordered not the date assessed or agreed. That enabled the court to then consider whether in cases to which CPR 40.8 applied, the existence of a CFA was relevant in deciding whether to make an order. It was held that the existence of a CFA was not relevant and so the usual order would be that interest runs from the date costs are ordered.

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<sup>1</sup> [2010] EWCA Civ 1444, [2012] All ER (D) 107 (Feb).

<sup>2</sup> [2012] EWCA Civ 137, [2012] All ER (D) 107 (Feb).

### **P Cost of setting up funding arrangements**

**[162.2]** Claimants cannot recover the cost of preparing and advising on CFAs nor can they recover costs incurred in discussing litigation with or taking instructions from ATE insurers<sup>1</sup>. Setting up funding arrangements involved the expertise and effort of solicitors in identifying a potential claimant and negotiating the terms on which they are to be engaged and that cannot properly be described as an item incurred by the client for the purposes of the litigation. Until the CFA is signed, the potential claimant is not merely not a claimant: he is not a client. As to liaising with ATE insurers after the insurance was in place that was collateral to the action, liaising with insurers being

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designed to ensure the claimant was protected against costs, accordingly the cost of such work was not recoverable from an opponent.

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<sup>1</sup> *Motto v Trafigura* [2011] EWCA Civ 1150, [2012] 2 All ER 181.

## VI Contingent fee agreements

[163] The phrase ‘contingent fee agreement’ was prevalent at the time of the decision of the Court of Appeal in *Thai Trading Co (a firm) v Taylor*<sup>1</sup> and in the main was used to denote a CFA which had no success fee. The continued use of such terminology, after the change to the CLSA 1990, s 58 brought about by the AJA 1999, would lead to confusion. The only relevant terminology is ‘conditional fee agreement’ as defined in s 58(2)<sup>2</sup>.

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<sup>1</sup> [1998] QB 781, [1998] 3 All ER 65, CA.

<sup>2</sup> See para [1002].

## VII Contingency fee agreements

[164]–[170] Rule 8 of the Law Society Rules of Professional Conduct<sup>1</sup> continues to use the phrase ‘contingency fee’ defined in r 18(2)(c)<sup>2</sup> as a sum payable only in the event of success. Rule 8 prohibits any agreement for such a sum which is not authorised by statute or the common law. The definition includes a conditional fee agreement within the meaning of the CLSA 1990, s 58<sup>3</sup>.

The phrase ‘contingency fee’ has also been used to denote a fee arrangement where the solicitor is to receive a percentage of the damages recovered by the client. Such an arrangement would not conform to the CLSA 1990, s 58 and the statutory scheme and would thus contravene r 8 as well as the statute. An agreement with a firm of accountants for the provision of services in support of litigation has been held not to be champertous and to be outside of the regulation of s 58<sup>4</sup>. Similarly in *Arkin v Borchard Lines Ltd*<sup>5</sup> the position of a professional commercial funder of litigation which had agreed to fund expert evidence and document management on a contingency basis was that the funder should potentially have a liability for the costs of the opponent to the extent of the funding it has provided. The agreement was not struck down as being champertous.

Following the AJA 1999 the use of the phrase ‘contingency fee’ is capable of leading to confusion. The only fee arrangements, having the effect that the client does not pay the same fee in all circumstances, which are lawful, are agreements which comply with the statutory scheme and are termed conditional fee agreements.

In *Ahmed v Powell*<sup>6</sup> the Chief Costs Judge held in answer to preliminary issue in that an arrangement between an insurance company and a firm of costs negotiators was champertous. Under the agreement the costs negotiators were

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## Membership organisations [181]

to be paid according to sums saved in costs that the insurer would otherwise have paid to claimants. The negotiators sought rights of audience in costs proceedings. It was held that no right of audience had arisen through the solicitors acting for the insurer since instructions had not been given by the solicitors but by the insurer. The court would not at its discretion grant a right of audience because of the champertous arrangement.

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<sup>1</sup> See para [1253].

<sup>2</sup> See para [1254].

<sup>3</sup> See para [1002].

<sup>4</sup> *R (on the application of Factortame) v Secretary of State for Transport* [2002] EWCA Civ 932, [2003] QB 381. [2002] 4 All ER 97.

<sup>5</sup> [2005] EWCA Civ 655, [2005] 3 All ER 613, [2005] 1 WLR 3055.

<sup>6</sup> (SCCO Ref 0210290) [2003] EWHC 9011 (Costs).

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## VIII Differential fee agreements

[171]–[180] A fee agreement providing for an ordinary charging rate for cases which win and a discounted rate for cases which lose is an agreement falling within the definition of a conditional fee agreement contained in the CLSA 1990, s 58<sup>1</sup>. This was the funding arrangement used in *Aratra Potato Co Ltd v Taylor Joynson Garrett (a firm)*<sup>2</sup>. From 1 April 2000 such an agreement is only lawful if it complies with the statutory scheme. It is submitted that such an arrangement is a CFA which has no success fee provided the fee for cases which win is the fee which would be charged where there is no difference in the fee payable if the case loses.

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<sup>1</sup> See para [1002].

<sup>2</sup> [1995] 4 All ER 695, [1995] NLJR 1402.

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## IX Membership organisations

[181] Section 30 of the AJA 1999<sup>1</sup> provides a mechanism for a body prescribed by the Lord Chancellor, to recover any provision made by or on behalf of the body to meet the costs liability of any person. By s 30 and the Access to Justice (Membership Organisations) Regulations 2000<sup>2</sup> in respect of arrangements made before 1 November 2005 provision is made for the recoupment of a sum no greater than the equivalent of the cost to a member of taking out a personal insurance policy covering adverse costs only. Arrangements made on or after 1 November 2005 are governed by the Access to Justice (Membership Organisation) Regulations 2005<sup>3</sup>.

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<sup>1</sup> See para [1013].

<sup>2</sup> SI 2000/693. See para [1080].

<sup>3</sup> SI 2005/2306. See para [1310].

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[182] The Access to Justice (Membership Organisation) Regulations 2005<sup>1</sup> replace the 2000 Regulations from 1 November 2005. This regulatory scheme still leaves the organisation responsible for the administration of the litigation and for ensuring that an agreement with the member exists, which can give rise to the recoupment of the costs. It also leaves own costs in lost cases with the organisation.

The 2005 Regulations differ from their predecessor only by removing the references to the detailed circumstances in which the member is liable to pay the costs of the proceedings – those are the words taken from the individual CFA regime and which were inappropriate for the arrangements with membership organisations. The 2005 Regulations still require that the arrangements contain a statement specifying the circumstances in which the member may be liable to pay costs of the proceedings and it is difficult to see how in real terms this is any different to the former regulations. The requirement to give a copy of the arrangements to the member has also been removed in the 2005 Regulations.

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<sup>1</sup> SI 2005/2306.

### **A Recovery of the provision for meeting liability**

[183]–[184] AJA 1999, s 30:

- (1) This section applies where a body of a prescribed description undertakes to meet (in accordance with arrangements satisfying prescribed conditions) liabilities which members of the body or other persons who are parties to proceedings may incur to pay the costs of other parties to the proceedings.
- (2) If in any of the proceedings a costs order is made in favour of any of the members or other persons, the costs payable to him may, subject to subsection (3) and (in the case of court proceedings) to rules of court, include an additional amount in respect of any provision made by or on behalf of the body in connection with the proceedings against the risk of having to meet such liabilities.
- (3) But the additional amount shall not exceed a sum determined in a prescribed manner; and there may, in particular, be prescribed as a manner of determination one which takes into account the likely cost to the member or other person of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings.
- (4) In this section “prescribed” means prescribed by regulations made by the Lord Chancellor by statutory instrument; and a statutory instrument containing such regulations shall be subject to annulment in pursuance of a resolution of either House of Parliament.
- (5) Regulations under subsection (1) may, in particular, prescribe as a description of body one which is for the time being approved by the Lord Chancellor or by a prescribed person.’

Subsection (1) makes it clear that the provision which can lead to the recovery of an additional amount is a provision to meet a member’s liability for opponent’s costs, not his own costs<sup>1</sup>. The ‘provision’ made by the organisation is thus an ‘additional amount’ which can be claimed by the individual and may be included in a costs order. Section 30(2) can be taken to mean that there has to be evidence of the making of such a provision. By subs (3) the amount claimed cannot exceed the ‘likely’ cost to an individual in purchasing an insurance policy to provide cover only for opponent’s costs. That is more

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## Membership organisations [186]

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restrictive than the provisions of s 29 which permit the recovery by an individual of a premium paid in respect not only of opponent's costs but own disbursements and costs.

Section 30 addresses only the 'self insurance' element of the costs to a membership organisation or other body. Where such a body uses a CFA to conduct proceedings the CFA must also comply with the statutory scheme in place at the time the CFA is made.

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<sup>1</sup> Section 30 refers to 'the costs of other parties'. In the LCD Conclusions paper *Conditional Fees: Sharing the Risks of Litigation* (February 2000) it is assumed that covers own disbursements – see para 98. However it seems difficult to read the words of the section to mean this.

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## **B The Regulations**

### **Access to Justice (Membership Organisations) Regulations 2000**

#### *Body of a prescribed description*

[185] The 2000 Regulations<sup>1</sup> make reference to an approval by the Lord Chancellor of the bodies to which the AJA 1999, s 30 may apply. All trade unions listed by the Certification Office for Trade Unions and Employers Organisations<sup>2</sup> are approved together with the following bodies<sup>3</sup>:

- AA Legal Services
- British Cycling Federation
- Defence Police Federation
- Durham Colliery Overmen Deputies & Shotfirers Retired Members Group
- Engineering Employers' Federation
- Police Federation of England and Wales
- RAC Motoring Services
- The Cyclist Touring Club
- The London Cycling Campaign
- British Triathlon Federation
- The Co-operative Group
- The National Union of Students

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<sup>1</sup> Access to Justice (Membership Organisations) Regulations 2000, SI 2000/693.

<sup>2</sup> The maintenance of a list of trade unions is a power conferred by the Trade Union and Labour Relations (Consolidation) Act 1992.

<sup>3</sup> The above list is as at November 2006. No later list has been published by the Ministry of Justice which took over the duties of the Department for Constitutional Affairs in May 2007.

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#### *Requirements for arrangements to meet costs liabilities*

[186] The Regulations lay down requirements concerning the 'arrangements' between the body and the individual under which the body agrees to meet the individual's liabilities. The arrangements must be in writing and must contain a statement specifying the individual's liability for costs. A copy of that statement must be provided to the individual. The Regulations specify the details in terms similar to the requirements for a CFA:

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### [186]

#### 1 Citation, commencement and interpretation

- (1) These Regulations may be cited as the Access to Justice (Membership Organisations) Regulations 2000.
- (2) These Regulations come into force on 1st April 2000.

#### 2 Bodies of a prescribed description

The bodies which are prescribed for the purpose of section 30 of the Access to Justice Act 1999 (recovery where body undertakes to meet costs liabilities) are those bodies which are for the time being approved by the Lord Chancellor for that purpose.

#### 3 Requirements for arrangements to meet costs liabilities

- (1) Section 30(1) of the Access to Justice Act 1999 applies to arrangements which satisfy the following conditions.
- (2) The arrangements must be in writing.
- (3) The arrangements must contain a statement specifying –
  - (a) the circumstances in which the member or other party may be liable to pay costs of the proceedings,
  - (b) whether such a liability arises –
    - (i) if those circumstances only partly occur,
    - (ii) irrespective of whether those circumstances occur, and
    - (iii) on the termination of the arrangements for any reason,
  - (c) the basis on which the amount of the liability is calculated, and
  - (d) the procedure for seeking assessment of costs.
- (4) A copy of the part of the arrangements containing the statement must be given to the member or other party to the proceedings whose liabilities the body is undertaking to meet as soon as possible after the undertaking is given.

#### 4 Recovery of additional amount for insurance costs

- (1) Where an additional amount is included in costs by virtue of section 30(2) of the Access to Justice Act 1999 (costs payable to a member of a body or other person party to the proceedings to include an additional amount in respect of provision made by the body against the risk of having to meet the member's or other person's liabilities to pay other parties' costs), that additional amount must not exceed the following sum.
- (2) That sum is the likely cost to the member of the body or, as the case may be, the other person who is a party to the proceedings in which the costs order is made of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings.

**[186.1]** AJA 1999, s 30 and the above Regulations came into force on 1 April 2000 and were not written for the purposes of Collective CFAs which had yet to be provided for<sup>1</sup>. Regulation 3 must be complied with for a membership organisation to recover costs through the member's costs order.

Regulation 3, is however, borrowed from the wording of the CFA Regulations 2000 and directly imports wording from reg 2 of those Regulations which deal with own costs. The s 30 provision is aimed at adverse costs not own costs and it is odd that arrangements between a Membership Organisation and its members, aimed at meeting an adverse costs liability, should have to be in a form which addresses own costs. It is all the more odd that that own costs arrangement should be in the form of a CFA without it actually being a CFA between a member and a solicitor. Compliance with reg 3 is a matter between

## Membership organisations [186.2]

the Membership Organisation and its member but it regulates the member's liability, presumably only to the Membership Organisation, for own costs. If it were to regulate a liability to a solicitor to pay own costs then it would constitute an individual CFA which would have to comply with the CFA Regulations 2000 with all that that entails. The reference in reg 3(3)(d) to an assessment of costs would seem to be meaningless however, unless the effect of the arrangement is to make the member liable to a solicitor for those costs, in which case there is an individual CFA and mere compliance with the Access to Justice (Membership Organisations) Regulations 2000 will not be sufficient. Given that the purpose of s 30 is to give some comparable recovery to s 29 for a self insurance element of the costs of a membership organisation it is difficult to see either the need for or the connection with the arrangements for own costs.

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<sup>1</sup> CCFAs were enabled by the CFA Regulations 2000, SI 2000/2988 which came into force on 30 November 2000.

*Suggested wording to comply with reg 3*

**[186.2]** The following wordings attempt to comply with reg 3 without creating at the same time an individual CFA. The wording in (i) below assumes that it is necessary to recognise the indemnity principle. Given this apparent necessity, the wordings will lead to a need carefully to consider the client care requirements.

- (1) You [the member] are ultimately responsible for paying the fees and disbursements of your legal representative, whether you win your case or not. If you win you are entitled to seek recovery of your costs from your opponent. Your legal representative's own costs are calculated as follows: [insert charging rate(s) of the legal representative who will act for the member]
- (2) If you lose you are ultimately responsible for paying the fees and disbursements of your opponent, in addition to your own costs.
- (3) The [Name of membership organisation] has agreed to indemnify you for the liability for costs mentioned in (I) and (ii) above.
- (4) This arrangement between you and [name of membership organisation] may be ended by [set out any terms in the Membership organisation's rules under which it or the member can terminate the indemnity arrangement.]
- (5) If this arrangement is ended you will be ultimately liable for all the costs referred to in (i) and (ii) above but you will not be entitled to an indemnity for that liability from the [name of membership organisation]
- (6) You are entitled to apply to the court for a detailed assessment of the costs of your legal representative which means that the court will check the bill. There are strict time limits for doing this. If you apply to the court within one month of receiving the bill the court will order that the bill be assessed. If you apply after that time but within 12 months of receiving the bill the court may, but does not have to, order an assessment. If 12 months have passed since you received the bill, or you have paid the bill and 12 months have not passed since you paid it, you will have to show special circumstances to the court if it is to order an

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assessment. If 12 months have passed since you have paid the bill you cannot obtain an assessment. An application for an assessment and the assessment itself can be an expensive process if you lose.

There has here been no attempt to incorporate the language of the regulation. The wording of the reg 3 is inappropriate for a non-CFA funded case, particularly reg 3(3)(b)(ii) and (iii) – clearly the member’s primary liability will not differ according to circumstances in a non CFA funded case.

### **Access to Justice (Membership Organisations) Regulations 2005**

[187] The 2005 regulations<sup>1</sup> differ from their predecessors only by removing the references to the detailed circumstances in which the member is liable to pay the costs of the proceedings – those are the words taken from the individual CFA regime and which were inappropriate for the arrangements with membership organisations. But, the 2005 regulations still require the arrangements to contain a statement specifying the circumstances in which the member may be liable to pay costs of the proceedings and it is difficult to see how in real terms this is any different to the former regulations. The requirement to give a copy of the arrangements to the member has been removed in the 2005 regulations.

#### **1 Citation, commencement and interpretation**

- (1) These Regulations may be cited as the Access to Justice (Membership Organisation) Regulations 2005 and shall come into force on 1st November 2005.
- (2) In these Regulations a reference to a section by number alone is a reference to the section so numbered in the Access to Justice Act 1999.

#### **2 Revocation and transitional**

- (1) Subject to paragraph (2), the Access to Justice (Membership Organisation) Regulations 2000 (the “2000 Regulations”) are revoked.
- (2) The 2000 Regulations shall continue to have effect for the purposes of arrangements entered into before 1st November 2005 as if these Regulations had not come into force.

#### **3 Bodies of a prescribed description**

The bodies which are prescribed for the purpose of section 30 (recovery where body undertakes to meet costs liabilities) are those bodies which are for the time being approved by the Secretary of State for that purpose.

#### **4 Requirements for arrangements to meet costs liabilities**

- (1) Section 30(1) applies to arrangements which satisfy the following conditions.
- (2) The arrangements must be in writing.
- (3) The arrangements must contain a statement specifying the circumstances in which the member may be liable to pay costs of the proceedings.

#### **5 Recovery of additional amount for insurance costs**

- (1) Where an additional amount is included in costs by virtue of section 30(2) (costs payable to a member of a body or other person party to the proceedings to include an additional amount in respect of provision made by the body against the risk of having to meet the member’s or other person’s liabilities to pay other parties’ costs), that additional amount must not exceed the following sum.
- (2) That sum is the likely cost to the member of the body or, as the case may be,

## Membership organisations [188]

the other person who is a party to the proceedings in which the costs order is made of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings.

<sup>1</sup> Access to Justice (Membership Organisations) Regulations 2005, SI 2005/2306.

*Disclosure of the existence of a s 30 arrangement*

**[188]–[189]** A s 30 arrangement is a ‘funding arrangement’ within the meaning of the CPR 1998, r 43.2(1)<sup>1</sup>. It follows that the rules concerning the disclosure of funding arrangements apply to s 30 arrangements<sup>2</sup>. The Costs Practice Direction requires disclosure of the existence of a s 30 agreement but not its terms<sup>3</sup>. Notice must be given at the time of issue of a claim form if the s 30 agreement is already in place<sup>4</sup>. Where a s 30 agreement is made after the issue of proceedings notice must be given within seven days of the making of the agreement<sup>5</sup>. There is no requirement in the Costs Practice Direction for pre-issue disclosure. The Protocols Practice Direction 4A.1 (in force until 6 April 2009) provided that disclosure ‘should’ occur pre-issue. There are conflicting views on the meaning of ‘should’. In *Metcalfe v Clipstone*<sup>6</sup> it was held to mean can but not must disclose whereas in *Bainbridge v MAF Pipelimes*<sup>7</sup> it was held to mean ‘must’ with the usual costs consequences of a failure to comply with the Practice Direction. From 6 April 2009 the Practice Direction (Pre-Action Conduct) provides at 9.3 that where a party enters into a funding arrangement within the meaning of rule 43.2(1)(k), that party must inform the other parties about this arrangement as soon as possible and in any event either within 7 days of entering into the funding arrangement concerned or, where a claimant enters into a funding arrangement before sending a letter before claim, in the letter before claim. Where the s 30 agreement relates to a defendant, notice of it must be given when filing the first document<sup>8</sup>. Section 30 agreements made after the serving of the first document must be notified within seven days of the making of the agreement<sup>9</sup>. All of these provisions are identical to those applying to individual CFAs. Form N251 may be used for the giving of this information<sup>10</sup>.

<sup>1</sup> CPR 1998, SI 1998/3132, r 43.2(1) provides:

‘In Parts 44 to 48, unless the context otherwise requires “funding arrangement” means an arrangement where a person has

. . .

(iii) made an agreement with a membership organisation to meet his legal costs;’

<sup>2</sup> SI 1998/3132, r 44.15(1) provides: ‘A party who seeks to recover an additional liability must provide information about the funding arrangement to the court and to other parties as required by a rule, practice direction or court order.’

<sup>3</sup> CPD, s 19.1(1).

<sup>4</sup> CPD, s 19.2(2) (a).

<sup>5</sup> CPD, s 19.2(4).

<sup>6</sup> (2004 unreported SCCO Case No: HN300882).

<sup>7</sup> (2004 unreported – Teesside County Court).

<sup>8</sup> CPD, s 19.2(3).

<sup>9</sup> CPD, s 19.2(4).

<sup>10</sup> See para [1241].

**[188]** Litigation Funding**X Collective conditional fee agreements**

**[190]–[192]** The Lord Chancellor’s Department issued a consultation paper in June 2000 entitled *Collective Conditional Fees*<sup>1</sup>. This addressed the different circumstances of bulk purchasers and suppliers of legal services. The consultation paper also considered the applicability of a bulk agreement for the benefit of individual third parties.

The *Collective Conditional Fee Agreements Regulations 2000*<sup>2</sup> came into force on 30 November 2000 and apply to all CCFAs made from that date until 1 November 2005, whether the funder is the recipient of the litigation services or not. Amendment was made to the Regulations by the *Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003*<sup>3</sup> to permit a CCFA to limit the fees payable to the sums recovered in costs or otherwise. That amendment has the effect of providing for a simplified CCFA in line with the simplified CFA<sup>4</sup> also introduced by the 2003 Regulations. All of these Regulations are revoked from 1 November 2005 by the *Conditional Fee Agreements (Revocation) Regulations 2005*<sup>5</sup>. Doubt has been raised as to the recovery of costs under a CCFA notwithstanding the commencement of the AJA 1999, s 31<sup>6</sup> which enables Rules of Court to provide for a recovery by a party of costs which would not have been payable by that party had no order for costs been made. Such Rules would remove the indemnity principle for the purposes of the particular Rule. The CPR has been amended to provide for a costs order where a simplified CFA or CCFA has been used ie where liability has been limited to recovered sums. The CPR make no other provision in respect of CCFAs which are an agreement between a funder and a provider of legal services. Where the funder is not also the recipient of the legal services the indemnity principle requires there to be a legal liability between the recipient and the provider<sup>7</sup>. Section 31 itself has not abolished the indemnity principle but has permitted Rules to be made which constitute exceptions. No Rule has been made which enables a CCFA to be treated as an exception to the indemnity principle.

<sup>1</sup> Lord Chancellor’s Department Consultation Paper, *Collective Conditional Fees*, June 2000, CP 12.

<sup>2</sup> SI 2000/2988. See para [1080].

<sup>3</sup> SI 2003/1240.

<sup>4</sup> For simplified CFAs see para [31] and for simplified CCFAs, see para [199.1]

<sup>5</sup> SI 2005/2305. See para [1301].

<sup>6</sup> AJA 1999, s 31 provides: ‘In section 51 of the Supreme Court Act 1981 (costs), in subsection (2) (rules regulating matters relating to costs), insert at the end “or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs”.’

<sup>7</sup> See para [200].

**A CCFAs before 1 November 2005****Definition and scope**

**[193]** A CCFA is defined in the CCFA Regulations 2000, reg 3<sup>1</sup>:

- ‘(1) Subject to paragraph (2) of this regulation, a collective conditional fee agreement is an agreement which—
- (a) disregarding section 58(3)(c)<sup>2</sup> of the Courts and Legal Services Act 1990, would be a conditional fee agreement; and

## Collective conditional fee agreements [193]

- (b) does not refer to specific proceedings, but provides for fees to be payable on a common basis in relation to a class<sup>3</sup> of proceedings, or, if it refers to more than one class of proceedings, on a common basis in relation to each class.
- (2) An agreement may be a collective conditional fee agreement whether or not –
- (a) the funder is a client; or
- (b) any clients are named in the agreement.’

The CCFA Regulations 2000 make provision for all CCFAs irrespective of the context in which they are to be used. The Regulations apply to bulk purchasers of legal services, such as the legal department of a multi-national company, and to bulk providers of legal services such as the legal representatives retained by a trade union to act for its members. There is a crucial difference between these two categories in that the bulk purchaser is also the client, whereas the bulk provider situation will involve numerous clients who are not funding the litigation. Regulation 3(2) provides that an agreement may be CCFA whether or not the funder is a client and whether any clients are named in the agreement. During the consultation period concerns were raised as to the consumer protection requirements for funding agreements. Where the funder is also the client, with bulk requirements, it is seen as desirable to dispense with the administration that would be needed if the individual CFA regime applied, there being no need for a new CFA to be entered into in respect of each new matter. Where, however, the CCFA is to be used in respect of bulk supply where individuals are to be the beneficiaries of the legal services but not the funders of those services, the need for consumer protection and additional client care arises. The Regulations reflect this difference in the requirements laid down for the CCFA but do so by seemingly applying consumer protection provisions to all CCFAs, including those where the client is also the funder. The intended saving in terms of the administration are thus not as great as they might have been. The Regulations are not set out so as to have provisions applying according to whether the CCFA is for a bulk purchaser or not.

In *Kitchen v Burwell*<sup>4</sup> Gray J proceeded on the basis that non-compliance with the Collective CFA Regulations did not render the CCFA unenforceable because the statutory provisions differed from those applying to a CFA. It is difficult to see the authority for that basis. No reference is made in the judgment to reg 3(1)(a) of the Collective CFA Regulations but it is submitted that if that were the reason for this view it amounts to a misinterpretation of that regulation<sup>5</sup>.

<sup>1</sup> SI 2000/2988.

<sup>2</sup> CLSA 1990, s 58(3) provides:

‘the following conditions are applicable to every conditional fee agreement –

. . .

(c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor.

Regulation 3(1)(a) of the CCFA Regulations is necessary in order to disapply the individual CFA Regulations. Regulation 7 of the CCFA Regulations further provides that, by the insertion of a reg 8 into the CFA Regulations 2000, that the CFA Regulations shall not apply to collective CFAs.

<sup>3</sup> ‘Class’ is not defined.

<sup>4</sup> [2005] EWHC 1771 (QB), [2006] 1 Costs LR 82.

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<sup>5</sup> CLSA 1990, s 58(3) provides:

‘the following conditions are applicable to every conditional fee agreement –

. . .

(c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor.

Regulation 3(1)(a) of the CCFA Regulations is necessary in order to disapply the individual CFA Regulations. Regulation 7 of the CCFA Regulations further provides that, by the insertion of a reg 8 into the CFA Regulations 2000, that the CFA Regulations shall not apply to collective CFAs.

### Definitions of ‘client’ and ‘funder’

[194] Regulation 1(2) defines ‘client’ as a person who will receive advocacy or litigation services to which the agreement relates. ‘Funder’ is defined as the party who under the CCFA will pay the legal representative’s fees. The client may or may not, therefore, also be the funder. This will call for the application of Rule 15 of the Law Society Rules of Professional Conduct to the person fitting the description of ‘client’ under the Regulations, whether or not that person is also the funder. Where the funder is not a person fitting the definition of ‘client’ for the purposes of the Regulations, that person will still be the subject of Rule 15.

### **B Contents of a standard<sup>1</sup> CCFA**

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<sup>1</sup> ‘Standard’ is used to describe a CCFA which does not satisfy the amendment to the CCFA Regulations 2000, SI 2000/2988 made by the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003, SI 2003/1240 which create ‘simplified’ CCFAs. For simplified CCFAs, see para [199.1].

### Specified circumstances in which fees to be paid

[195] Regulation 4(1) requires the CCFA to specify the circumstances in which the legal representative’s fees and expenses, or part of them, are payable. The definition of a CCFA in effect requires reference to the individual CFA provisions of the CLSA 1990, s 58 and the definition therein of a CFA and of a CFA which provides for a success fee. The CCFA Regulations are then applied to those definitions. Hence ‘specified circumstances’ pre-supposes that there is an agreement that some or all of the fees and expenses will be payable only in specified circumstances. The CCFA then must set out what those circumstances are.

### Information and advice in the specific proceedings

[196] Regulation 4(2) requires the CCFA to contain a term as to the giving of information to the client concerned in the specific proceedings. These requirements apply to a client whether or not he is also the funder. The CCFA must contain a term that when accepting instructions in relation to any specific proceedings, the legal representative must inform the client as to the circumstances in which the client may be liable to pay the costs of the legal representative. There must be a term that further explanation, advice or information about the costs liability as may be reasonably required by the client must also be given. There must be a term that the legal representative must also confirm in writing his acceptance of the instructions in respect of the

## Collective conditional fee agreements [196]

specific proceedings. All of these requirements are designed with 'consumer protection' in mind. The opportunity to recognise that these requirements are irrelevant where the funder and the client are the same legal person was ignored, with the result that this administrative requirement applies to all CCFA's. These provisions differ from the individual CFA Regulations. Where the individual Regulations apply there is an actual requirement that costs information is given and a further requirement that there must be a term of the CFA stating that immediately before the CFA is signed the costs information was given. That method of ensuring that the consumer has the information necessary to understand their liability has been omitted from the CCFA Regulations, albeit it may be assumed that the contractual term required by the Regulations will also be performed. Under the CCFA there is no regulation as to the giving of costs information but only as to the terms of the agreement itself. The requirements as to costs information do not apply to a CCFA between a legal representative and an additional legal representative.

Regulation 4 provides:

- '(2) A collective conditional fee agreement must provide that, when accepting instructions in relation to any specific proceedings the legal representative must –
  - (a) inform the client as to the circumstances in which the client may be liable to pay the costs of the legal representative; and
  - (b) if the client requires any further explanation, advice or other information about the matter referred to in sub-paragraph (a), provide such further explanation, advice or other information about it as the client may reasonably require.
- (3) Paragraph (2) does not apply in the case of an agreement between a legal representative and an additional legal representative.
- (4) A collective conditional fee agreement must provide that, after accepting instructions in relation to any specific proceedings, the legal representative must confirm his acceptance of instructions in writing to the client.'

During the consultation period it became clear that there was a concern that where the CCFA was to be used to fund the litigation of an individual who was not a party to the CCFA, that individual should be informed that the case was being conducted under a funding arrangement<sup>1</sup>. Regulation 4 appears to address that concern, but of course applies to all CCFA's. In the case of CCFA relating to an individual who is not a party to the CCFA, the Rules of Professional Conduct will in any event impose a requirement for the giving of advice to the client.

In *Duffy v Port Ramsgate Ltd*<sup>2</sup> a CCFA between a trade union and a firm of solicitors, in order to comply with reg 4 of the CCFA Regulations 2000, required the solicitor to inform the member as to the circumstances in which the member may be liable to pay the solicitor's charges. It was argued that no new information having been given to the client when the case was transferred to CCFA funding there was a breach of the CCFA itself and of Rule 15 Solicitors Practice Rules 1990. The argument failed:

'I do not think the Claimant in this case has been misled as to his liability for costs or has been let down by his solicitors in explaining that liability to him. The obligation of the solicitors acting under a CCFA is to explain to the litigant the consequences of the CCFA so far as the litigant is concerned. By emphasising his costs free position [the firm] appear to have done that correctly. In my judgment it would have been unreal, bordering upon the

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absurd, for them to have attempted to give the full information which another litigant, not funded by a trade union, should be given.’ At [21].

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<sup>1</sup> Lord Chancellor’s Department Consultation Paper, *Collective Conditional Fees*, June 2000, CP 12, para 252.

<sup>2</sup> (2004) unreported SCCO Case No: 0306901 [2004] EWHC 9008 (Costs).

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### Further requirements where there is a success fee

[197] Regulation 5(1) provides:

‘Where a collective conditional fee agreement provides for a success fee the agreement must provide that, when accepting instructions in relation to any specific proceedings the legal representative must prepare and retain a written statement containing –

- (a) his assessment of the probability of the circumstances arising in which the percentage increase will become payable in relation to those proceedings (“the risk assessment”)<sup>1</sup>;
- (b) his assessment of the amount of the percentage increase in relation to those proceedings, having regard to the risk assessment; and
- (c) the reasons, by reference to the risk assessment, for setting the percentage increase at that level.’

The legal representative is thus to prepare and retain a statement containing the following–

- (a) an assessment of the probability of winning – the “risk assessment”;
- (b) an assessment of the percentage increase having regard to (a);
- (c) the reasons, by reference to the risk assessment, for setting the percentage increase.

The above requirements are more detailed than those applicable to an individual CFA. Each of the three requirements requires consideration.

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<sup>1</sup> For Risk Assessment see Pt IX.

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### *Risk assessment*

[197.1] This is assumed to be an expression of the level of confidence in winning. Many practitioners are familiar with the use of percentages to indicate a level of confidence. Practitioners who use a risk assessment method based upon a weighted list of factors which produces a score expressed as a number will usually have a conversion of that number firstly into a percentage of the maximum number which could have been scored and secondly from that into a percentage increase. For example a score of 12 out of a possible 20 represents a 60% confidence level which is then converted into a percentage increase. This Regulation would not be satisfied with a number with no explanation – it calls for an ‘assessment’ which is then referred to as ‘the risk assessment’.

### *Percentage increase*

[197.2] The assumption here is that the expression of the chances of success can be and needs to be converted into a success fee. (b) seems to be the place

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## Collective conditional fee agreements [198.1]

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to explain the basis of that conversion. That can be satisfied by the explanation of any conversion method which is being used, such as the ready reckoner contained in the Law Society publication *Conditional Fees – a Survival Guide*<sup>1</sup>.

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<sup>1</sup> (Law Society Publishing, 2nd edn, 2001).

### *The reasons for the level of the success fee*

**[197.3]** The reasoned explanation of the chances of success on which is based then (b) and (c) has already been given in (a). If (c) means the full reasons for the success fee, that would seem to be the same as requirement (a) which appears to constitute the “risk assessment” to which both (b) and (c) refer. It is difficult to see the differences between the three requirements in (a), (b) and (c), with perhaps the most difficult being the difference between (a) and (c) which each seem to require a reasoned explanation. It can only be safe to assume that if all of the requirements are satisfied it matters not what their order is.

### **Other factors affecting the success fee**

**[198]** The CCFA Regulations<sup>1</sup> make no reference to other factors which under an individual CFA would be included in the success fee. In particular there is no reference to an amount reflecting a liability for disbursements and no reference to a percentage increase representing the cost of the postponement of the fees. This latter element cannot be recovered from an opponent and in an individual CFA must be stated separately, or, where no such figure is included in the success fee, it should be stated that there is no such inclusion. It is recommended that the same approach be adopted for CCFA's.

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<sup>1</sup> SI 2000/2988.

### **Information to be given where the client is also the funder**

**[198.1]** Here it is envisaged that a bulk purchaser of legal services must be informed<sup>1</sup> as to costs liability<sup>2</sup> each time new specific proceedings are included under the CCFA and each time the legal representative must confirm in writing an acceptance of instructions<sup>3</sup>. It is likely that these requirements will be combined in one note making reference to the proceedings and to the terms of the CCFA and to an acceptance of instructions. If there is a success fee there must be retained a written risk assessment statement<sup>4</sup>. The Regulations do not, therefore, make the risk assessment a term of the CCFA although it is likely that a CCFA with a success fee will, when defining the success fee, refer to this risk assessment and incorporate it into the contract. The CCFA will contain a provision that the client will permit disclosure of the reasons for setting the success fee to the court or other person at the direction of the court. If the CCFA itself incorporates the risk assessment it would be better were it also to provide that the party to the CCFA gives permission for such disclosure.

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<sup>1</sup> SI 2000/2988, reg 4(2)(a) uses the word ‘inform’ but does not specify that this must be in writing.

<sup>2</sup> SI 2000/2988, reg 4(2)(a).

<sup>3</sup> SI 2000/2988, reg. 4(4).

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<sup>4</sup> SI 2000/2988, reg 5(1).

**Information to be given where the client is not the funder**

**[198.2]** Where a CCFA is being used to fund an individual's litigation, for example of a member by a Trade Union, the CCFA must state that the legal representative will inform the individual of the circumstances in which he or she will be liable to pay the costs of the legal representative. This is rather less than the advice and information which Practice Rule 15 of the Law Society Rules of Professional Conduct requires, particularly given there is no reference to adverse costs liability. The legal representative must confirm to the individual in writing the acceptance of instructions for the specific proceedings. Where there is a success fee the CCFA (to which the individual client is not a party) must state that if the legal representative or the client is required to disclose the reasons for the success fee to the court or any other person, the legal representative may do so. There is no provision in the Regulations entitling the client as client to a copy of the reasons for the success fee nor even a provision that the client is to be provided with a copy if they so request.

**C Table of the information to be given to the client under a CCFA****[198.3]**

Information	To Client	Regulation
Circumstances in which client liable for legal representative's costs	Yes	4(2)(a)
Further explanation, advice or information reasonably required by the client	Yes	4(2)(b)
Written confirmation of the acceptance of instructions	Yes	4(4)
Written risk assessment	No	5(1)

**D CCFAs providing for a success fee in the case of court proceedings**

**[199]** Following the regime of the individual CFA the CCFA must contain terms concerning disclosure of the reasons for a success fee and the recoupment of disallowed amounts of the success fee:

Regulation 5 states:

- (2) If the agreement relates to court proceedings it must provide that where the success fee becomes payable as a result of those proceedings, then –

[Disclosure]

- (a) if –
- (i) any fees subject to the increase are assessed, and
  - (ii) the legal representative or the client is required by the court to disclose to the court or any other person the reasons for setting the percentage increase at the level assessed by the legal representative, he may do so,

[Disallowed amounts]

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### Collective conditional fee agreements [199.1]

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- (b) if –
- (i) any such fees are assessed by the court, and
  - (ii) any amount in respect of the percentage increase is disallowed on the assessment on the ground that the level at which the increase was set was unreasonable in view of facts which were or should have been known to the legal representative at the time it was set that amount ceases to be payable under the agreement, unless the court is satisfied that it should continue to be so payable, and

#### [Lower amounts on settlement]

- (c) if –
- (i) sub-paragraph (b) does not apply, and
  - (iii) the legal representative agrees with any person liable as a result of the proceedings to pay fees subject to the percentage increase that a lower amount than the amount payable in accordance with the conditional fee agreement is to be paid instead, the amount payable under the collective conditional fee agreement in respect of those fees shall be reduced accordingly, unless the court is satisfied that the full amount should continue to be payable under it.<sup>7</sup>

The above provisions are identical to those applying to individual CFAs. There are some complications for CCFAs arising from the fact that the party seeking a costs order may not be a party to the CCFA and may not have received a copy of the risk assessment supporting the level of the success fee.

### ***E Contents of a simplified<sup>1</sup> CCFA***

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<sup>1</sup> 'Simplified' is used to refer to a CCFA, which complies with the amendments to the CCFA Regulations, made by the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003, SI 2003/1240. For CCFAs that do not comply with the amended Regulations, see para [195].

### **Specified circumstances in which fees to be paid**

**[199.1]** Regulation 4(1) of the CCFA Regulations 2000 requires the CCFA to specify the circumstances in which the legal representative's fees and expenses, or part of them, are payable. By reg 4(1A)<sup>2</sup> the circumstances referred to in 4(1) may include the fact that the legal representative's fees and expenses are payable only to the extent that sums are recovered in respect of the proceedings, whether by way of costs or otherwise. A simplified CCFA does not affect any liability in respect of an after the event insurance policy<sup>3</sup>. Where the CCFA does limit the client's liability for costs to sums recovered the Regulations are simplified. Where a CCFA is being used by a third party funder, for example a trade union in respect of members, it is likely that the funder intends that the client should retain all damages and have an indemnity for all costs. The CCFA is the agreement between the funder and the legal representative. There is no necessary connection therefore between the liability of the third party funder and the sums recovered by the party to the proceedings. In particular a third party funder may intend to be liable for own costs for work done after a rejection of a Part 36 payment where that payment has not been beaten. If a simplified CCFA limits the funder's liability to costs recovered then the same difficulties will arise as for a simplified CFA with regard to Part 36<sup>4</sup>. It is submitted that the regulation of CCFAs needs to

**[199.1]** Litigation Funding

recognise that where there is a third party funder the client is not intended to fund the litigation and that the only legal liability is between the funder and the legal representative.

<sup>2</sup> Inserted by SI 2003/1240, reg 3(2).

<sup>3</sup> CCFA Regulations 2000, reg 5(5) as inserted by SI 2003/1240, reg 3(3).

<sup>4</sup> See para [35].

**Information and advice**

**[199.2]** Regulations 4(2)(a) and (b) of the CCFA Regulations 2000 require the CCFA to provide that, when accepting instructions in relation to any specific proceedings, the legal representative must inform the client as to the circumstances in which the client may be liable to pay the costs of the legal representative and provide such further explanation, advice or other information as to that matter as is required by the client. Paragraph [196] deals with the information to be given where the client is and is not also the funder.

**Further requirements where there is a success fee**

**[199.3]** Regulation 5(1)(a), (b) and (c) require the legal representative to prepare and retain a written statement of his assessment of the probability of the circumstances arising in which the success fee will become payable, the percentage increase attributable to the risk and the reasons by reference to risk for setting the percentage increase. See paras [197]–[198].

**Simplified CCFA's providing for a success fee in the case of court proceedings**

**[199.4]** Regulation 5 states:

- (2) If the agreement relates to court proceedings it must provide that where the success fee becomes payable as a result of those proceedings, then –
- (a) if–
- (i) any fees subject to the increase are assessed, and
  - (ii) the legal representative or the client is required by the court to disclose to the court or any other person the reasons for setting the percentage increase at the level assessed by the legal representative,
- he may do so . . . ’

Regulation 5(2)(b) and (c) do not apply to simplified CCFA's. Accordingly the CCFA can provide for own costs, including a success fee, to be limited only by all sums recovered and not just recovered costs, but not contain a provision removing liability where the success fee has been reduced on assessment or by agreement with the paying party. Had the 2003 Regulations defined a simplified CFA as one where fees are limited to costs (as opposed to sums) recovered these changes would not have appeared anomalous.

**E Disclosure**

**[199.5]** A CCFA is governed in the same way as an individual CFA in terms of the disclosure requirements of the CPR 1998 and Practice Direction about Costs. The CCFA Regulations define a CCFA as a CFA but for the CLSA 1990, s 58(3)(c) and it is assumed that for the purposes of the CPR and PD a CFA includes a CCFA. A CCFA is therefore a ‘funding arrangement’ within the

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## Collective conditional fee agreements [199.6]

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meaning of the CPR 1998, r 43.2(1)<sup>1</sup>. It follows that the rules concerning the disclosure of funding arrangements apply to CCFA's in the same way as for individual CFAs<sup>2</sup>. The Practice Direction about Costs requires disclosure of the existence of a CCFA but not its terms<sup>3</sup>. Notice must be given at the time of issue of a claim form if the CCFA is already in place<sup>4</sup>. Where a CCFA is made after the issue of proceedings notice must be given within seven days of the making of the agreement<sup>5</sup>. There is no requirement in the CPD for pre-issue disclosure<sup>6</sup>. The Protocols Practice Direction provides that disclosure 'should' occur pre-issue. For the conflicting views on the meaning of 'should' see para [188]–[189]. Where the CCFA relates to a defendant, notice of it must be given when filing the first document<sup>7</sup>. CCFA's made after the serving of the first document must be notified within seven days of the making of the agreement<sup>8</sup>. All of these provisions are identical to those applying to individual CFAs. Form N251 may be used for the giving of this information.

The requirements for disclosure at the assessment of costs stage are the same as those that apply to a CFA. The CCFA must be disclosed and to comply with the CPR 1998, Part 44 and CPD 14.9 either the risk assessment itself or at least a statement reciting the calculation of the success fee must be disclosed<sup>9</sup>.

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<sup>1</sup> CPR 1998, SI 1998/3132, r 43.2(1) provides:

'In Parts 44 to 48, unless the context otherwise requires "funding arrangement" means an arrangement where a person has –

- (i) entered into a conditional fee agreement which provides for a success fee within the meaning of section 58(2) of the Courts and Legal Services Act 1990.'

<sup>2</sup> SI 1998/3132, r 44.15(1) provides: 'A party who seeks to recover an additional liability must provide information about the funding arrangement to the court and to other parties as required by a rule, practice direction or court order.'

<sup>3</sup> CPD, s 19.1(1).

<sup>4</sup> CPD, s 19.2(2)(a).

<sup>5</sup> CPD, s 19.2(4).

<sup>6</sup> CPD, s 19.2(5).

<sup>7</sup> CPD, s 19.2(3).

<sup>8</sup> CPD, s 19.2(4).

<sup>9</sup> *Woollam v Cleanaway Ltd* (2004) unreported Chester County Court (Judge Halbert).

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### **F Shortfalls**

**[199.6]** Where the funder and the client are the same legal entity the recovery of a shortfall in the success fee following an assessment or agreement raises no difficult questions. The CCFA will provide that the funder-client is liable for the success fee. The provisions relating to the disallowance by a court and the acceptance of a lower sum by any settlement are dealt with above. A shortfall will arise outside of those circumstances. The success fee will be paid by the losing party as a multiplier of the assessed base costs which will in most if not all cases be a lower sum than the own party base costs. If it is intended that that shortfall should be recoverable by the legal representative the terms of the CCFA must make that clear. Where the funder and client are the same legal entity there is no difficulty. Where, however, the client is not the same legal entity as the funder, the CCFA will only be able to provide for recovery from the funder. Any circumstances in which the client is to be liable for any costs cannot be dealt with by the CCFA because the client here is not a party to the CCFA. There must therefore be a separate funding agreement between the

### [199.6] Litigation Funding

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legal representative and the individual for any circumstances in which the individual is to be liable for costs. Work done outside of the terms of a CCFA but without there being an agreement with the individual is likely to prove to be a difficult issue if costs are sought from the individual.

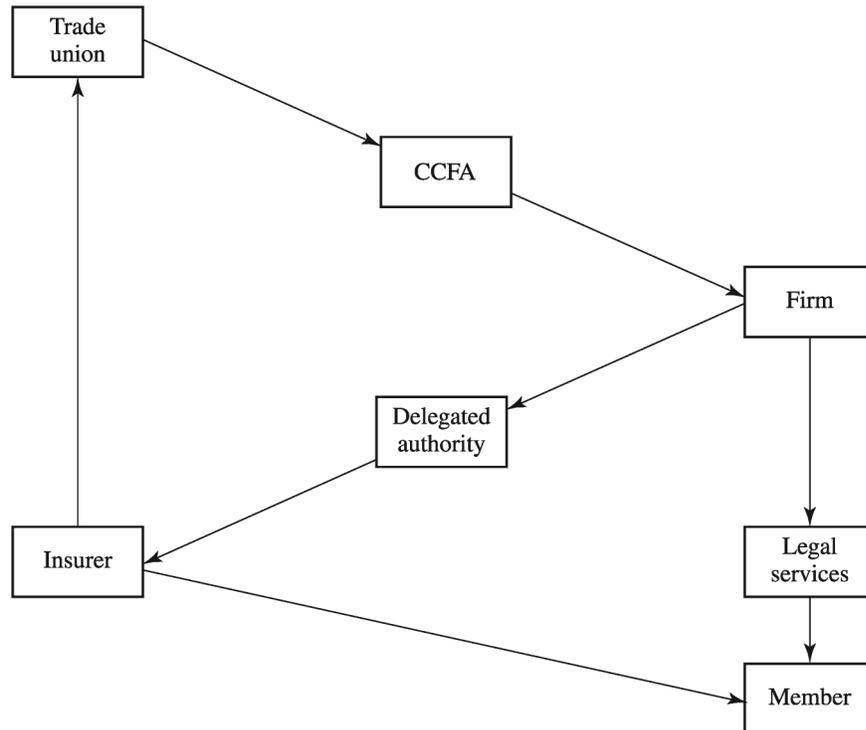
#### **G Third party funders and the indemnity principle**

[200] Where a third party funder uses a CCFA, the recovery of costs incurred by the third party, for which the party to the proceedings had no primary liability, can only be achieved by dis-applying the indemnity principle. This situation applies also to subrogated claims under insurance contracts. Although artificial, the provision by a third party of an indemnity for costs incurred by a party is a method of funding which does not offend the indemnity principle. A CCFA however, is a funding arrangement which does not involve the party to proceedings unless that party is also the funder. Subrogated proceedings are brought by and in the name of the policy holder, they are not proceedings brought in the name of the funder. Equally with Trade Union funding, the case is brought by the member and not by the Union. Recovery of costs under a CCFA must therefore be made either by an order in favour of the party to the proceedings (in which case the indemnity principle requires first that the party be liable) or to the funder as a third party. The mechanism for the latter approach seems to be the Supreme Court Act 1981, s 51(3) and the CPR 1998, r 48.2 which would require the funder to be joined as a party for costs purposes and show exceptional circumstances why costs should be awarded. In *Holden v Oyston*<sup>1</sup>, McKinnon J held that the Solicitors Indemnity Fund should recover costs in circumstances where it would have been liable to pay costs had the case failed. The power to make third party costs orders in favour of a non-party was seemingly assumed to be within s 51 on the basis of the wording of the CPR 1998. No cases where such a power had been exercised are cited in this decision.

The various relationships existing where a third party funder uses a CCFA with ATE insurance are shown below.

## Collective conditional fee agreements [200.1]

## [200.1]



The legal relationship of the recipient of legal services under a Trade Union CCFA has been considered in two costs appeals in 2003 with differing reasoning. In *Gliddon v Lloyd Maunder Ltd*<sup>1</sup> Master O’Hare held that the CCFA Regulations 2000 do not create an exception to the indemnity principle. It was recognised that a CCFA is between the legal representative and the funder only but it was held that there was a ‘linkage of liability’ with the client who by contract with the Trade Union has permitted the latter to instruct a solicitor. In *Thornley v Lang*<sup>2</sup> the Court of Appeal reviewed the line of authorities dealing with trade union funding and held that the member here was liable on the basis of the CCFA. It reached that result by alternative routes. Either the union agreed with the authority of its member or the member ratified the union’s agreement. On either footing there was a contract under which the member was liable and that contract was a CCFA. The court expressly rejected the argument that the member had entered into a CFA on an individual basis which would be subject to the CFA Regulations. Field J<sup>3</sup> had found that the member had no liability for the success fee but that of the CLSA 1990, s 58A(6), in providing for a costs order to include as success fee, enabled an order to be made on the basis of the CCFA to which the member was not a party. The Court of Appeal rejected that basis for the decision.

<sup>1</sup> [2002] EWHC 819 (QB), [2002] All ER (D) 296 (Apr).

<sup>1</sup> [2003] NLJR 318, SC.

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<sup>2</sup> [2003] EWCA Civ 1484, [2003] 1 All ER 886, [2004] 1 WLR 378.

<sup>3</sup> *Thornley v Lang* (25 February 2003, unreported) – Newcastle Combined Court Centre Claim No: NE 204504.

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**[200.2]** The indemnity principle formed the basis for challenges to a Trade Union arrangement in *Kitchen v Burwell*<sup>1</sup> where the CCFA was made after the union's member had been represented by the solicitors for six weeks under the union's legal assistance scheme. The change was communicated 13 months later by letter to which the member made no response. It was found that the letter was sufficient to vary the retainer so that it now incorporated the CCFA. The member's continued use of the legal service after receiving the letter was acceptance by conduct. It was further found that a clause in the CCFA stating that the solicitors would not seek to recover costs directly from the member was not in breach of the indemnity principle. That conclusion was arrived at however by deciding that the clause did not mean that the solicitors could not make a recovery from the member because it was clear from other terms of the CCFA and in other documents that the union was only providing an indemnity and that the member had a liability to pay the costs.

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<sup>1</sup> [2005] EWHC 1771 (QB), [2006] 1 Costs LR 82.

### CCFAs and after the event insurance

**[200.3]** The relationship of the party to proceedings and the legal representative under a CCFA where the funder is not a party to the proceedings is considered at paras [200]–[200.2] where the argument that the party to the proceedings has no liability for own costs under a CCFA is explored. The CCFA creates a liability between the funder and the legal representative but also between the party and the legal representative. Section 29 of the AJA 1999 provides for the recovery by a party to proceedings of an insurance premium in respect of that party's liability in those proceedings. If the analysis in *Thornley*<sup>1</sup> is followed it is possible to argue that the trade union member has a liability for own costs to the extent that the CCFA provides. Such a liability could therefore be insured by after the event insurance covering for example own disbursements and adverse costs. The union arrangements in *Kitchen v Burwell*<sup>2</sup> included the union funding an after the event premium for the member and indemnifying the member for the premium in the event that the case failed. No argument was raised as to the reasonableness of the party purchasing such a policy in circumstances where he had in the original arrangements been indemnified directly by the union.

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<sup>1</sup> [2003] EWCA Civ 1484, [2004] 1 All ER 886, [2004] 1 WLR 378.

<sup>2</sup> [2005] EWHC 1771 (QB), [2006] 1 Costs LR 82.

### CCFAs after 1 November 2005

**[200.4]** The Conditional Fee Agreements (Revocation) Regulations 2005<sup>1</sup> revoke the Collective Conditional Fee Agreements Regulations 2000 as from 1 November 2005. A CCFA entered into on or after that date must comply

## Insurance [203]

with the CLSA 1990, s 58. The disclosure requirements in respect of additional liabilities continue to apply<sup>2</sup>. The Law Society Client Care Code is amended from the same date<sup>3</sup>.

<sup>1</sup> SI 2005/2305. See para [1301].

<sup>2</sup> See para [199.5].

<sup>3</sup> See para [150].

## XI Insurance

[201] The major distinction to be drawn in the insurance products available to provide cover for the costs of litigation is between policies sold where the event which gives rise to the legal claim has not occurred and those sold where that event has already occurred. The phrases ‘before the event’ and ‘after the event’ are used to refer to this distinction.

### ***A Insurance before the event – legal expenses insurance (LEI)***

[202] The generic term used in before the event insurance is Legal Expenses Insurance (LEI) which takes two forms. Many household and motor insurance policies have an add-on benefit of cover for legal expenses. In some cases there is no charge for this addition in others the policyholder will have paid a sum in the region of £10. The limits of indemnity in these policies will vary but generally start from £10,000. The policy may also seek to restrict to a panel the solicitor who may do the work. The Insurance Companies (Legal Expenses Insurance) Regulations 1990<sup>1</sup> provide for the insured to have choice of lawyer where there are legal proceedings. Prior to issue of proceedings the Regulations do not require that the insured should have a right to choose a lawyer<sup>2</sup>. The same Regulations require that the insured have a right to choose a lawyer where there is a conflict of interest between the insured and the insurer. LEI policies are also available as ‘stand alone’ products not connected to some other policy.

Before a CFA is signed the client must be informed as to whether the legal representative considers that the client’s costs liability is insured under an existing policy<sup>2</sup>. Whether the litigation is to be funded by a CFA or not, the client must be informed of costs including the question of whether the costs are or can be insured<sup>3</sup>.

<sup>1</sup> SI 1990/1159.

<sup>2</sup> SI 1990/1159, reg 6(1) and (3).

<sup>2</sup> CFA Regulations 2000, reg 4(1)(c).

<sup>3</sup> Practice Rule 15 and Solicitors’ Costs Information and Client Care Code paragraph 4(j).

### **Typical cover under a legal expenses policy**

[203] Cover will depend upon which sections of a policy have been purchased but typically can include employment, personal injury, contract and motoring claims. The policy may include cover for family members as well as the insured. It is essential to ascertain that the client is within the class of persons

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covered and that the class of claim is within the sections of the policy which have been purchased. Cover will be for irrecoverable legal costs of the insured and the opponent. The policy will require the insured to persuade the insurer that the case should be pursued.

### **B Insurance after the event – AEI**

[204] After the event insurance products are relatively new in that they effectively came about to support the availability of CFAs which became lawful in England and Wales in July 1995. The number of providers of such policies has grown considerably since 1995 and the variations in cover are accordingly many and complex. AEI policies are available to support litigation funded by a CFA and funded without a CFA. In addition to the many policies available to insure the liability which a client has in costs, there are policies available also to the solicitor to enable the firm to insure on a stop loss basis.

### **C Client insurance**

#### **Insurance to support a CFA**

[205] The client with a CFA is at risk of being liable for the costs of the opponent. The client may also be liable for own disbursements including counsel's fees depending upon the terms of the CFA and whether own counsel is acting on a CFA or not. Although this client liability is equally applicable to defendants, not all of the policies offered are available to defendants.

#### *Typical cover*

[206] The typical cover offered under policies designed to support a CFA will include not only opponent's costs but also own disbursements. Not all products include own counsel's fees in the meaning of own disbursements. There are variations also as to whether cover is retrospective from the date of the policy and if so to what extent. Some insurers do not accept proposals where proceedings have already been issued, others will not accept proposals within a specified time of a trial date. Further variation exists with regard to application or assessment fees. Not all providers have policies to cover all fields of litigation, in particular some are confined to personal injury matters. Premium rates will depend in many cases on the limit of indemnity taken and the type of case, with percentage rates in the range of 1.5% up to 40%. Some providers use a fixed premium on a scale of the indemnity others provide a quote for individual cases. Where the limit of indemnity being sought is high, limits often being below £50,000, it is usual for the case to be assessed on an individual basis. With lower value cases many insurers operate a delegated authority scheme where below defined values the solicitor has authority to bind the insurers without reference on an individual case basis. Where delegated authority schemes are available the firm will be assessed by the insurer against their own criteria.

As with all policies of insurance it is essential to read the full policy wording when considering the suitability of a policy for an individual client.

### **D Insurance in non-CFA cases**

[207] Many but not all providers have policies to cover costs in cases where there is no CFA. Typically therefore, cover is for both side's costs and

disbursements. Given that both side's costs are to be covered, the limit of indemnity which the client will need will be higher than that needed under a CFA. The premium percentage rate will also be higher than for a CFA case. In many policies cover for adverse costs will be retrospective from the date of the policy but own costs will be covered only from the date of the policy.

### ***E Own costs partly insured and partly covered by a CFA***

[208] Some providers do offer a policy which covers adverse costs and a percentage of own costs in a case where there is a CFA. In such a case there is a question of whether the success fee for the CFA should be lower than it would have been had the solicitor taken the risk of receiving no costs at all. To apply the success fee to the whole of the costs without reducing the success fee in proportion to the costs insured would give a distorted result. The alternative here would be for the CFA to provide that the success fee will be applied only to the proportion of costs uninsured which is a truer reflection of the risk being taken by the solicitor.

### ***F Solicitors and ATE from January 14 2005 – FSA Regulation***

[209] From 14 January 2005 the FSA assumed regulation of activity concerned with general insurance. Activity is termed 'mediation' for the purposes of the FSA and in essence covers anything to do with taking out insurance and then using it, including filling in a proposal form. Such activity is a regulated activity for the purposes of the Financial Services and Markets Act 2000. Solicitors who deal with clients using ATE products are carrying on an activity in respect of General Insurance.

Solicitors do not however have to be registered by the FSA. Solicitors can be regulated instead by the Law Society. The Law Society is a Delegated Professional Body – DPB.

The Law Society has produced a set of rules approved by the FSA which solicitors must follow: Solicitors' Financial Services (Conduct of Business) Rules 2001 [amended 7 October 2004], Solicitors' Financial Services (Scope) Rules 2001 [amended 8 June 2004] and Solicitors' Financial Services (Insurance and Mortgages) Amendment Rules 2004. On a day to day basis the responsibilities of solicitors are contained in the Conduct of Business Rules that set out what solicitors must do. Firms must be registered with the FSA on the Exempt Professional Firms register and must comply with these rules in order to carry on insurance activity without being regulated by the FSA. Under this DPB scheme it is important to note that solicitors must not state that they are regulated by the FSA.

Insurance Mediation activity:

Article 2.3 of the Insurance Mediation Directive<sup>1</sup>:

' "Insurance mediation" means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim.'

Article 8 Solicitors' Financial Services (Scope) Rules 2001:

'insurance mediation activity means any of the following activities specified in the Regulated Activities Order<sup>2</sup> which is carried on in relation to a contract of insurance or rights to or interests in a life policy:

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- (a) dealing in investments as agent;
- (b) arranging (bringing about) deals in investments;
- (c) making arrangements with a view to transactions in investments;
- (d) assisting in the administration and performance of a contract of insurance;
- (e) advising on investments;
- (f) agreeing to carry on a regulated activity in (a) to (e) above”

The following activities with respect to ATE insurance falls within the definition of insurance mediation:

- (a) dealing as an agent in contracts of insurance;
- (b) arranging, or making arrangements, with a view to a person entering into a contract of insurance;
- (c) assisting in the administration and performance of contracts of insurance;
- (d) advising on the merits of buying and selling a contract of insurance.

<sup>1</sup> Directive 2002/92/EC.

<sup>2</sup> Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544.

**[210]** The main requirements for firms under the Law Society scheme:

Only firms that can comply with the ‘basic conditions’ of the DPB are able to conduct insurance activities without being authorised and regulated by the FSA. Section 4 of the Solicitors’ Financial Services (Scope) Rules 2001 sets out seven conditions:

- (a) the activities arise out of, or are complementary to, the provision of a particular professional service to a particular client;
- (b) the manner of the provision by the firm of any service in the course of carrying on the activities is incidental to the provision by the firm of professional services;
- (c) the firm accounts to the client for any pecuniary reward or other advantage which the firm receives from a third party;
- (d) the activities are not of a description, nor do they relate to an investment of a description, specified in any order made by the Treasury under section 327(6) of the Act;
- (e) the firm does not carry on, or hold itself out as carrying on, a regulated activity other than one which is allowed by these rules or one in relation to which the firm is an exempt person;
- (f) there is not in force any order or direction of the FSA under sections 328 or 329 of the Act which prevents the firm from carrying on the activities; and
- (g) the activities are not otherwise prohibited by these rules.

**[211]** The main requirements of the Law Society scheme in respect of individual clients

- (1) ‘Status Disclosure’  
Firms not authorised and regulated by the FSA but by the Law Society must tell their clients that they are not authorised by the FSA but by the Law Society. This is termed a “status disclosure” ie it discloses to the client the status of the solicitor as not being authorised by the FSA. Written notice of the following must be given before any services relating to insurance are provided:

## Insurance [211]

- a statement that the firm is not authorised by the FSA;
  - the name and address of the firm;
  - the nature of the regulated activities carried on by the firm, and the fact that they are limited in scope;
  - a statement that the firm is regulated by the Law Society; and
  - a statement explaining that complaints and redress mechanisms are provided through Law Society regulation.
- (2) Letterhead  
The letterhead of a firm must bear the words “regulated by the Law Society”. This is an existing requirement of the Solicitors’ Publicity Code 2001. This requirement provides, therefore, only some of the new requirements referred to in point 1 above. It is likely that firms will use a separate information sheet to ensure full compliance.
- (3) Records of insurance transactions  
File notes or client letters must now include a note that the firm has been instructed to effect an insurance transaction and/or has given instructions to another person to effect a transaction. Records must be kept for six years from the date the record is made.
- (4) Record of commissions  
If a firm receives a commission in respect of insurance activities the firm must comply with Practice Rule 10. It must also record the amount of commission and how it has been accounted to the client. Such record can be in the form of a client letter or bill of costs. Records must be kept for six years from the date the record is made.
- (5) Client information  
Where a firm recommends a contract of insurance to a client, the firm must inform the client whether the firm has given advice on the basis of a ‘fair analysis’ of a sufficiently large number of insurance contracts available on the market to enable the firm to make a recommendation in accordance with professional criteria regarding which contract of insurance would be adequate to meet the client’s needs. It is not a requirement that a firm conducts a fair analysis of the market.  
If the firm does not conduct a fair analysis of the market, the firm must:
- (a) advise the client whether the firm is contractually obliged to conduct insurance mediation activities only with one or more insurance undertakings;
  - (b) advise the client that the client can request details of the insurance undertakings the firm selects from or deals with in relation to the contract of insurance provided; and
  - (c) provide the client with such details on request.
- (6) Suitability of insurance policy  
Before a firm recommends a contract of insurance the firm must take reasonable steps to ensure that the recommendation is suitable to the client’s demands and needs by:
- (a) considering relevant information already held;
  - (b) obtaining details of any relevant existing insurance;
  - (c) identifying the client’s requirements and explaining to the client what the client needs to disclose;
  - (d) assessing whether the level of cover is sufficient for the risks that the client wishes to insure; and

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- (e) considering the relevance of any exclusions, excesses, limitations or conditions.

The policy summary provided by the insurer will assist in complying with this requirement.

(7) Demands and needs statements

When a firm recommends or arranges insurance then before the contract is finalised the client must be provided with a statement that:

- (a) sets out the client's demands and needs on the basis of the information provided by the client;  
(b) where a recommendation has been made, explains the reason for recommending that contract of insurance;  
(c) reflects the complexity of the insurance contract being proposed;

The Demands and Needs Statements provided by insurers are not sufficient to enable compliance with this requirement of the Law Society rules. Because the firm is conducting insurance mediation activities directly with the client it is the firm that needs to provide the most detailed demands and needs statement. Insurers will only have provided generic statements not specific to the individual client's situation.

(8) Complaints

Solicitors are regulated by the Law Society. Complaints relating to solicitors and insurance are therefore governed by the mechanisms already required by the Law Society.

Complaints relating to the insurer or intermediary will be governed by the FSA where the insurer and intermediary is authorised and regulated by the FSA. If the insurer is not UK based then it will be governed by rules applicable to its domicile and not by the FSA.

## **G Providers of after the event insurance**

[212]–[220] The number of providers of this class of insurance continues to change. The list contained in the October 2008 edition of Litigation Funding, published by the Law Society runs to 35 providers. Further advice on providers can be obtained through insurance brokers, by reference to Litigation Funding (Law Society Publications) and to the website: [www.thejudge.co.uk](http://www.thejudge.co.uk).

## **XII Risk assessment**

### **A Risk, costs and profit**

[221] Whatever method of risk assessment is to be used, consideration needs to be given to the purposes which the assessment is designed to serve. The relationship between risk, the cost of litigating and ultimately the profitability of the work needs to be understood. There is a common interest between the client, the insurer and the litigation practice in assessing the risks involved in bringing and continuing the case.

#### **Client need**

[222] Risk assessment is based upon a methodical examination of the case being presented to the lawyer by the client. The claimant client may or may not be clear as to the real objective of the proposed litigation. Equally the defendant client may or may not be clear as to the basis upon which a

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## Risk assessment [225]

settlement may be sought or the reasoning behind insisting on trial. Assessment in terms of the risk factors involved in the individual case and the necessary fact investigation and information gathering needed for that analysis provides an illumination for the client which better enables the lawyer to meet the needs of the client. Whilst good interviewing will lead to a sound grasp of client expectation, the process of risk analysis enables that initial position to be evaluated in terms of achievability, time and cost. Advice to the client presented as a result of a risk analysis will be instructive in explaining the legal context of the case and enable an informed decision to be taken as to its future conduct. If the case now is ready for negotiation the information marshalled during the analysis will be readily available for a sound negotiation plan.

### Negotiation planning

[223] Fisher and Ury<sup>1</sup> maintain that at the heart of successful legal negotiation lies the BATNA. A risk analysis will enable a realistic view to be taken as to what is the Best Alternative To a Negotiated Agreement and will avoid the common problem of assumptions being made as to the available options. If you know the risks involved in trial, a realistic appraisal can be made of any offer to settle and of the opportunity for making an offer to settle, be that as claimant or defendant.

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<sup>1</sup> Fisher and Ury, *Getting to Yes*, (New York, Penguin, 1983).

### Lawyer needs

[224] The usefulness of risk analysis is by no means confined to conditional fee agreement (CFA) work. Nonetheless, in this funding field an accurate assessment of the chances of success is essential for the viability of this category of work. A risk assessment will enable a refinement of the definition of success to be made. The definition of success lies at the centre of a CFA and indeed the viability of this funding mechanism. Without properly investigating client objectives no sensible agreement can be reached as to what success means for the funding agreement. Once that assessment has been made it also serves the purpose of setting the success fee and ensuring the viability of the work. In cases where the success fee becomes recoverable from the other side it will also serve to fend off the losing side's attack on the level of fee. (See AJA 1999, s 27<sup>1</sup> which inserts s 58A into the CLSA 1990<sup>2</sup>: in force from 1 April 2000).

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<sup>1</sup> See para [1011].

<sup>2</sup> See para [1003].

### Insurer's needs

[225] Insurance products are available to provide cover for other side's costs if the case is run on a CFA. Products also provide cover for both sides' costs in conventionally funded cases. The essence of such cover is the risk of the case failing. The risk assessment process of the client's own lawyer will enable a clear picture for the insurer and enable a realistic assessment to be made of the level of costs involved and the appropriate premium level to be set. The level of case presentation and analysis displayed to insurers does have an influence on the decisions made in individual cases.

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[226] The new litigation funding regime places great emphasis on a cost benefit approach and the ratio of costs, including any success fee and insurance premium, to quantum must be a major consideration. The Community Legal Service approach to cost benefit is to link the prediction of success with the ratio of costs to quantum. Thus where the prediction is 50–60% the predicted damages must be at least double the predicted costs. Under a CFA with a success fee the concern must be that the level of costs is not so disproportionate to the damages as to make it likely that costs will be disallowed in part. The strict CLS ratios may be viewed here as inappropriate.

### **B Principles of risk assessment**

[227] It is the uncertainty involved in litigation which creates the need for a risk assessment and it is the uncertainties which are being assessed.

#### **Risk headings**

[228] We will examine risk assessment as to:

- the facts;
- the law;
- the client;
- the opponent;
- the procedure;
- the costs.

#### *The factual uncertainty*

[229] In many, but not all cases, there will be factual uncertainties which can affect the likelihood of success. ‘The facts’ refers to two levels – direct facts and inferred facts. Did the barrel fall out of the window? is a question of direct fact – why did it fall? may well be a matter for inference. [Did it fall due to the defendant’s negligence is the ultimate inferential fact]. Uncertainty can arise at the direct level but it often arises at the second, inferential level. An analysis aims to throw up these factual uncertainties so that a view can be taken as to how to remove or minimise the uncertainty or proceed with the uncertainty.

In order to arrive at the uncertainties it is necessary to extract the factual issues from the materials available.

[230]–[240] In addition to the distinction between direct facts and inferential facts there will be at least FOUR categories of fact:

- Facts known to the client which **support** your case – CF;
- Facts known to the client which are **adverse** to your case – CU;
- Facts which are not yet known but which would be **favourable** – OF;  
and
- Facts which are not known but which would be **unfavourable** – OU.

An analysis can then be made against the facts in issue showing what evidence there is and is not, where it comes from and whether it is favourable or not.

#### **Fact analysis form**

##### **[241]**

KEY: CF favourable facts known to your client CU unfavourable facts known to your client
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## Risk assessment [246]

OF favourable facts known to opponent OU unfavourable facts known to opponent ? facts as yet unknown		
Claimant Evidence	Fact in Issue	Defendant Evidence

[242] The legal action will set out the facts which must be established – the facts in issue. Thus s 2 (1) Misrepresentation Act 1967 –

‘Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the representation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.’

[243] Here the facts in issue are –

- Contract;
- Misrepresentation;
- By a party;
- Loss; and
- Lack of reasonable grounds.

[For the reference to fraud see uncertainty in law below]

Against each we can now assess the evidence and it would be possible to express confidence levels by a percentage figure. This goes a long way to satisfying the requirement of a written assessment when entering a CFA.

### Proving the facts

[244] It is necessary, and now possible, to assess how these facts can be proved. When that is looked at the area of uncertainty will arise in the nature of the method of proof and any evidence on either side already to hand. The areas of uncertainty build up a picture which enables an assessment to be made of the objective of the client and the chances of success. It will highlight graphically where the gaps are and where the work needs to be done. Thus, consideration can be given to the source and reliability of evidence, be it documentary, oral or expert. Establishing the facts piece by piece will throw up inconsistencies between evidence addressing the same fact and conflicts in the evidence of the opposing parties. Again this is essential analysis in order to assess the case.

### Contributory negligence

[245] A further illustration of the effects of findings of fact comes from contributory negligence. Given a case where it is known that the defendant will raise contributory negligence, a risk assessment can show the effect on outcome of a particular finding. It cannot show how likely the finding is – that will always be the area for professional judgment. The costs of the case set against the various outcomes will again place a value on the risk attached to the case going to trial.

[246] Example –

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Assuming loss of £20,000 can be proved

Contrib Neg	Effect on Damages	Likelihood of finding
Nil	20,000	5%
25%	15,000	25%
50%	10,000	50%
75%	5,000	20%

**[247]** The client would be advised if offered £5,000 that there was a very good chance of recovering more – indeed in this example an 80% chance. Were there to be an offer of £10,000 the advice changes since there is only a 30% chance of beating it.

The above table can be used to reflect the possibility of an overestimate of the likelihood factor. Suppose it were only 35% likely that the judge will find 50% contributory negligence and 30% likely that it will be found to be 75%. We then get:

Contrib neg	Effect on Damages	Likelihood
Nil	20,000	5%
25%	15,000	25%
50%	10,000	35%
75%	5,000	35%

Here the change is not dramatic. At £5,000 there is still a 65% chance of a better outcome. At £10,000 there is still only a 30% chance of a better outcome.

Looked at another way, how wrong does the calculation have to be before the risk changes dramatically, a good indication of the value of the risk in the litigation.

*The uncertainty in the law*

**[248]** Assuming the facts are clear and can be proved, do they establish a legal action? Would a judge agree? Why will the other side not agree?

**[249]** Section 2(1) of the Misrepresentation Act 1967 serves as a good example where uncertainty in the law can affect the risk assessment. Until *Royscott Trust Ltd v Rogerson*<sup>1</sup> it was unclear what was meant by the reference to fraud. This had serious implications for quantum. On the facts of that case it was possible to see the effects of the law being decided in each of the possible ways and for a risk assessment to show that effect which could then influence settlement were that to have been a possibility.

The area of damages is fertile ground for uncertainty savagely affecting the risk assessment. Consider for example *Swingcastle Ltd v Alistair Gibson*<sup>2</sup>, *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*<sup>3</sup>, *South Australia Asset Management v York Montague*<sup>4</sup> and *Lloyds Bank plc v Parker Bullen (a firm)*<sup>5</sup> all of which concern professional negligence and the value of land. See also *Ruxley Electronics and Construction Ltd v Forsyth*<sup>6</sup>.

## Risk assessment [261]

Again, in these cases the risk assessment can be done to show the effects on the claimant's case of the various decisions on the law that could have been made. At that stage some assessment has to be made as to the likelihood of one decision rather than another and clearly that is a matter for judgment. But, the isolation of that factor and its implications for the client are hugely useful for decision-making and especially in identifying prospects of settlement. The other side is faced with the same uncertainty when it comes to the law – the difference will be the degree of likelihood which each side's lawyers are prepared to put on a favourable decision. In most cases each side will have a view that the prospects of success are favourable reflecting the difference in view as to the law.

Putting aside cases where one or even both of the parties wants a court to decide the law (test case situation), the true value of the case going to trial can be arrived at by seeing the area of difference in outcome according to each possible finding on the law. That value is what is at risk should the case proceed to trial.

<sup>1</sup> [1991] 2 QB 297, [1991] 3 All ER 294, CA.

<sup>2</sup> [1991] 2 AC 223, [1991] 2 All ER 353, HL.

<sup>3</sup> [1995] QB 375, [1995] 2 All ER 769, CA.

<sup>4</sup> [1997] AC 191, [1996] 3 All ER 365, HL.

<sup>5</sup> [2000] Lloyd's Rep PN 51, [1999] EGCS 107.

<sup>6</sup> [1994] 3 All ER 801, [1994] 1 WLR 650, CA; revsd [1996] AC 344, [1995] 3 All ER 268, HL.

*Client risk*

**[250]–[260]** Risk assessment must include an assessment of the client. Assessment includes the client's commitment to the case, potential as a witness and whether the sympathy factor is likely to be positive or negative, why the client has decided to see a solicitor, have they seen another solicitor(s) already, are they the aggrieved or a relative of a deceased victim? Are they able to give a clear account of events? Do they add to their story at a later date? Do they contradict themselves? What is the level of their expectation as to outcome? Have they responded to advice or requests for further information? How emotionally involved in the case are they? Must they have 'their day in court'? Do they want revenge over the defendant/person they see as responsible? If the case reaches a trial, to what extent is the case dependent on the acceptance of the clients' version of events?

Note – the requirement to give a written assessment to the client when entering a CFA may cause some difficulty here. If the client is being taken on notwithstanding reservations about the client themselves, any recorded risk assessment ought to reflect that.

*Opponent risk*

**[261]** Assessing the other side in terms of solvency is likely to be standard. This should be reviewed periodically for the obvious reason that the client will receive nothing from the action against an insolvent defendant and the CFA will leave the solicitor unpaid if the client is unable to pay. The reputation of the other side, particularly as a litigant may be of importance as indeed may the reputation of those representing them. In clinical negligence cases the

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individual medical practitioner may have from no part to play to a very central part in the litigation decisions. It may be obvious that the other side is going to be difficult and therefore costly to deal with. The unrepresented opponent is likely to add to the time needed to proceed with the case.

### *Procedural risk*

[262] Limitation periods are the firm favourite here but the Pre-action protocols and indeed the whole of the CPR may hold traps for the unwary. With the protocols consideration needs to be given to the time period for completion and the time remaining. Part 36 provides a staging point for reassessing risk. The use of summary judgment and issues of security for costs as well as statutory defences will feature in insolvency litigation.

### *Cost risk*

[263] Even outside of conditional fee agreements, the cost risk is a factor to be assessed. Meeting the costs of pre-action protocols and fact investigation including potentially the need for experts raises questions for the client and the solicitor which may well have a bearing on the viability of the case for litigation. Proportionality of costs and the use and effect of Part 36 offers are the new regime in this respect. With recoverability of insurance premiums and the success fee comes the need to assess the suitability of the funding mechanism CFA or other and the awareness of the ability of a losing opponent to challenge the recoverability.

## **Further elements of risk analysis**

### *Theory of the case*

[264] With the evidence and assertions available, what explanation(s) best deals with the material in a way which achieves the client objective?

The material may, certainly early on, suggest more than one theory, but there is a danger in proceeding with conflicting theories. Far better to proceed with a chosen theory and be prepared to abandon it later. Equally in the early stages it is important to keep open the possibilities for fresh theories.

The theory chosen will have an effect on the investigation and the formulation of negotiation strategy, the making of Part 36 offers and right through to trial advocacy. The selection of evidence, the preparation of questions, the whole tenor of the case will wholly differ according to which of the theories you selected. Use of a theory also leads to effective analysis by seeing the evidence found as either in line with the theory or not. If not, then the decision has to be made to proceed without the evidence or to reformulate the theory.

Equally crucial is the need to consider the theory of the case from the point of view of the opponent.

### *Analysing the evidence*

[265] There will be critical stages throughout the litigation process at which an analysis of the evidence is vital. At first interview the purpose is to look for facts and assertions which suggest possible hypotheses. Prior to a Part 36 offer there will have to be a very firm hypothesis to put to the other side with a clear assessment of the evidence in support. Again at the time of issue of proceed-

## Risk assessment [268]

ings. When information and rebuttal come from the other side there needs to be a reassessment and finally before trial the purpose is to assess the evidence for trial performance.

At each stage the purpose of analysis must be kept in mind and the amount and quality of the evidence will vary over time so that the exercise is not a repeat but a true re-appraisal with new material.

At each stage there must be a formulation or re-formulation of a theory of the case and a careful analysis of the evidence in the light of the theory.

The analysis is to a great extent a matter of information control and its mechanics are dealt with below. However, it is worth stating here that the analysis will as the stages go on increasingly include an evaluation exercise, that is, some estimate of how well the evidence will achieve its purpose at the relevant stage. The answer in evaluation at first interview needs only to be in terms of generating initial hypotheses and routes for investigation, whereas before trial the field has narrowed in terms of hypotheses and it is necessary to evaluate the likely effect of the evidence on the trier of fact.

*Information control*

**[266]** A systematic approach to the evidence and the *facts in issue* will lead to an orderly analysis of the evidence at the various stages and the on-going appraisal of the theory of the case.

Each piece of evidence, and indeed each question asked, must aim at a fact in issue. A chart can be drawn up which allocates evidence, favourable and not, to the facts in issue which arise in the case. Gaps can be immediately seen and inconsistencies either between own evidence or between it and the other side will become clear. The litigator will know what they know *and* know what they do not.

Claimant evidence	Fact in issue	Def Evidence
List nature and source and gaps	See cause of action eg s 2(1) Misrep Act	Nature/source and gaps

Facts may be known/unknown, proved or yet to be proved.

*Weighting the risk*

**[267]** Using a mathematical basis for risk assessment is popular but it carries with it the danger, that by allotting a number and then adding to and subtracting from it, an appearance of precision or objectivity is given to what is in reality a subjective process.

The basis of risk assessment here then is to try to predict someone else's decision and evaluation of the evidence in terms of these expressions of confidence<sup>1</sup>.

<sup>1</sup> See paras [64]–[69].

*Chance for settlement*

**[268]** Litigators assess risk, by whatever method they use, with a view to trial. That is, they are assessing the prospects of success on the assumption that the



## Risk assessment [302]

the value of the case to the party concerned. Where the parties put similar values on the case that is conducive to settlement. Where there is a wide divergence with the claimant's view much higher than defendant there is less likely to be settlement. Again, in preparing for negotiation, this factor must be kept in mind.

*Information balance*

[281] The bird's eye view of the cases not likely to settle suggest that the parties do not have the same information. This situation is common and is likely to lead to trial because one of the parties has an erroneous view. The problem is that neither party has the bird's eye view – they can only have their own view. Again, in the preparation for negotiation which ought to take place consideration needs to be given to this analysis. It is an example of risk assessing settlement as opposed to trial. It may be that where the case is subjected to a Case Management Conference the bird's eye view will be disclosed and the work on settlement can proceed more effectively.

**C Risk assessment template****[282]–[300]**

Fact	Law
Client	Opponent
Costs	Procedure
Theory of the Case	

**D Risk factors**

[301] The uncertainties in litigation have been classified above into six areas – Fact, Law, Client, Opponent, Procedure and Costs from which a list of factors can be produced against which a case can be analysed. Whichever factor list is used (or both may be used in the case of personal injury in each case), a profile of the case can be built by ranking the factors in order of importance to the case. Having ranked the factors it will be clear as to where, at the time the particular assessment is being made, where the work has to be done. Thus, for example, if there were serious doubt as to the solvency of the opponent steps would have to be taken to address that factor before work and costs are put into other factors.

Factor lists can be constructed for any field of litigation. The method to be adopted in using them will be the same and is explained below.

**Fact in issue factor list for personal injury**

[302] This is a fact in issue factor list for personal injury:

- (1) Duty of care owed to claimant
- (2) Identity of party owing duty to claimant
- (3) Question of law involved in duty of care
- (4) Standard of care
- (5) Contributory negligence
- (6) Independent witness
- (7) Documentary evidence

**[302]** Litigation Funding

- (8) Solvency of opponent
- (9) Likely performance of client as a witness
- (10) Reputation of the defendant
- (11) More than one prospective defendant
- (12) Quantum in relation to costs
- (13) Need for expert evidence
- (14) Limitation period
- (15) Causation in fact
- (16) Injury reported
- (17) Medical assistance given
- (18) Evidence of quantum

**Factor list for non-personal injury civil claim**

**[303]** This is a fact in issue factor list for a non-personal injury civil claim:

- (1) Dependency on oral evidence of fact
- (2) Available documents own side
- (3) Available documents other side
- (4) Limitation period
- (5) Client's potential as a witness
- (6) Arguable question of law
- (7) Assessment of damages (Quantum)
- (8) Solvency of opponent
- (9) Ratio of costs to recovery value
- (10) Chances of settlement
- (11) Liability likely to be insured
- (12) Client wants 'day in court'
- (13) Number of alleged wrongs/breaches
- (14) Causation
- (15) Mitigation
- (16) Need for expert evidence
- (17) Reputation of opponent
- (18) Realism of client's case

**Applying the factor lists – Individual Factor List***Ranking instructions*

**[304]** In the table below rank the factors from the factor lists by putting the number corresponding to the chosen factor into the TOP box if it is the top choice and into the BOTTOM box if it is the last choice. This exercise is then repeated a further 8 times giving a total of 9 top and 9 bottom choices.

**Example:** If it is decided that the top factor is *existence of documents* and the least relevant factor is *level of emotion* the number 4 is put into the TOP box and the number 10 into the BOTTOM box for ranking round one. The exercise is then repeated with the remaining factors until all 9 rounds are complete.

Ranking round	Top	Bottom
1		
2		
3		

Risk assessment [307]

4		
5		
6		
7		
8		
9		

Analysis

[305] The profile in terms of the most significant features at this stage and, therefore, the features which will require work, is given in the first five factors as ranked. This kind of profile will always benefit from the Theory of the Case technique<sup>1</sup>.

<sup>1</sup> See para [264].

Weighting the risk

[306] Whenever an expression of confidence is to be made the risk analysis is used to highlight exactly what factors it is which have been considered in arriving at that level of confidence. Where there is no information about a factor eg, solvency, the expression of confidence must reflect that lack of knowledge. The final expression is to some extent then subjective to the individual litigator. It is important to recognise that the profile created will vary from litigator to litigator and that it is a reflection of how the individual litigator will run the litigation.

Confidence level

[307]–[1000] This sheet is to be completed after the ranking sheet has been completed

From the ranking sheet enter the top 5 factors in the left hand column and give a % to each to reflect your confidence in that factor.

Factor	Confidence level %
	Total % divided by 5 .....
	Success Fee .....

Composite Legal Expenses

80e (DAS)

**[307]** Litigation Funding

---

First Assist Insurance Services

First Legal Indemnity

Free Claim IDC

Funding & Insurance Solutions

LawAssist/Litigation Protection

Litco Partnership

Lowton Ellenbrook

M Young legal Associates

National Accident Helpline

QLP

Saturn Professional Risks

Solicitors Services

Solicitors Support Services

Stirling Financial

Temple Legal Protection

## Litigation Funding Materials



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0008

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## COURTS AND LEGAL SERVICES ACT 1990

### 1990 Chapter 41

#### Miscellaneous

#### [1001]

##### 58 [previous version]

(1) In this section “a conditional fee agreement” means an agreement in writing between a person providing advocacy or litigation services and his client which—

- (a) does not relate to proceedings of a kind mentioned in subsection (10);
- (b) provides for that person’s fees and expenses, or any part of them, to be payable only in specified circumstances;
- (c) complies with such requirements (if any) as may be prescribed by the Secretary of State; and
- (d) is not a contentious business agreement (as defined by section 59 of the Solicitors Act 1974).

(2) Where a conditional fee agreement provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not a conditional fee agreement, it shall specify the percentage by which that amount is to be increased.

(3) Subject to subsection (6), a conditional fee agreement which relates to specified proceedings shall not be unenforceable by reason only of its being a conditional fee agreement.

(4) In this section ‘specified proceedings’ means proceedings of a description specified by order made by the Secretary of State for the purposes of subsection (3).

(5) Any such order shall prescribe the maximum permitted percentage for each description of specified proceedings.

(6) An agreement which falls within subsection (2) shall be unenforceable if, at the time when it is entered into, the percentage specified in the agreement exceeds the prescribed maximum permitted percentage for the description of proceedings to which it relates.

(7) Before making any order under this section the Secretary of State shall consult the designated judges, the General Council of the Bar, the Law Society and such other authorised bodies (if any) as he considers appropriate.

(8) Where a party to any proceedings has entered into a conditional fee agreement and a costs order is made in those proceedings in his favour, the costs payable to him shall not include any element which takes account of any percentage increase payable under the agreement.

(9) Rules of court may make provision with respect to the taxing of any costs which include fees payable under a conditional fee agreement.

(10) The proceedings mentioned in subsection (1)(a) are any criminal proceedings and any proceedings under—

- (a) the Matrimonial Causes Act 1973;
- (b) the Domestic Violence and Matrimonial Proceedings Act 1976;
- (c) the Adoption Act 1976;
- (d) the Domestic Proceedings and Magistrates’ Courts Act 1978;
- (e) sections 1 and 9 of the Matrimonial Homes Act 1983;
- (f) Part III of the Matrimonial and Family Proceedings Act 1984;
- (g) Parts I, II or IV of the Children Act 1989; or
- (h) the inherent jurisdiction of the High Court in relation to children.

**[1001]** Courts and Legal Services Act 1990, s 58

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**AMENDMENT**

Substituted by new ss 58, 58A (set out below), by the Access to Justice Act 1999, s 27(1). Date in force: 1 April 2000 (with savings in relation to existing cases): see SI 2000/774, arts 2(b), 5 and SI 2000/900, art 2.

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**[1002]****[58 Conditional fee agreements**

- (1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.
- (2) For the purposes of this section and section 58A—
- (a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and
  - (b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances.
- (3) The following conditions are applicable to every conditional fee agreement—
- (a) it must be in writing;
  - (b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and
  - (c) it must comply with such requirements (if any) as may be prescribed by the [Lord Chancellor].
- (4) The following further conditions are applicable to a conditional fee agreement which provides for a success fee—
- (a) it must relate to proceedings of a description specified by order made by the [Lord Chancellor];
  - (b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and
  - (c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the [Lord Chancellor].
- (5) If a conditional fee agreement is an agreement to which section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies, subsection (1) shall not make it unenforceable.]
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**AMENDMENT**

Substituted together with s 58A, for s 58 as originally enacted, by the Access to Justice Act 1999, s 27(1). Date in force: 1 April 2000 (with savings in relation to existing cases): see SI 2000/774, arts 2(b), 5 and SI 2000/900, art 2. Sub-s (3): in para (c) words “Lord Chancellor” in square brackets substituted by SI 2005/3429, art 8, Schedule, para 2. Date in force: 12 January 2006: see SI 2005/3429, art 1(2). Sub-s (4): in paras (a), (c) words “Lord Chancellor” in square brackets substituted by SI 2005/3429, art 8, Schedule, para 2. Date in force: 12 January 2006: see SI 2005/3429, art 1(2).

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## Courts and Legal Services Act 1990, s 58A [1003]

**[1003]****[58A Conditional fee agreements: supplementary**

(1) The proceedings which cannot be the subject of an enforceable conditional fee agreement are—

(a) criminal proceedings, apart from proceedings under section 82 of the Environmental Protection Act 1990; and

(b) family proceedings.

(2) In subsection (1) ‘family proceedings’ means proceedings under any one or more of the following—

(a) the Matrimonial Causes Act 1973;

[(b) the Adoption and Children Act 2002;]

(c) the Domestic Proceedings and Magistrates’ Courts Act 1978;

(d) Part III of the Matrimonial and Family Proceedings Act 1984;

(e) Parts I, II and IV of the Children Act 1989;

(f) [Parts 4 and 4A] of the Family Law Act 1996; . . .

[(fa) Chapter 2 of Part 2 of the Civil Partnership Act 2004 (proceedings for dissolution etc of civil partnership);

(fb) Schedule 5 to the 2004 Act (financial relief in the High Court or a county court etc);

(fc) Schedule 6 to the 2004 Act (financial relief in magistrates’ courts etc);

(fd) Schedule 7 to the 2004 Act (financial relief in England and Wales after overseas dissolution etc of a civil partnership); and]

(g) the inherent jurisdiction of the High Court in relation to children.

(3) The requirements which the [Lord Chancellor] may prescribe under section 58(3)(c)—

(a) include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made; and

(b) may be different for different descriptions of conditional fee agreements (and, in particular, may be different for those which provide for a success fee and those which do not).

(4) In section 58 and this section (and in the definitions of ‘advocacy services’ and ‘litigation services’ as they apply for their purposes) ‘proceedings’ includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.

(5) Before making an order under section 58(4), the [Lord Chancellor] shall consult—

(a) the designated judges;

(b) the General Council of the Bar;

(c) the Law Society; and

(d) such other bodies as he considers appropriate.

(6) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee.

(7) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a conditional fee agreement (including one which provides for a success fee.)

**AMENDMENT**

Substituted together with s 58, for s 58 as originally enacted, by the Access to Justice Act 1999, s 27(1). Date in force: 1 April 2000 (with savings in relation to existing cases): see SI 2000/774, arts 2(b), 5 and SI 2000/900, art 2.

**[1003] Courts and Legal Services Act 1990, s 58A**

Sub-s (2): para (b) substituted by the Adoption and Children Act 2002, s 139(1), Sch 3, para 80. Date in force: 30 December 2005: see SI 2005/2213, art 2(o); for transitional provisions see the Adoption and Children Act 2002, s 139(2), Sch 4, para 22. In para (f) words in square brackets substituted by the Forced Marriage (Civil Protection) Act 2007, s 3(1), Sch 2, Pt 1, para 2. Date in force: 25 November 2008: see SI 2008/2779, art 2(c). In para (f) word omitted repealed by the Civil Partnership Act 2004, s 261(1), (4), Sch 27, para 138, Sch 30. Date in force: 5 December 2005: see SI 2005/3175, art 2(2), (6). Paras (fa)–(fd) inserted by the Civil Partnership Act 2004, s 261(1), Sch 27, para 138. Date in force: 5 December 2005: see SI 2005/3175, art 2(2).

Sub-s (3): words “Lord Chancellor” in square brackets substituted by SI 2005/3429, art 8, Schedule, para 2. Date in force: 12 January 2006: see SI 2005/3429, art 1(2).

Sub-s (5): words “Lord Chancellor” in square brackets substituted by SI 2005/3429, art 8, Schedule, para 2. Date in force: 12 January 2006: see SI 2005/3429, art 1(2).

**[1003.1]****[58AA Damages-based agreements relating to employment matters**

(1) A damages-based agreement which relates to an employment matter and satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.

(2) But a damages-based agreement which relates to an employment matter and does not satisfy those conditions is unenforceable.

(3) For the purposes of this section—

(a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that—

(i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and

(ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained;

(b) a damages-based agreement relates to an employment matter if the matter in relation to which the services are provided is a matter that is, or could become, the subject of proceedings before an employment tribunal.

(4) The agreement—

(a) must be in writing;

(b) must not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner;

(c) must comply with such other requirements as to its terms and conditions as are prescribed; and

(d) must be made only after the person providing services under the agreement has provided prescribed information.

(5) Regulations under subsection (4) are to be made by the Lord Chancellor and may make different provision in relation to different descriptions of agreements.

(6) Before making regulations under subsection (4) the Lord Chancellor must consult—

(a) the designated judges,

(b) the General Council of the Bar,

(c) the Law Society, and

(d) such other bodies as the Lord Chancellor considers appropriate.

(7) In this section—

Courts and Legal Services Act 1990, s 58B [1004]

“payment” includes a transfer of assets and any other transfer of money’s worth (and the reference in subsection (4)(b) to a payment above a prescribed amount, or above an amount calculated in a prescribed manner, is to be construed accordingly);

“claims management services” has the same meaning as in Part 2 of the Compensation Act 2006 (see section 4(2) of that Act).

(8) Nothing in this section applies to an agreement entered into before the coming into force of the first regulations made under subsection (4).]

AMENDMENT

Inserted by the Coroners and Justice Act 2009, s 154(1), (2). Date in force: 12 November 2009: see the Coroners and Justice Act 2009, s 182(1)(e).

[1004]–[1010]

[58B Litigation funding agreements

(1) A litigation funding agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a litigation funding agreement.

(2) For the purposes of this section a litigation funding agreement is an agreement under which—

- (a) a person (‘the funder’) agrees to fund (in whole or in part) the provision of advocacy or litigation services (by someone other than the funder) to another person (‘the litigant’); and
- (b) the litigant agrees to pay a sum to the funder in specified circumstances.

(3) The following conditions are applicable to a litigation funding agreement—

- (a) the funder must be a person, or person of a description, prescribed by the [Lord Chancellor];
- (b) the agreement must be in writing;
- (c) the agreement must not relate to proceedings which by virtue of section 58A(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of any such description as may be prescribed by the [Lord Chancellor];
- (d) the agreement must comply with such requirements (if any) as may be so prescribed;
- (e) the sum to be paid by the litigant must consist of any costs payable to him in respect of the proceedings to which the agreement relates together with an amount calculated by reference to the funder’s anticipated expenditure in funding the provision of the services; and
- (f) that amount must not exceed such percentage of that anticipated expenditure as may be prescribed by the [Lord Chancellor] in relation to proceedings of the description to which the agreement relates.

(4) Regulations under subsection (3)(a) may require a person to be approved by the [Lord Chancellor] or by a prescribed person.

(5) The requirements which the [Lord Chancellor] may prescribe under subsection (3)(d)—

- (a) include requirements for the funder to have provided prescribed information to the litigant before the agreement is made; and
- (b) may be different for different descriptions of litigation funding agreements.

(6) In this section (and in the definitions of ‘advocacy services’ and ‘litigation services’ as they apply for its purposes) ‘proceedings’ includes any sort of proceedings

**[1004]** Courts and Legal Services Act 1990, s 58B

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for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.

(7) Before making regulations under this section, the [Lord Chancellor] shall consult—

- (a) the designated judges;
- (b) the General Council of the Bar;
- (c) the Law Society; and
- (d) such other bodies as he considers appropriate.

(8) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any amount payable under a litigation funding agreement.

(9) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a litigation funding agreement.]

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**AMENDMENT**

Inserted by the Access to Justice Act 1999, s 28. Date in force: to be appointed: see the Access to Justice Act 1999, s 108(1). Sub-s (3): in paras (a), (c), (f) words “Lord Chancellor” in square brackets substituted by the Access to Justice Act 1999, s 28 (as amended by SI 2005/3429, art 8, Schedule, para 4(b)). Date in force: 12 January 2006: see SI 2005/3429, art 1(2). Sub-s (4): words “Lord Chancellor” in square brackets substituted by the Access to Justice Act 1999, s 28 (as amended by SI 2005/3429, art 8, Schedule, para 4(b)). Date in force: 12 January 2006: see SI 2005/3429, art 1(2). Sub-s (5): words “Lord Chancellor” in square brackets substituted by the Access to Justice Act 1999, s 28 (as amended by SI 2005/3429, art 8, Schedule, para 4(b)). Date in force: 12 January 2006: see SI 2005/3429, art 1(2). Sub-s (7): words “Lord Chancellor” in square brackets substituted by the Access to Justice Act 1999, s 28 (as amended by SI 2005/3429, art 8, Schedule, para 4(b)). Date in force: 12 January 2006: see SI 2005/3429, art 1(2).

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## ACCESS TO JUSTICE ACT 1999

### 1999 Chapter 22

#### [1011]

##### 27 Conditional fee agreements

*Section 58 of the Courts and Legal Services Act 1990 substituted by new ss 58 and 58A: see E[1002], E[1003].*

#### [1012]

##### 28 Litigation funding agreements

*Inserts new s 58B in the Courts and Legal Services Act 1990.*

#### [1013]–[1020]

##### 30 Recovery where body undertakes to meet costs liabilities

(1) This section applies where a body of a prescribed description undertakes to meet (in accordance with arrangements satisfying prescribed conditions) liabilities which members of the body or other persons who are parties to proceedings may incur to pay the costs of other parties to the proceedings.

(2) If in any of the proceedings a costs order is made in favour of any of the members or other persons, the costs payable to him may, subject to subsection (3) and (in the case of court proceedings) to rules of court, include an additional amount in respect of any provision made by or on behalf of the body in connection with the proceedings against the risk of having to meet such liabilities.

(3) But the additional amount shall not exceed a sum determined in a prescribed manner; and there may, in particular, be prescribed as a manner of determination one which takes into account the likely cost to the member or other person of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings.

(4) In this section ‘prescribed’ means prescribed by regulations made by the [Lord Chancellor] by statutory instrument; and a statutory instrument containing such regulations shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(5) Regulations under subsection (1) may, in particular, prescribe as a description of body one which is for the time being approved by the [Lord Chancellor] or by a prescribed person.

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**Amendments** Sub-ss (4), (5): words “Lord Chancellor” in square brackets substituted by SI 2005/3429, art 8, Schedule, para 4(c). Date in force: 12 January 2006: see SI 2005/3429, art 1(2).

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0002

[ST: 191] [ED: 100000] [REL: 96]  
XPP 8.4C.1 SC\_00MDD nllp BCS

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SI 1995/1674

## CONDITIONAL FEE AGREEMENTS ORDER 1995

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### DATE IN FORCE:

5 July 1995. Revoked by SI 1998/1860, art 2 as from 30 July 1998: see SI 1998/1860, art 1(1).

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### [1021]–[1030]

#### 1 Citation and commencement

*This Order may be cited as the Conditional Fee Agreements Order 1995 and shall come into force on the day after the day on which it was made.*

#### 2 Specified proceedings

*(1) The proceedings specified for the purpose of section 58(4) of the Courts and Legal Services Act 1990 (conditional fee agreements in respect of specified proceedings not to be unenforceable) are the following: –*

- (a) proceedings in which there is a claim for damages in respect of personal injuries or in respect of a person's death, and 'personal injuries' includes any disease and any impairment of a person's physical or mental condition;*
- (b) proceedings in England and Wales by a company which is being wound up in England and Wales or Scotland;*
- (c) proceedings by a company in respect of which an administration order made under Part II of the Insolvency Act 1986 is in force;*
- (d) proceedings in England and Wales by a person acting in the capacity of –*
  - (i) liquidator of a company which is being wound up in England and Wales or Scotland; or*
  - (ii) trustee of a bankrupt's estate;*
- (e) proceedings by a person acting in the capacity of an administrator appointed pursuant to the provisions of Part II of the Insolvency Act 1986;*
- (f) proceedings before the European Commission of Human Rights and the European Court of Human Rights established under article 19 of the Convention for the Protection of Human Rights and Fundamental Freedoms opened for signature at Rome on 4th November 1950, ratified by the United Kingdom on 8th March 1951, which came into force on 3rd August 1953,*

*provided that the client does not have legal aid in respect of the proceedings.*

*(2) Proceedings specified in paragraph (1) shall be specified proceedings notwithstanding that they are concluded without the commencement of court proceedings.*

*(3) In paragraphs (1)(b) and (1)(d) 'company' means a company within the meaning of section 735(1) of the Companies Act 1985 or a company which may be wound up under Part V of the Insolvency Act 1986.*

*(4) Where legal aid in respect of the proceedings to which a conditional fee agreement relates is granted after that agreement is entered into the proceedings shall cease to be specified from the date of the grant.*

*(5) In this article, 'legal aid' means representation under Part IV of the Legal Aid Act 1988.*

**[1021]** Conditional Fee Agreements Order 1995, art 3

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**3 Maximum permitted percentage increase on fees**

*For the purpose of section 58(5) of the Courts and Legal Services Act 1990 the maximum permitted percentage by which fees may be increased in respect of each description of proceedings specified in article 2 is 100%.*

SI 1995/1675

## CONDITIONAL FEE AGREEMENTS REGULATIONS 1995

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### DATE IN FORCE:

5 July 1995. Revoked by SI 2000/692, reg 7 as from 1 April 2000: see SI 2000/692, reg 1(2).

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### [1031]–[1040]

#### 1 Citation, commencement and interpretation

(1) *These Regulations may be cited as the Conditional Fee Agreements Regulations 1995 and shall come into force on the day after the day on which they are made.*

(2) *In these Regulations –*

*“agreement”, in relation to an agreement between a legal representative and an additional legal representative, includes a retainer;*

*“legal aid” means representation under Part IV of the Legal Aid Act 1988;*

*“legal representative” means a person providing advocacy or litigation services.*

#### 2 Agreements to comply with prescribed requirements

*An agreement shall not be a conditional fee agreement unless it complies with the requirements of the following regulations.*

#### 3 Requirements of an agreement

*An agreement shall state –*

- (a) the particular proceedings or parts of them to which it relates (including whether it relates to any counterclaim, appeal or proceedings to enforce a judgment or order);
- (b) the circumstances in which the legal representative’s fees and expenses or part of them are payable;
- (c) what, if any, payment is due –
  - (i) upon partial failure of the specified circumstances to occur;
  - (ii) irrespective of the specified circumstances occurring; and
  - (iii) upon termination of the agreement for any reason;
- (d) the amount payable in accordance with sub-paragraphs (b) or (c) above or the method to be used to calculate the amount payable; and in particular whether or not the amount payable is limited by reference to the amount of any damages which may be recovered on behalf of the client.

#### 4 Additional requirements

(1) *The agreement shall also state that, immediately before it was entered into, the legal representative drew the client’s attention to the matters specified in paragraph (2).*

(2) *The matters are –*

- (a) whether the client might be entitled to legal aid in respect of the proceedings to which the agreement relates, the conditions upon which legal aid is available and the application of those conditions to the client in respect of the proceedings;
- (b) the circumstances in which the client may be liable to pay the fees and expenses of the legal representative in accordance with the agreement;
- (c) the circumstances in which the client may be liable to pay the costs of any other party to the proceedings; and

**[1031]** Conditional Fee Agreements Regulations 1995, reg 4

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- (d) the circumstances in which the client may seek taxation of the fees and expenses of the legal representative and the procedure for so doing.

**5 Application of regulation 4**

*Regulation 4 shall not apply to an agreement between a legal representative and an additional legal representative.*

**6 Form of agreement**

*An agreement shall be in writing and, except in the case of an agreement between a legal representative and an additional legal representative, shall be signed by the client and the legal representative.*

**7 Amendment of agreement**

*Where it is proposed to extend the agreement to cover further proceedings or parts of them regulations 3 to 6 shall apply to the agreement as extended.*

SI 1998/1860

## CONDITIONAL FEE AGREEMENTS ORDER 1998

Date in force 30 July 1998. Revoked by SI 2000/823, art 2 as from 1 April 2000: see SI 2000/823, art 1(1).

### [1041]–[1050]

#### 1 Citation, commencement and interpretation

- (1) *This Order may be cited as the Conditional Fee Agreements Order 1998 and shall come into force on the day after the day on which it is made.*
- (2) *In this Order 'the Act' means the Courts and Legal Services Act 1990.*

#### 2 Revocation of 1995 order

*The Conditional Fee Agreements Order 1995 is revoked.*

#### 3 Specified proceedings

- (1) *All proceedings are proceedings specified for the purposes of section 58(3) of the Act (conditional fee agreements in respect of specified proceedings not to be unenforceable).*
- (2) *Proceedings specified in paragraph (1) shall be specified proceedings notwithstanding that they are concluded without the commencement of court proceedings.*

#### 4 Maximum permitted percentage increase on fees

*For the purposes of section 58(5) of the Act the maximum permitted percentage by which fees may be increased in respect of any proceedings designated by article 3 as proceedings specified for the purposes of section 58(3) of the Act is 100%.*

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[ST: 199] [ED: 100000] [REL: 96]  
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**0**

SI 2000/692

## CONDITIONAL FEE AGREEMENTS REGULATIONS 2000

### AMENDMENT

Revoked by SI 2005/2305, reg 2. Date in force: 1 November 2005 (except in relation to a conditional fee agreement entered into before that date): see SI 2005/2305, regs 1, 3(1).

### [1051]–[1060]

#### 1 Citation, commencement and interpretation

- (1) *These Regulations may be cited as the Conditional Fee Agreements Regulations 2000.*
- (2) *These Regulations come into force on 1st April 2000.*
- (3) *In these Regulations –*
  - ‘client’ includes, except where the context otherwise requires, a person who –*
    - (a) has instructed the legal representative to provide the advocacy or litigation services to which the conditional fee agreement relates, or
    - (b) is liable to pay the legal representative’s fees in respect of those services; and
  - ‘legal representative’ means the person providing the advocacy or litigation services to which the conditional fee agreement relates.*

#### 2 Requirements for contents of conditional fee agreements: general

- (1) *A conditional fee agreement must specify –*
  - (a) the particular proceedings or parts of them to which it relates (including whether it relates to any appeal, counterclaim or proceedings to enforce a judgment or order),
  - (b) the circumstances in which the legal representative’s fees and expenses, or part of them, are payable,
  - (c) what payment, if any, is due –
    - (i) if those circumstances only partly occur,
    - (ii) irrespective of whether those circumstances occur, and
    - (iii) on the termination of the agreement for any reason, and
  - (d) the amounts which are payable in all the circumstances and cases specified or the method to be used to calculate them and, in particular, whether the amounts are limited by reference to the damages which may be recovered on behalf of the client.
- (2) *A conditional fee agreement to which regulation 4 applies must contain a statement that the requirements of that regulation which apply in the case of that agreement have been complied with.*

#### 3 Requirements for contents of conditional fee agreements providing for success fees

- (1) *A conditional fee agreement which provides for a success fee –*
  - (a) must briefly specify the reasons for setting the percentage increase at the level stated in the agreement, and
  - (b) must specify how much of the percentage increase, if any, relates to the cost to the legal representative of the postponement of the payment of his fees and expenses.

**[1051] Conditional Fee Agreements Regulations 2000, reg 3**

(2) *If the agreement relates to court proceedings, it must provide that where the percentage increase becomes payable as a result of those proceedings, then –*

- (a) *if –*
  - (i) *any fees subject to the increase are assessed, and*
  - (ii) *the legal representative or the client is required by the court to disclose to the court or any other person the reasons for setting the percentage increase at the level stated in the agreement,*  
*he may do so,*
- (b) *if –*
  - (i) *any such fees are assessed, and*
  - (ii) *any amount in respect of the percentage increase is disallowed on the assessment on the ground that the level at which the increase was set was unreasonable in view of facts which were or should have been known to the legal representative at the time it was set,*  
*that amount ceases to be payable under the agreement, unless the court is satisfied that it should continue to be so payable, and*
- (c) *if –*
  - (i) *sub-paragraph (b) does not apply, and*
  - (ii) *the legal representative agrees with any person liable as a result of the proceedings to pay fees subject to the percentage increase that a lower amount than the amount payable in accordance with the conditional fee agreement is to be paid instead,*  
*the amount payable under the conditional fee agreement in respect of those fees shall be reduced accordingly, unless the court is satisfied that the full amount should continue to be payable under it.*

(3) *In this regulation ‘percentage increase’ means the percentage by which the amount of the fees which would be payable if the agreement were not a conditional fee agreement is to be increased under the agreement.*

**3A [Requirements where the client’s liability is limited to sums recovered**

*[(1) This regulation applies to a conditional fee agreement under which, except in the circumstances set out in [paragraphs (5) and (5A)], the client is liable to pay his legal representative’s fees and expenses only to the extent that sums are recovered in respect of the relevant proceedings, whether by way of costs or otherwise.*

*(2) In determining for the purposes of paragraph (1) the circumstances in which a client is liable to pay his legal representative’s fees and expenses, no account is to be taken of any obligation to pay costs in respect of the premium of a policy taken out to insure against the risk of incurring a liability in the relevant proceedings.*

*(3) Regulations 2, 3 and 4 do not apply to a conditional fee agreement to which this regulation applies.*

*(4) A conditional fee agreement to which this regulation applies must—*

- (a) *specify—*
  - (i) *the particular proceedings or parts of them to which it relates (including whether it relates to any appeal, counterclaim or proceedings to enforce a judgment or order); and*
  - (ii) *the circumstances in which the legal representative’s fees and expenses, or part of them, are payable; and*
- (b) *if it provides for a success fee—*
  - (i) *briefly specify the reasons for setting the percentage increase at the level stated in the agreement; and*
  - (ii) *provide that if, in court proceedings, the percentage increase becomes payable as a result of those proceedings and the legal representative or the client is ordered to disclose to the court or any other person the*

#### Conditional Fee Agreements Regulations 2000, reg 4 [1051]

reasons for setting the percentage increase at the level stated in the agreement, he may do so.

(5) *A conditional fee agreement to which this regulation applies may specify that the client will be liable to pay the legal representative's fees and expenses whether or not sums are recovered in respect of the relevant proceedings, if the client—*

- (a) fails to co-operate with the legal representative;
- (b) fails to attend any medical or expert examination or court hearing which the legal representative reasonably requests him to attend;
- (c) fails to give necessary instructions to the legal representative; ..
- (d) withdraws instructions from the legal representative;
- [(e) is an individual who is adjudged bankrupt or enters into an arrangement or a composition with his creditors, or against whom an administration order is made; or
- (f) is a company for which a receiver, administrative receiver or liquidator is appointed].

[(5A) *A conditional fee agreement to which this regulation applies may specify that, in the event of the client dying in the course of the relevant proceedings, his estate will be liable for the legal representative's fees and expenses, whether or not sums are recovered in respect of those proceedings.*]

(6) *Before a conditional fee agreement to which this regulation applies is made, the legal representative must inform the client as to the circumstances in which the client [or his estate] may be liable to pay the legal representative's fees and expenses, and provide such further explanation, advice or other information as to those circumstances as the client may reasonably require.*

#### AMENDMENTS

Inserted by SI 2003/1240, reg 2(1), (2). Date in force: 2 June 2003: see SI 2003/1240, reg 1.Para (1): words “paragraphs (5) and (5A)” in square brackets substituted by SI 2003/3344, reg 2(1), (2). Date in force: 2 February 2004: see SI 2003/3344, reg 1. Para (5): in sub-para (c) word omitted revoked by SI 2003/3344, reg 2(1), (3)(a). Date in force: 2 February 2004: see SI 2003/3344, reg 1.Para (5): sub-paras (e), (f) inserted by SI 2003/3344, reg 2(1), (3)(b). Date in force: 2 February 2004: see SI 2003/3344, reg 1.Para (5A): inserted by SI 2003/3344, reg 2(1), (4). Date in force: 2 February 2004: see SI 2003/3344, reg 1.Para (6): words “or his estate” in square brackets inserted by SI 2003/3344, reg 2(1), (5). Date in force: 2 February 2004: see SI 2003/3344, reg 1.

#### 4 Information to be given before conditional fee agreements made

- (1) *Before a conditional fee agreement is made the legal representative must –*
- (a) inform the client about the following matters, and
  - (b) if the client requires any further explanation, advice or other information about any of those matters, provide such further explanation, advice or other information about them as the client may reasonably require.
- (2) *Those matters are –*
- (a) the circumstances in which the client may be liable to pay the costs of the legal representative in accordance with the agreement,
  - (b) the circumstances in which the client may seek assessment of the fees and expenses of the legal representative and the procedure for doing so,
  - (c) whether the legal representative considers that the client's risk of incurring liability for costs in respect of the proceedings to which agreement relates is insured against under an existing contract of insurance,
  - (d) whether other methods of financing those costs are available, and, if so, how they apply to the client and the proceedings in question,

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**[1051]** Conditional Fee Agreements Regulations 2000, reg 4

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- (e) whether the legal representative considers that any particular method or methods of financing any or all of those costs is appropriate and, if he considers that a contract of insurance is appropriate or recommends a particular such contract –
  - (i) his reasons for doing so, and
  - (ii) whether he has an interest in doing so.
- (3) *Before a conditional fee agreement is made the legal representative must explain its effect to the client.*
- (4) *In the case of an agreement where –*
  - (a) the legal representative is a body to which section 30 of the Access to Justice Act 1999 (recovery where body undertakes to meet costs liabilities) applies, and
  - (b) there are no circumstances in which the client may be liable to pay any costs in respect of the proceedings,  
*paragraph (1) does not apply.*
- (5) *Information required to be given under paragraph (1) about the matters in paragraph (2)(a) to (d) must be given orally (whether or not it is also given in writing), but information required to be so given about the matters in paragraph (2)(e) and the explanation required by paragraph (3) must be given both orally and in writing.*
- (6) *This regulation does not apply in the case of an agreement between a legal representative and an additional legal representative.*

**5 Form of agreement**

- (1) *A conditional fee agreement must be signed by the client and the legal representative.*
- (2) *This regulation does not apply in the case of an agreement between a legal representative and an additional legal representative.*

**6 Amendment of agreement**

*Where an agreement is amended to cover further proceedings or parts of them –*

- (a) regulations 2, 3 [,3A] and 5 apply to the amended agreement as if it were a fresh agreement made at the time of the amendment, and
- (b) the obligations under regulation 4 apply in relation to the amendments in so far as they affect the matters mentioned in that regulation.

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**AMENDMENTS**

In para (a) reference to “, 3A” in square brackets inserted by SI 2003/1240, reg 2(1), (3). Date in force: 2 June 2003: see SI 2003/1240, reg 1.

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**7 Revocation of 1995 Regulations**

*The Conditional Fee Agreements Regulations 1995 are revoked.*

**[8 Exclusion of Collective Conditional Fee Agreements**

*These Regulations shall not apply to collective conditional fee agreements within the meaning of regulation 3 of the Collective Conditional Fee Agreements Regulations 2000.]*

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**AMENDMENTS**

Inserted by SI 2000/2988, reg 7.

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SI 2000/823

## CONDITIONAL FEE AGREEMENTS ORDER 2000

### [1061]–[1070]

#### 1 Citation, commencement and interpretation

- (1) This Order may be cited as the Conditional Fee Agreements Order 2000 and shall come into force on 1st April 2000.
- (2) In this Order “the Act” means the Courts and Legal Services Act 1990.

#### 2 Revocation of 1998 Order

The Conditional Fee Agreements Order 1998 is revoked.

#### 3 Agreements providing for success fees

All proceedings which, under section 58 of the Act, can be the subject of an enforceable conditional fee agreement, except proceedings under section 82 of the Environmental Protection Act 1990, are proceedings specified for the purposes of section 58(4)(a) of the Act.

#### 4 Amount of success fees

In relation to all proceedings specified in article 3, the percentage specified for the purposes of section 58(4)(c) of the Act shall be 100%.

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[ST: 203] [ED: 100000] [REL: 96]  
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SI 2000/900

ACCESS TO JUSTICE ACT 1999 (TRANSITIONAL PROVISIONS)  
ORDER 2000

**[1071]–[1079]**

1

(1) This Order may be cited as the Access to Justice Act 1999 (Transitional Provisions) Order 2000 and shall come into force on 1st April 2000.

(2) In this Order a reference to a section by number alone means the section so numbered in the Access to Justice Act 1999.

2

(1) Section 58A(6) and (7) of the Courts and Legal Services Act 1990 shall not apply, as regards a party to proceedings, to:

(a) any proceedings in relation to which that party entered into a conditional fee agreement before 1st April 2000; or

(b) any proceedings arising out of the same cause of action as any proceedings to which sub-paragraph (a) refers.

(2) The coming into force of section 27 (Conditional fee agreements) shall not affect the validity of any conditional fee agreement entered into before 1st April 2000, and any such agreement shall continue to have effect after that date as if section 27 had not come into force.

(3) In paragraphs 1(a) and (2) ‘conditional fee agreement’ has the same meaning as in section 58 of the Courts and Legal Services Act 1990 as that section stands immediately before the coming into force of section 27 of the Access to Justice Act 1999.

3

Section 29 (Recovery of insurance premiums by way of costs) shall not apply, as regards a party to proceedings, to:

(a) any proceedings in relation to which that party took out an insurance policy of the sort referred to in section 29 before 1st April 2000; or

(b) any proceedings arising out of the same cause of action as any proceedings to which sub-paragraph (a) refers.

4

Section 30 (Recovery where body undertakes to meet costs liabilities) shall not apply, as regards a party to proceedings, to:

(a) any proceedings in relation to which that party gave an undertaking before 1st April 2000 which, if it had been given after that date, would have been an undertaking to which section 30(1) applied; or

(b) any proceedings arising out of the same cause of action as any proceedings to which sub-paragraph (a) refers.

0002

[ST: 205] [ED: 100000] [REL: 96]  
XPP 8.4C.1 SC\_00MDD nllp BCS

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SI 2000/2988

## COLLECTIVE CONDITIONAL FEE AGREEMENTS REGULATIONS 2000

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### AMENDMENT

Revoked by SI 2005/2305, reg 2. Date in force: 1 November 2005 (except in relation to a collective conditional fee agreement entered into before that date): see SI 2005/2305, regs 1, 3.

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### [1080]

#### 1 Citation, commencement and interpretation

(1) *These regulations may be cited as the Collective Conditional Fee Agreements Regulations 2000, and shall come into force on 30th November 2000.*

(2) *In these Regulations, except where the context requires otherwise—*

*“client” means a person who will receive advocacy or litigation services to which the agreement relates;*

*“collective conditional fee agreement” has the meaning given in regulation 3;*

*“conditional fee agreement” has the same meaning as in section 58 of the Courts and Legal Services Act 1990;*

*“funder” means the party to a collective conditional fee agreement who, under that agreement, is liable to pay the legal representative’s fees;*

*“legal representative” means the person providing the advocacy or litigation services to which the agreement relates.*

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### MODIFICATION

A registered European lawyer may provide professional activities by way of legal advice and assistance or legal aid, and these Regulations shall be interpreted accordingly: see the European Communities (Lawyer’s Practice) Regulations 2000, SI 2000/1119, reg 14.

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## 2

*These Regulations shall apply to agreements entered into on or after 30th November 2000, and agreements entered into before that date shall be treated as if these Regulations had not come into force.*

### 3 Definition of “collective conditional fee agreement”

(1) *Subject to paragraph (2) of this regulation, a collective conditional fee agreement is an agreement which—*

(a) *disregarding section 58(3)(c) of the Courts and Legal Services Act 1990, would be a conditional fee agreement; and*

(b) *does not refer to specific proceedings, but provides for fees to be payable on a common basis in relation to a class of proceedings, or, if it refers to more than one class of proceedings, on a common basis in relation to each class.*

(2) *An agreement may be a collective conditional fee agreement whether or not—*

(a) *the funder is a client; or*

(b) *any clients are named in the agreement.*

**[1080]** Collective Conditional Fee Agreements Regs 2000, reg 4**4 Requirements for contents of collective conditional fee agreements: general**

(1) *A collective conditional fee agreement must specify the circumstances in which the legal representative's fees and expenses, or part of them, are payable.*

*[(1A) The circumstances referred to in paragraph (1) may include the fact that the legal representative's fees and expenses are payable only to the extent that sums are recovered in respect of the proceedings, whether by way of costs or otherwise.]*

(2) *A collective conditional fee agreement must provide that, when accepting instructions in relation to any specific proceedings the legal representative must—*

- (a) *inform the client as to the circumstances in which the client [or his estate] may be liable to pay the costs of the legal representative; and*
- (b) *if the client requires any further explanation, advice or other information about the matter referred to in sub-paragraph (a), provide such further explanation, advice or other information about it as the client may reasonably require.*

(3) *Paragraph (2) does not apply in the case of an agreement between a legal representative and an additional legal representative.*

(4) *A collective conditional fee agreement must provide that, after accepting instructions in relation to any specific proceedings, the legal representative must confirm his acceptance of instructions in writing to the client.*

**AMENDMENTS**

Para (1A): inserted by SI 2003/1240, reg 3(1), (2). Date in force: 2 June 2003: see SI 2003/1240, reg 1. Para (2): in sub-para (a) words “or his estate” in square brackets inserted by SI 2003/3344, reg 3(1), (2). Para (2): in sub-para (a) words “or his estate” in square brackets inserted by SI 2003/3344, reg 3(1), (2).

**5 Requirements for contents of collective conditional fee agreements providing for success fees**

(1) *Where a collective conditional fee agreement provides for a success fee the agreement must provide that, when accepting instructions in relation to any specific proceedings the legal representative must prepare and retain a written statement containing—*

- (a) *his assessment of the probability of the circumstances arising in which the percentage increase will become payable in relation to those proceedings (“the risk assessment”);*
- (b) *his assessment of the amount of the percentage increase in relation to those proceedings, having regard to the risk assessment; and*
- (c) *the reasons, by reference to the risk assessment, for setting the percentage increase at that level.*

(2) *If the agreement relates to court proceedings it must provide that where the success fee becomes payable as a result of those proceedings, then—*

- (a) *if—*
  - (i) *any fees subject to the increase are assessed, and*
  - (ii) *the legal representative or the client is required by the court to disclose to the court or any other person the reasons for setting the percentage increase at the level assessed by the legal representative, he may do so,*
- (b) *if—*
  - (i) *any such fees are assessed by the court, and*
  - (ii) *any amount in respect of the percentage increase is disallowed on the assessment on the ground that the level at which the increase was set*

## Collective Conditional Fee Agreements Regs 2000, reg 5 [1080]

was unreasonable in view of facts which were or should have been known to the legal representative at the time it was set

*that amount ceases to be payable under the agreement, unless the court is satisfied that it should continue to be so payable, and*

(c) if—

- (i) sub-paragraph (b) does not apply, and
- (ii) the legal representative agrees with any person liable as a result of the proceedings to pay fees subject to the percentage increase that a lower amount than the amount payable in accordance with the conditional fee agreement is to be paid instead,

*the amount payable under the collective conditional fee agreement in respect of those fees shall be reduced accordingly, unless the court is satisfied that the full amount should continue to be payable under it.*

(3) *In this regulation “percentage increase” means the percentage by which the amount of the fees which would have been payable if the agreement were not a conditional fee agreement is to be increased under the agreement.*

*[[ (4) Sub-paragraphs (b) and (c) of paragraph (2) do not apply to a collective conditional fee agreement under which, except in the circumstances set out in [paragraphs (6) and (7)], the client is liable to pay his legal representative’s fees and expenses only to the extent that sums are recovered in respect of the proceedings, whether by way of costs or otherwise.*

*(5) In determining for the purposes of paragraph (4) the circumstances in which a client is liable to pay his legal representative’s fees and expenses, no account is to be taken of any obligation to pay costs in respect of the premium of a policy taken out to insure against the risk of incurring a liability in the relevant proceedings.*

*(6) A collective conditional fee agreement to which paragraph (4) applies may specify that the client will be liable to pay his legal representative’s fees and expenses whether or not sums are recovered in respect of the relevant proceedings, if the client—*

- (a) fails to co-operate with the legal representative;
- (b) fails to attend any medical or expert examination or court hearing which the legal representative reasonably requests him to attend;
- (c) fails to give necessary instructions to the legal representative; . . .
- (d) withdraws instructions from the legal representative;]
- [(e) is an individual who is adjudged bankrupt or enters into an arrangement or a composition with his creditors, or against whom an administration order is made; or*
- (f) is a company for which a receiver, administrative receiver or liquidator is appointed].]*

*[(7) A collective conditional fee agreement to which paragraph (4) applies may specify that, in the event of the client dying in the course of the relevant proceedings, his estate will be liable for the legal representative’s fees and expenses, whether or not sums are recovered in respect of those proceedings.]*

Paras (4)–(6): inserted by SI 2003/1240, reg 3(1), (3). Date in force: 2 June 2003: see SI 2003/1240, reg 1. Para (4): words “paragraphs (6) and (7)” in square brackets substituted by SI 2003/3344, reg 3(1), (3)(a). Date in force: 2 February 2004: see SI 2003/3344, reg 1. Para (6): in sub-para (c) word omitted revoked by SI 2003/3344, reg 3(1), (3)(b)(i). Date in force: 2 February 2004: see SI 2003/3344, reg 1. Para (6): sub-paras (e), (f) inserted by SI 2003/3344, reg 3(1), (3)(b)(ii). Date in force: 2 February 2004: see SI 2003/3344, reg 1. Para (7): inserted by SI 2003/3344, reg 3(1), (3)(c). Date in force: 2 February 2004: see SI 2003/3344, reg 1.

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**[1080]** Collective Conditional Fee Agreements Regs 2000, reg 6

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**6 Form and amendment of collective conditional fee agreement**

- (1) *Subject to paragraph (2), a collective conditional fee agreement must be signed by the funder, and by the legal representative.*
- (2) *Paragraph (1) does not apply in the case of an agreement between a legal representative and an additional legal representative.*
- (3) *Where a collective conditional fee agreement is amended, regulations 4 and 5 apply to the amended agreement as if it were a fresh agreement made at the time of the amendment.*

**7 Amendment to the Conditional Fee Agreements Regulations 2000**

*After regulation 7 of the Conditional Fee Agreements Regulations 2000 there shall be inserted the following new regulation:—*

**8 “Exclusion of collective conditional fee agreements**

*These Regulations shall not apply to collective conditional fee agreements within the meaning of regulation 3 of the Collective Conditional Fee Agreements Regulations 2000.”.*

SI 2000/693

## ACCESS TO JUSTICE (MEMBERSHIP ORGANISATIONS) REGULATIONS 2000

*Revoked by SI 2005/2306, reg 2(1). Date in force: 1 November 2005 (except in relation to arrangements entered into before that date): see SI 2005/2306, regs 1(1), 2(2).*

### **[1081]–[1090]**

#### **1 Citation, commencement and interpretation**

- (1) *These Regulations may be cited as the Access to Justice (Membership Organisations) Regulations 2000.*
- (2) *These Regulations come into force on 1st April 2000.*

#### **2 Bodies of a prescribed description**

*The bodies which are prescribed for the purpose of section 30 of the Access to Justice Act 1999 (recovery where body undertakes to meet costs liabilities) are those bodies which are for the time being approved by the Lord Chancellor for that purpose.*

#### **3 Requirements for arrangements to meet costs liabilities**

- (1) *Section 30(1) of the Access to Justice Act 1999 applies to arrangements which satisfy the following conditions.*
- (2) *The arrangements must be in writing.*
- (3) *The arrangements must contain a statement specifying—*
  - (a) *the circumstances in which the member or other party may be liable to pay costs of the proceedings,*
  - (b) *whether such a liability arises—*
    - (i) *if those circumstances only partly occur,*
    - (ii) *irrespective of whether those circumstances occur, and*
    - (iii) *on the termination of the arrangements for any reason,*
  - (c) *the basis on which the amount of the liability is calculated, and*
  - (d) *the procedure for seeking assessment of costs.*
- (4) *A copy of the part of the arrangements containing the statement must be given to the member or other party to the proceedings whose liabilities the body is undertaking to meet as soon as possible after the undertaking is given.*

#### **4 Recovery of additional amount for insurance costs**

- (1) *Where an additional amount is included in costs by virtue of section 30(2) of the Access to Justice Act 1999 (costs payable to a member of a body or other person party to the proceedings to include an additional amount in respect of provision made by the body against the risk of having to meet the member's or other person's liabilities to pay other parties' costs), that additional amount must not exceed the following sum.*
- (2) *That sum is the likely cost to the member of the body or, as the case may be, the other person who is a party to the proceedings in which the costs order is made of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings.*

0002

[ST: 211] [ED: 100000] [REL: 96]  
XPP 8.4C.1 SC\_00MDD nllp BCS

**Composed:** Fri Sep 21 16:26:50 EDT 2012

**VER:** [SC\_00MDD-Local:14 Feb 12 09:43][MX-SECNDARY: 16 Aug 12 07:51][TT: 19 Jan 11 08:07 loc=gbr unit=bcs\_binder\_01\_e\_0013]

**0**

SI 2000/1317

CIVIL PROCEDURE (AMENDMENT NO 3) RULES 2000

**[1091]–[1100]**

**39 Transitional provisions**

- (1) This rule applies where a person has –
  - (a) entered into a funding arrangement, and
  - (b) started proceedings in respect of a claim the subject of that funding arrangement, before the date on which these Rules come into force.
- (2) Any requirement imposed –
  - (a) by any provision of the Civil Procedure Rules 1998 amended by these Rules, or
  - (b) by a practice directionin respect of that funding arrangement may be complied with within 28 days of the coming into force of these Rules, and that compliance shall be treated as compliance with the relevant rule or practice direction.
- (3) For the purpose of this rule, ‘funding arrangement’ means an arrangement where a person has –
  - (a) entered into a conditional fee agreement which provides for a success fee within the meaning of section 58(2) of the Courts and Legal Services Act 1990;
  - (b) taken out an insurance policy to which section 29 of the Access to Justice Act 1999 (recovery of insurance premiums by way of costs) applies; or
  - (c) made an agreement with a membership organisation prescribed for the purpose of section 30 of the Access to Justice Act 1999 (recovery where body undertakes to meet cost liabilities) to meet his legal costs.

0002

[ST: 213] [ED: 100000] [REL: 96]  
XPP 8.4C.1 SC\_00MDD nllp BCS

**Composed:** Fri Sep 21 16:26:56 EDT 2012

**VER:** [SC\_00MDD-Local:14 Feb 12 09:43][MX-SECNDARY: 16 Aug 12 07:51][TT: 19 Jan 11 08:07 loc=gbr unit=bcs\_binder\_01\_e\_0014]

**0**

SI 1998/3132

## CIVIL PROCEDURE RULES 1998

### PART 7

#### HOW TO START PROCEEDINGS – THE CLAIM FORM

##### **[1101]**

###### **7.1 Where to start proceedings**

Restrictions on where proceedings may be started are set out in the [the relevant practice directions supplementing this Part].

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##### AMENDMENT

Words in square brackets substituted by SI 2009/3390, r 6. Date in force: 6 April 2010: see SI 2009/3390, r 1(2).

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##### **[1102]**

###### **7.2 How to start proceedings**

(1) Proceedings are started when the court issues a claim form at the request of the claimant.

(2) A claim form is issued on the date entered on the form by the court.

(A person who seeks a remedy from the court before proceedings are started or in relation to proceedings which are taking place, or will take place, in another jurisdiction must make an application under Part 23)

(Part 16 sets out what the claim form must include)

[[The [Costs Practice Direction] sets out the information about a funding arrangement to be provided with the claim form where the claimant intends to seek to recover an additional liability)

(‘Funding arrangements’ and ‘additional liability’ are defined in rule 43.2)]

[ . . . ]

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##### AMENDMENT

Third and fourth parentheses below para (2): inserted by SI 2000/1317, r 4. Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI 2000/1317, rr 1, 39. Third parenthesis below para (2): words “Costs Practice Direction” in square brackets substituted by SI 2009/3390, r 6(b). Date in force: 6 April 2010: see SI 2009/3390, r 1(2). Fifth parenthesis below para (2): inserted by SI 2008/2178, r 6(a) and revoked by SI 2011/88, r 5. Date in force: 6 April 2011: see SI 2011/88, r 1.

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##### **[1102.1]**

###### **7.2A**

[[Practice Direction 7A] makes provision for procedures to be followed when claims are brought by or against a partnership within the jurisdiction.]

**[1102.1]** Civil Procedure Rules 1998, r 7.2A

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Inserted by SI 2006/1689, r 4. Date in force: 2 October 2006: see SI 2006/1689, r 1. Words in square brackets substituted by SI 2009/3390, r 6. Date in force: 6 April 2010: see SI 2009/3390, r 1(2).

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**[1103]****7.3 Right to use one claim form to start two or more claims**

A claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings.

**[1104]****7.4 Particulars of claim**

(1) Particulars of claim must –

- (a) be contained in or served with the claim form; or
- (b) subject to paragraph (2) be served on the defendant by the claimant within 14 days after service of the claim form.

(2) Particulars of claim must be served on the defendant no later than the latest time for serving a claim form.

(Rule 7.5 sets out the latest time for serving a claim form).

[(3) Where the claimant serves particulars of claim separately from the claim form in accordance with paragraph (1)(b), the claimant must, within 7 days of service on the defendant, file a copy of the particulars except where—

- (a) paragraph 5.2(4) of [Practice Direction 7C] applies; or
- (b) paragraph 6.4 of [Practice Direction 7E] applies.]

(Part 16 sets out what the particulars of claim must include)

(Part 22 requires particulars of claim to be verified by a statement of truth)

. . .

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**AMENDMENT**

Para (3): substituted by SI 2008/3327, r 4. Date in force: 6 April 2009: see SI 2008/3327, r 1. Para (3): words in square brackets substituted by SI 2009/3390, r 6. Date in force: 6 April 2010: see SI 2009/3390, r 1(2). Third parenthesis below para (3) (omitted) revoked by SI 2008/2178, r 6(b)(ii), (c). Date in force: 1 October 2008: see SI 2009/3390, r 1(2).

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**[1105]****[7.5 Service of a claim form**

(1) Where the claim form is served within the jurisdiction, the claimant must complete the step required by the following table in relation to the particular method of service chosen, before 12.00 midnight on the calendar day four months after the date of issue of the claim form.

<i>Method of service</i>	<i>Step required</i>
First class post, document exchange or other service which provides for delivery on the next business day	Posting, leaving with, delivering to or collection by the relevant service provider
Delivery of the document to or leaving it at the relevant place	Delivering to or leaving the document at the relevant place

Civil Procedure Rules 1998, r 7.7 **[1107]**

<i>Method of service</i>	<i>Step required</i>
Personal service under rule 6.5	Completing the relevant step required by rule 6.5(3)
Fax	Completing the transmission of the fax
Other electronic method	Sending the e-mail or other electronic transmission

(2) Where the claim form is to be served out of the jurisdiction, the claim form must be served in accordance with Section IV of Part 6 within 6 months of the date of issue.]

**AMENDMENT**

Substituted by SI 2008/2178, r 6(d). Date in force: 1 October 2008: see 2008/2178, r 1(2).

**[1106]****[7.6 Extension of time for serving a claim form**

- (1) The claimant may apply for an order extending the period for compliance with rule 7.5.
- (2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made—
  - (a) within the period specified by rule 7.5; or
  - (b) where an order has been made under this rule, within the period for service specified by that order.
- (3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if—
  - (a) the court has failed to serve the claim form; or
  - (b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and
  - (c) in either case, the claimant has acted promptly in making the application.
- (4) An application for an order extending the time for compliance with rule 7.5—
  - (a) must be supported by evidence; and
  - (b) may be made without notice.]

**AMENDMENT**

Substituted by SI 2008/2178, r 6(d). Date in force: 1 October 2008: see SI 2008/2178, r 1(2).

**[1107]****7.7 Application by defendant for service of claim form**

- (1) Where a claim form has been issued against a defendant, but has not yet been served on him, the defendant may serve a notice on the claimant requiring him to serve the claim form or discontinue the claim within a period specified in the notice.
- (2) The period specified in a notice served under paragraph (1) must be at least 14 days after service of the notice.
- (3) If the claimant fails to comply with the notice, the court may, on the application of the defendant –
  - (a) dismiss the claim; or
  - (b) make any other order it thinks just.

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**[1108]** Civil Procedure Rules 1998, r 7.8

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**[1108]****7.8 Form for defence etc. must be served with particulars of claim**

(1) When particulars of claim are served on a defendant, whether they are contained in the claim form, served with it or served subsequently, they must be accompanied by

- 
- (a) a form for defending the claim;
- (b) a form for admitting the claim; and
- (c) a form for acknowledging service.

(2) Where the claimant is using the procedure set out in Part 8 (alternative procedure for claims) –

- (a) paragraph (1) does not apply; and
- (b) a form for acknowledging service must accompany the claim form.

**[1109]****7.9 Fixed date and other claims**

A practice direction –

- (a) may set out the circumstances in which the court may give a fixed date for a hearing when it issues a claim;
- (b) may list claims in respect of which there is a specific claim form for use and set out the claim form in question; and
- (c) may disapply or modify these Rules as appropriate in relation to the claims referred to in paragraphs (a) and (b).

**[1110]****7.10 Production centre for claims**

(1) There shall be a Production Centre for the issue of claim forms and other related matters.

(2) [Practice Direction 7C] makes provision for –

- (a) which claimants may use the Production Centre;
- (b) the type of claims which the Production Centre may issue;
- (c) the functions which are to be discharged by the Production Centre;
- (d) the place where the Production Centre is to be located; and
- (e) other related matters.

(3) [Practice Direction 7C] may disapply or modify these Rules as appropriate in relation to claims issued by the Production Centre.

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**AMENDMENT**

Paras (2), (3): words “Practice Direction 7C” in square brackets substituted by SI 2009/3390, r 6(e). Date in force: 6 April 2010: see SI 2009/3390, r 1(2).

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**[1111]****[7.11 Human Rights**

(1) A claim under section 7(1)(a) of the Human Rights Act 1998 in respect of a judicial act may be brought only in the High Court.

(2) Any other claim under section 7(1)(a) of that Act may be brought in any court.]

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**AMENDMENT**

Civil Procedure Rules 1998, r 8.1 **[1121]**

Inserted by SI 2000/2092, r 6. Date in force: 2 October 2000: see SI 2000/2092, r 1.

**[1112]–[1120]****[7.12 Electronic issue of claims**

- (1) A practice direction may make provision for a claimant to start a claim by requesting the issue of a claim form electronically.
- (2) The practice direction may, in particular—
  - (a) specify—
    - (i) the types of claim which may be issued electronically; and
    - (ii) the conditions which a claim must meet before it may be issued electronically;
  - (b) specify—
    - (i) the court where the claim will be issued; and
    - (ii) the circumstances in which the claim will be transferred to another court;
  - (c) provide for the filing of other documents electronically where a claim has been started electronically;
  - (d) specify the requirements that must be fulfilled for any document filed electronically; and
  - (e) provide how a fee payable on the filing of any document is to be paid where that document is filed electronically.
- (3) The practice direction may disapply or modify these Rules as appropriate in relation to claims started electronically.]  
[(Practice Direction 5C deals with electronic issue of claims started or continued under the Electronic Working scheme.) ]

**AMENDMENT**

Inserted by SI 2003/3361, r 3. Date in force: 1 February 2004: see SI 2003/3361, r 1(a).  
Parenthesis below para (3) inserted by SI 2009/3390, r 6. Date in force: 6 April 2010: see SI 2009/3390, r 1(2).

**PART 8****ALTERNATIVE PROCEDURE FOR CLAIMS****[1121]****8.1 Types of claim in which part 8 procedure may be followed**

- (1) The Part 8 procedure is the procedure set out in this Part.
- (2) A claimant may use the Part 8 procedure where –
  - (a) he seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact; or
  - (b) paragraph (6) applies.
- (3) The court may at any stage order the claim to continue as if the claimant had not used the Part 8 procedure and, if it does so, the court may give any directions it considers appropriate.
- (4) Paragraph (2) does not apply if a practice direction provides that the Part 8 procedure may not be used in relation to the type of claim in question.
- (5) Where the claimant uses the Part 8 procedure he may not obtain default judgment under Part 12.

**[1121]** Civil Procedure Rules 1998, r 8.1

- (6) A rule or practice direction may, in relation to a specified type of proceedings –
- (a) require or permit the use of the Part 8 procedure; and
  - (b) disapply or modify any of the rules set out in this Part as they apply to those proceedings.

(Rule 8.9 provides for other modifications to the general rules where the Part 8 procedure is being used)

[(Part 78 provides procedures for European orders for payment and for the European small claims procedure. [It also provides procedures for applications for mediation settlement enforcement orders in relation to certain cross-border disputes.]]]

**Amendment** Second parenthesis below para (6): inserted by SI 2008/2178, r 7. Date in force (for certain purposes): 12 December 2008: see SI 2008/2178, r 1(3)(a). Date in force (for remaining purposes): 1 January 2009: see SI 2008/2178, r 1(3)(b). Second parenthesis below para (6): words from “It also provides” to “certain cross-border disputes.” in square brackets inserted by SI 2011/88, r 6. Date in force: 6 April 2011: see SI 2011/88, r 1.

**[1122]****8.2 Contents of the claim form**

Where the claimant uses the Part 8 procedure the claim form must state –

- (a) that this Part applies;
- (b)
  - (i) the question which the claimant wants the court to decide; or
  - (ii) the remedy which the claimant is seeking and the legal basis for the claim to that remedy;
- (c) if the claim is being made under an enactment, what that enactment is;
- (d) if the claimant is claiming in a representative capacity, what that capacity is; and
- (e) if the defendant is sued in a representative capacity, what that capacity is.

(Part 22 provides for the claim form to be verified by a statement of truth)

(Rule 7.5 provides for service of the claim form)

[(The [Costs Practice Direction] sets out the information about a funding arrangement to be provided with the claim form where the claimant intends to seek to recover an additional liability)

(‘Funding arrangement’ and ‘additional liability’ are defined in rule 43.2)].

**AMENDMENT**

Third and fourth parentheses: inserted by SI 2000/1317, r 5. Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI 2000/1317, rr 1, 39. Third parenthesis: words “Costs Practice Direction” in square brackets substituted by SI 2009/3390, r 7(a). Date in force: 6 April 2010: see SI 2009/3390, r 1(2).

**[1123]****[8.2A Issue of claim form without naming defendants**

[(1) A practice direction may set out the circumstances in which a claim form may be issued under this Part without naming a defendant.

(2) The practice direction may set out those cases in which an application for permission must be made by application notice before the claim form is issued.]

(3) The application notice for permission –

Civil Procedure Rules 1998, r 8.4 **[1125]**

- (a) need not be served on any other person; and
  - (b) must be accompanied by a copy of the claim form that the applicant proposes to issue.
- (4) Where the court gives permission it will give directions about the future management of the claim.]

**AMENDMENTS**

Inserted by SI 2000/221, r 5. Date in force: 2 May 2000: see SI 2000/221, r 1(b). Paras (1), (2): substituted by SI 2001/256, r 5. Date in force: 26 March 2001: see SI 2001/256, r 1(a).

**[1124]****8.3 Acknowledgment of service**

- (1) The defendant must –
- (a) file an acknowledgment of service in the relevant practice form not more than 14 days after service of the claim form; and
  - (b) serve the acknowledgment of service on the claimant and any other party.
- (2) The acknowledgment of service must state –
- (a) whether the defendant contests the claim; and
  - (b) if the defendant seeks a different remedy from that set out in the claim form, what that remedy is.
- (3) The following rules of Part 10 (acknowledgment of service) apply –
- (a) rule 10.3(2) (exceptions to the period for filing an acknowledgment of service); and
  - (b) rule 10.5 (contents of acknowledgment of service).
- (4) . . .

[(The [Costs Practice Direction] sets out the information about a funding arrangement to be provided with the acknowledgment of service where the defendant intends to seek to recover an additional liability)

(‘Funding arrangement’ and ‘additional liability’ are defined in rule 43.2)]

**AMENDMENTS**

Para (4): revoked by SI 2001/4015, r 11. Date in force: 25 March 2002: see SI 2001/4015, r 1(c). Parentheses below para (4) inserted by SI 2000/1317, r 6. Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI 2000/1317, rr 1, 39. In first parenthesis words in square brackets substituted by SI 2009/3390, r 7. Date in force: 6 April 2010: see SI 2009/3390, r 1(2).

**[1125]****8.4 Consequence of not filing an acknowledgment of service**

- (1) This rule applies where –
- (a) the defendant has failed to file an acknowledgment of service; and
  - (b) the time period for doing so has expired.
- (2) The defendant may attend the hearing of the claim but may not take part in the hearing unless the court gives permission.

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**[1126]** Civil Procedure Rules 1998, r 8.5

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**[1126]****8.5 Filing and serving written evidence**

- (1) The claimant must file any written evidence on which he intends to rely when he files his claim form.
- (2) The claimant's evidence must be served on the defendant with the claim form.
- (3) A defendant who wishes to rely on written evidence must file it when he files his acknowledgment of service.
- (4) If he does so, he must also, at the same time, serve a copy of his evidence on the other parties.
- (5) The claimant may, within 14 days of service of the defendant's evidence on him, file further written evidence in reply.
- (6) If he does so, he must also, within the same time limit, serve a copy of his evidence on the other parties.
- (7) The claimant may rely on the matters set out in his claim form as evidence under this rule if the claim form is verified by a statement of truth.

**[1127]****8.6 Evidence – general**

- (1) No written evidence may be relied on at the hearing of the claim unless –
  - (a) it has been served in accordance with rule 8.5; or
  - (b) the court gives permission.
- (2) The court may require or permit a party to give oral evidence at the hearing.
- (3) The court may give directions requiring the attendance for cross-examination of a witness who has given written evidence.

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(Rule 32.1 contains a general power for the court to control evidence)

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**[1128]****8.7 Part 20 claims**

Where the Part 8 procedure is used, Part 20 (counterclaims and other additional claims) applies except that a party may not make a Part 20 claim (as defined by rule 20.2) without the court's permission.

**[1129]****8.8 Procedure where defendant objects to use of the part 8 procedure**

- (1) Where the defendant contends that the Part 8 procedure should not be used because –
  - (a) there is a substantial dispute of fact; and
  - (b) the use of the Part 8 procedure is not required or permitted by a rule or practice direction,

he must state his reasons when he files his acknowledgment of service.

(Rule 8.5 requires a defendant who wishes to rely on written evidence to file it when he files his acknowledgment of service)

- (2) When the court receives the acknowledgment of service and any written evidence it will give directions as to the future management of the case.

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Civil Procedure Rules 1998, r 15.4 **[1144]**

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(Rule 8.1(3) allows the court to make an order that the claim continue as if the claimant had not used the Part 8 procedure)

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**[1130]–[1140]**

**8.9 Modifications to the general rules**

Where the Part 8 procedure is followed –

- (a) provision is made in this Part for the matters which must be stated in the claim form and the defendant is not required to file a defence and therefore –
  - (i) Part 16 (statements of case) does not apply;
  - (ii) Part 15 (defence and reply) does not apply;
  - (iii) any time limit in these Rules which prevents the parties from taking a step before a defence is filed does not apply;
  - (iv) the requirement under rule 7.8 to serve on the defendant a form for defending the claim does not apply;
- (b) the claimant may not obtain judgment by request on an admission and therefore –
  - (i) rules 14.4 to 14.7 do not apply; and
  - (ii) the requirement under rule 7.8 to serve on the defendant a form for admitting the claim does not apply; and
- (c) the claim shall be treated as allocated to the multi-track and therefore Part 26 does not apply.

PART 15

DEFENCE AND REPLY

**[1141]**

**15.1 Part not to apply where claimant uses Part 8 procedure**

This Part does not apply where the claimant uses the procedure set out in Part 8 (alternative procedure for claims).

**[1142]**

**15.2 Filing a defence**

A defendant who wishes to defend all or part of a claim must file a defence.

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(Part 14 contains further provisions which apply where the defendant admits a claim)

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**[1143]**

**15.3 Consequence of not filing a defence**

If a defendant fails to file a defence, the claimant may obtain default judgment if Part 12 allows it.

**[1144]**

**15.4 The period for filing a defence**

- (1) The general rule is that the period for filing a defence is –

**[1144]** Civil Procedure Rules 1998, r 15.4

- (a) 14 days after service of the particulars of claim; or
- (b) if the defendant files an acknowledgment of service under Part 10, 28 days after service of the particulars of claim.

(Rule 7.4 provides for the particulars of claim to be contained in or served with the claim form or served within 14 days of service of the claim form)

- (2) The general rule is subject to the following rules –
- (a) [rule [6.35] (which specifies how the period for filing a defence is calculated where the claim form is served out of the jurisdiction [under rule 6.32 or 6.33]);
  - (b) rule 11(which provides that, where the defendant makes an application disputing the court’s jurisdiction, [the defendant] need not file a defence before the hearing);
  - (c) rule 24.4(2) (which provides that, if the claimant applies for summary judgment before the defendant has filed a defence, the defendant need not file a defence before the summary judgment hearing); and
  - (d) rule [6.12(3)] (which requires the court to specify the period for responding to the particulars of claim when it makes an order under that rule).

**AMENDMENT**

Para (2): in sub-para (a) words in square brackets beginning with the word “rule” substituted by SI 2000/940, r 10. Date in force: 2 May 2000: see SI 2000/940, r 1. Para (2): in sub-para (a) reference to “6.35” in square brackets substituted by SI 2008/2178, r 12(a)(i). Date in force: 1 October 2008: see SI 2008/2178, r 1(2). Para (2): in sub-para (a) words “under rule 6.32 or 6.33” in square brackets inserted by SI 2008/2178, r 12(a)(ii). Date in force: 1 October 2008: see SI 2008/2178, r 1(2). Para (2): in sub-para (b) words “the defendant” in square brackets substituted by SI 2008/2178, r 12(b). Date in force: 1 October 2008: see SI 2008/2178, r 1(2). Para (2): in sub-para (d) reference to “6.12(3)” in square brackets substituted by SI 2008/2178, r 12(c). Date in force: 1 October 2008: see SI 2008/2178, r 1(2).

**[1145]****15.5 Agreement extending the period for filing a defence**

- (1) The defendant and the claimant may agree that the period for filing a defence specified in rule 15.4 shall be extended by up to 28 days.
- (2) Where the defendant and the claimant agree to extend the period for filing a defence, the defendant must notify the court in writing.

**[1146]****15.6 Service of copy of defence**

A copy of the defence must be served on every other party.

(Part 16 sets out what a defence must contain)

[(The [Costs Practice Direction] sets out the information about a funding arrangement to be provided with the defence where the defendant intends to seek to recover an additional liability)

(‘Funding arrangement’ and ‘additional liability’ are defined in rule 43.2)]

**AMENDMENTS**

Second and third parentheses inserted by SI 2000/1317, r 7. Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI 2000/1317, rr 1, 39. In second

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Civil Procedure Rules 1998, r 15.11 **[1151]**

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parenthesis words in square brackets substituted by SI 2009/3390, r 11. Date in force: 6 April 2010: see SI 2009/3390, r 1(2).

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**[1147]**

**15.7 Making a counterclaim**

Part 20 applies to a defendant who wishes to make a counterclaim.

**[1148]**

**15.8 Reply to defence**

If a claimant files a reply to the defence, he must –

- file his reply when he files his allocation questionnaire; and
- serve his reply on the other parties at the same time as he files it.

(Rule 26.3(6) requires the parties to file allocation questionnaires and specifies the period for doing so)

(Part 22 requires a reply to be verified by a statement of truth)

**[1149]**

**15.9 No statement of case after a reply to be filed without court's permission**

A party may not file or serve any statement of case after a reply without the permission of the court.

**[1150]**

**15.10 Claimant's notice where defence is that money claimed has been paid**

(1) Where –

- (a) the only claim (apart from a claim for costs and interest) is for a specified amount of money; and
- (b) the defendant states in his defence that he has paid to the claimant the amount claimed,

the court will send notice to the claimant requiring him to state in writing whether he wishes the proceedings to continue.

(2) When the claimant responds, he must serve a copy of his response on the defendant.

(3) If the claimant fails to respond under this rule within 28 days after service of the court's notice on him the claim shall be stayed.

(4) Where a claim is stayed under this rule any party may apply for the stay to be lifted.

(If the claimant files notice under this rule that he wishes the proceedings to continue, the procedure which then follows is set out in Part 26)

**[1151]–[1160]**

**15.11 Claim stayed if it is not defended or admitted**

(1) Where –

- (a) at least 6 months have expired since the end of the period for filing a defence specified in rule 15.4;
- (b) no defendant has served or filed an admission or filed a defence or counterclaim; and
- (c) the claimant has not entered or applied for judgment under Part 12 (default judgment), or Part 24 (summary judgment),

the claim shall be stayed.

**[1151]** Civil Procedure Rules 1998, r 15.11

(2) Where a claim is stayed under this rule any party may apply for the stay to be lifted.

## PART 43

## SCOPE OF COSTS RULES AND DEFINITIONS

**[1161]****43.1 Scope of this part**

This Part contains definitions and interpretation of certain matters set out in the rules about costs contained in Parts 44 to 48.

(Part 44 contains general rules about costs; Part 45 deals with fixed costs; Part 46 deals with fast track trial costs; Part 47 deals with the detailed assessment of costs and related appeals and Part 48 deals with costs payable in special cases)

**[1162]****43.2 Definitions and application**

- (1) In Parts 44 to 48, unless the context otherwise requires –
- (a) “costs” includes fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person under rule 48.6[, any additional liability incurred under a funding arrangement] and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track;
  - (b) “costs judge” means a taxing master of the [Senior Courts];
  - [(ba) “Costs Office” means the Senior Courts Costs Office;]
  - (c) “costs officer” means –
    - (i) a costs judge;
    - (ii) a district judge; and
    - (iii) an authorised court officer;
  - (d) “authorised court officer” means any officer of –
    - (i) a county court;
    - (ii) a district registry;
    - (iii) the Principal Registry of the Family Division; or
    - (iv) the [Costs Office],
 whom the Lord Chancellor has authorised to assess costs.
  - (e) “fund” includes any estate or property held for the benefit of any person or class of person and any fund to which a trustee or personal representative is entitled in [that] capacity . . . ;
  - (f) “receiving party” means a party entitled to be paid costs;
  - (g) “paying party” means a party liable to pay costs;
  - (h) “assisted person” means an assisted person within the statutory provisions relating to legal aid; . . .
  - [(i) “LSC funded client” means an individual who receives services funded by the Legal Services Commission as part of the Community Legal Service within the meaning of Part I of the Access to Justice Act 1999;]
  - [(j)] “fixed costs” means the amounts which are to be allowed in respect of solicitors’ charges in the circumstances set out in [Section I of] Part 45.
  - [(k) “funding arrangement” means an arrangement where a person has –
    - (i) entered into a conditional fee agreement [or a collective conditional fee agreement] which provides for a success fee within the meaning of section 58(2) of the Courts and Legal Services Act 1990;

## Civil Procedure Rules 1998, r 43.2 [1162]

- (ii) taken out an insurance policy to which section 29 of the Access to Justice Act 1999 (recovery of insurance premiums by way of costs) applies; or
  - (iii) made an agreement with a membership organisation to meet [that person's] legal costs;
  - (l) “percentage increase” means the percentage by which the amount of a legal representative’s fee can be increased in accordance with a conditional fee agreement which provides for a success fee;
  - (m) “insurance premium” means a sum of money paid or payable for insurance against the risk of incurring a costs liability in the proceedings, taken out after the event that is the subject matter of the claim;
  - (n) “membership organisation” means a body prescribed for the purposes of section 30 of the Access to Justice Act 1999 (recovery where body undertakes to meet costs liabilities); . . .
  - (o) “additional liability” means the percentage increase, the insurance premium, or the additional amount in respect of provision made by a membership organisation, as the case may be;
  - [(p) “free of charge” has the same meaning as in section 194(10) of the Legal Services Act 2007;
  - (q) “pro bono representation” has the same meaning as in section 194(10) of the Legal Services Act 2007;
  - (r) “the prescribed charity” has the same meaning as in section 194(8) of the Legal Services Act 2007].
- . . .
- (2) The costs to which Parts 44 to 48 apply include –
- (a) the following costs where those costs may be assessed by the court –
    - (i) costs of proceedings before an arbitrator or umpire;
    - (ii) costs of proceedings before a tribunal or other statutory body; and
    - (iii) costs payable by a client to his solicitor; and
  - (b) costs which are payable by one party to another party under the terms of a contract, where the court makes an order for an assessment of those costs.
- [(3) Where advocacy or litigation services are provided to a client under a conditional fee agreement, costs are recoverable under Parts 44 to 48 notwithstanding that the client is liable to pay his legal representative’s fees and expenses only to the extent that sums are recovered in respect of the [proceedings], whether by way of costs or otherwise.
- (4) In paragraph (3), the reference to a conditional fee agreement is to an agreement which satisfies all the conditions applicable to it by virtue of section 58 of the Courts and Legal Services Act 1990.]

**AMENDMENT**

Para (1): in sub-para (a) words “, any additional liability incurred under a funding arrangement” in square brackets inserted by SI 2000/1317, r 12(a). Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI 2000/1317, rr 1, 39. Para (1): in sub-para (b) words “Senior Courts” in square brackets substituted by SI 2009/2092, r 6(a). Date in force: 1 October 2009: see SI 2009/2092, r 1(2). Para (1): sub-para (ba) inserted by SI 2009/2092, r 6(b). Date in force: 1 October 2009: see SI 2009/2092, r 1(2). Para (1): in sub-para (d)(iv) words “Costs Office” in square brackets substituted by SI 2009/2092, r 6(c). Date in force: 1 October 2009: see SI 2009/2092, r 1(2). Para (1): in sub-para (e) word “that” in square brackets substituted by SI 2008/2178, r 22(a). Date in force: 1 October 2008: see SI 2008/2178, r 1(2). Para (1): in sub-para (e) words omitted revoked by SI 2009/2092, r 6(d). Date in force: 1 October 2009: see SI 2009/2092, r 1(2). Para (1): in sub-para (b) word omitted revoked by SI 2000/1317, r 12(b). Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI

**[1162]** Civil Procedure Rules 1998, r 43.2

2000/1317, rr 1, 39. Para (1): sub-para (i) inserted by SI 2000/1317, r 12(d). Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI 2000/1317, rr 1, 39. Para (1): sub-para (j) renumbered as such by SI 2000/1317, r 12(c). Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI 2000/1317, rr 1, 39. Para (1): in sub-para (j) words “Section I of” in square brackets inserted by SI 2003/2113, r 10. Date in force: 6 October 2003: see SI 2003/2113, r 1(c). Para (1): sub-paras (k)–(o) inserted by SI 2000/1317, r 12(e). Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI 2000/1317, rr 1, 39. Para (1): in sub-para (k)(i) words “or a collective conditional fee agreement” in square brackets inserted by SI 2001/256, r 14(a). Date in force: 26 March 2001: see SI 2001/256, r 1(a). Para (1): in sub-para (k)(iii) words “that person’s” in square brackets substituted by SI 2008/2178, r 22(b). Date in force: 1 October 2008: see SI 2008/2178, r 1(2). Para (1): in sub-para (n) word omitted revoked by SI 2008/2178, r 22(c). Date in force: 1 October 2008: see SI 2008/2178, r 1(2). Para (1): sub-paras (p)–(r) inserted by SI 2008/2178, r 22(e). Date in force: 1 October 2008: see SI 2008/2178, r 1(2). Parenthesis below para (1): revoked by SI 2003/1242, r 5(a). Date in force: 2 June 2003: see SI 2003/1242, r 1. Paras (3), (4): inserted by SI 2003/1242, r 5(b). Date in force: 2 June 2003 (in relation to a conditional fee agreement in issue which was entered into on or after that date): see SI 2003/1242, rr 1, 6. Para (3): word “proceedings” in square brackets substituted by SI 2003/1329, r 3. Date in force: 9 June 2003: see SI 2003/1329, r 1.

**[1163]****43.3 Meaning of summary assessment**

“Summary assessment” means the procedure by which the court, when making an order about costs, orders payment of a sum of money instead of fixed costs or ‘detailed assessment’.

**[1164]–[1170]****43.4 Meaning of detailed assessment**

“Detailed assessment” means the procedure by which the amount of costs is decided by a costs officer in accordance with Part 47.

## PART 44

## GENERAL RULES ABOUT COSTS

**[1171]****44.1 Scope of this Part**

This Part contains general rules about [costs, entitlement to costs and orders in respect of pro bono representation].

(The definitions contained in Part 43 are relevant to this Part)

## AMENDMENT

Words in square brackets substituted by SI 2008/2178, r 23(b). Date in force: 1 October 2008: see SI 2008/2178, r 1(2).

**[1172]****44.2 Solicitor’s duty to notify client**

Where –

Civil Procedure Rules 1998, r 44.3 **[1173]**

- (a) the court makes a costs order against a legally represented party; and
  - (b) the party is not present when the order is made,
- the party's solicitor must notify his client in writing of the costs order no later than 7 days after the solicitor receives notice of the order.

**[1173]****44.3 Court's discretion and circumstances to be taken into account when exercising its discretion as to costs**

- (1) The court has discretion as to—
  - (a) whether costs are payable by one party to another;
  - (b) the amount of those costs; and
  - (c) when they are to be paid.
- (2) If the court decides to make an order about costs—
  - (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
  - (b) the court may make a different order.
- (3) The general rule does not apply to the following proceedings—
  - (a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or
  - (b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.
- (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including—
  - (a) the conduct of all the parties;
  - (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
  - (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention[, and which is not an offer to which costs consequences under Part 36 apply].
- . . . .
- (5) The conduct of the parties includes—
  - (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed [the Practice Direction (Pre-Action Conduct) or] any relevant pre-action protocol;
  - (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
  - (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and
  - (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.
- (6) The orders which the court may make under this rule include an order that a party must pay—
  - (a) a proportion of another party's costs;
  - (b) a stated amount in respect of another party's costs;
  - (c) costs from or until a certain date only;
  - (d) costs incurred before proceedings have begun;
  - (e) costs relating to particular steps taken in the proceedings;
  - (f) costs relating only to a distinct part of the proceedings; and
  - (g) interest on costs from or until a certain date, including a date before judgment.
- (7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).

**[1173]** Civil Procedure Rules 1998, r 44.3

- (8) Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.
- (9) Where a party entitled to costs is also liable to pay costs the court may assess the costs which that party is liable to pay and either—
- (a) set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance; or
  - (b) delay the issue of a certificate for the costs to which the party is entitled until he has paid the amount which he is liable to pay.

**AMENDMENT**

Para (4): in sub-para (c) words in square brackets substituted by SI 2006/3435, r 10(a)(i). Date in force: 6 April 2007: see SI 2006/3435, r 1. Para (4): words omitted revoked by SI 2006/3435, r 10(a)(ii). Date in force: 6 April 2007: see SI 2006/3435, r 1. Para (5): in sub-para (a) words in square brackets inserted by SI 2008/3327, r 9(b). Date in force: 6 April 2009: see SI 2008/3327, r 1.

**[1174]****[44.3A Costs orders relating to funding arrangements**

- (1) The court will not assess any additional liability until the conclusion of the proceedings, or the part of the proceedings, to which the funding arrangement relates. (“Funding arrangement” and “additional liability” are defined in rule 43.2)
- (2) At the conclusion of the proceedings, or the part of the proceedings, to which the funding arrangement relates the court may—
- (a) make a summary assessment of all the costs, including any additional liability;
  - (b) make an order for detailed assessment of the additional liability but make a summary assessment of the other costs; or
  - (c) make an order for detailed assessment of all the costs.
- (Part 47 sets out the procedure for the detailed assessment of costs).]

**AMENDMENT**

Inserted by SI 2000/1317, r 14. Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI 2000/1317, rr 1, 39.

**[1175]****[44.3B Limits on recovery under funding arrangements**

- (1) [Unless the court orders otherwise, a] party may not recover as an additional liability –
- (a) any proportion of the percentage increase relating to the cost to the legal representative of the postponement of the payment of his fees and expenses;
  - (b) any provision made by a membership organisation which exceeds the likely cost to that party of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings;
  - (c) any additional liability for any period . . . during which [that party] failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order;
  - (d) any percentage increase where [that party] has failed to comply with –

## Civil Procedure Rules 1998, r 44.3C [1175.1]

- (i) a requirement in the [Costs Practice Direction]; or
  - (ii) a court order,
- to disclose in any assessment proceedings the reasons for setting the percentage increase at the level stated in the [conditional fee agreement].
- [(e) any insurance premium where that party has failed to provide information about the insurance policy in question by the time required by a rule, practice direction or court order.

(Paragraph 9.3 of the Practice Direction (Pre-Action Conduct) provides that a party must inform any other party as soon as possible about a funding arrangement entered into before the start of proceedings.)]

(2) This rule does not apply in an assessment under rule 48.9 (assessment of a solicitor's bill to his client).

(Rule 3.9 sets out the circumstances the court will consider on an application for relief from a sanction for failure to comply with any rule, practice direction or court order).]

## AMENDMENT

Inserted by SI 2000/1317, r 14. Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI 2000/1317, rr 1, 39. Para (1): words in square brackets inserted by SI 2009/2092, r 7(b)(i). Date in force: 1 October 2009: see SI 2009/2092, r 1(2). Para (1): in sub-para (c) words omitted revoked and words in square brackets inserted by SI 2009/2092, r 7(b)(ii). Date in force: 1 October 2009: see SI 2009/2092, r 1(2). Para (1): in sub-para (d) words in square brackets inserted by SI 2009/2092, r 7(b)(iii). Date in force: 1 October 2009: see SI 2009/2092, r 1(2). Para (1): in sub-para (d)(i) words in square brackets inserted by SI 2009/3390, r 22(a)(i). Date in force: 6 April 2010: see SI 2009/3390, r 1(2). Para (1): in sub-para (d) words "conditional fee agreement;" in square brackets substituted by SI 2009/2092, r 7(b)(iii)(bb). Date in force: 1 October 2009: see SI 2009/2092, r 1(2); for transitional provisions see r 23 thereof. Para (1): sub-para (e) and words in parentheses following inserted by SI 2009/2092, r 7(b)(iv). Date in force: 1 October 2009: see SI 2009/2092, r 1(2).

**[1175.1]****[44.3C Orders in respect of pro bono representation**

- (1) In this rule, "the 2007 Act" means the Legal Services Act 2007.
- (2) Where the court makes an order under section 194(3) of the 2007 Act—
  - (a) the court may order the payment to the prescribed charity of a sum no greater than the costs specified in Part 45 to which the party with pro bono representation would have been entitled in accordance with that Part and in respect of that representation had it not been provided free of charge; or
  - (b) where Part 45 does not apply, the court may determine the amount of the payment (other than a sum equivalent to fixed costs) to be made by the paying party to the prescribed charity by—
    - (i) making a summary assessment; or
    - (ii) making an order for detailed assessment,
 of a sum equivalent to all or part of the costs the paying party would have been ordered to pay to the party with pro bono representation in respect of that representation had it not been provided free of charge.
- (3) Where the court makes an order under section 194(3) of the 2007 Act, the order must specify that the payment by the paying party must be made to the prescribed charity.
- (4) The receiving party must send a copy of the order to the prescribed charity within 7 days of receipt of the order.
- (5) Where the court considers making or makes an order under section 194(3) of the 2007 Act, Parts 43 to 48 apply, where appropriate, with the following modifications—

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**[1175.1]** Civil Procedure Rules 1998, r 44.3C

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- (a) references to “costs orders”, “orders about costs” or “orders for the payment of costs” are to be read, unless otherwise stated, as if they refer to an order under section 194(3);
- (b) references to “costs” are to be read, as if they referred to a sum equivalent to the costs that would have been claimed by, incurred by or awarded to the party with pro bono representation in respect of that representation had it not been provided free of charge; and
- (c) references to “receiving party” are to be read, as meaning a party who has pro bono representation and who would have been entitled to be paid costs in respect of that representation had it not been provided free of charge.]

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**AMENDMENT**

Inserted by SI 2008/2178, r 23(c). Date in force: 1 October 2008: see SI 2008/2178, r 1(2).

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**[1176]****44.4 Basis of assessment**

(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –

- (a) on the standard basis; or
- (b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(Rule 48.3 sets out how the court decides the amount of costs payable under a contract)

(2) Where the amount of costs is to be assessed on the standard basis, the court will –

- (a) only allow costs which are proportionate to the matters in issue; and
- (b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

(Factors which the court may take into account are set out in rule 44.5)

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

(4) Where –

- (a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or
- (b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis,

the costs will be assessed on the standard basis.

(5) . . .

(6) Where the amount of a solicitor’s remuneration in respect of non-contentious business is regulated by any general orders made under the Solicitors Act 1974, the amount of the costs to be allowed in respect of any such business which falls to be assessed by the court will be decided in accordance with those general orders rather than this rule and rule 44.5.

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**AMENDMENT**

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Civil Procedure Rules 1998, r 44.7 **[1179]**

Para (5): revoked by SI 2000/1317, r 15. Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI 2000/1317, rr 1, 39.

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**[1177]**

**44.5 Factors to be taken into account in deciding the amount of costs**

(1) The court is to have regard to all the circumstances in deciding whether costs were –

- (a) if it is assessing costs on the standard basis –
  - (i) proportionately and reasonably incurred; or
  - (ii) were proportionate and reasonable in amount, or
- (b) if it is assessing costs on the indemnity basis –
  - (i) unreasonably incurred; or
  - (ii) unreasonable in amount.

(2) In particular the court must give effect to any orders which have already been made.

(3) The court must also have regard to –

- (a) the conduct of all the parties, including in particular –
  - (i) conduct before, as well as during, the proceedings; and
  - (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
- (b) the amount or value of any money or property involved;
- (c) the importance of the matter to all the parties;
- (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
- (e) the skill, effort, specialised knowledge and responsibility involved;
- (f) the time spent on the case; and
- (g) the place where and the circumstances in which work or any part of it was done.

(Rule 35.4(4) gives the court power to limit the amount that a party may recover with regard to the fees and expenses of an expert)

**[1178]**

**44.6 Fixed costs**

A party may recover the fixed costs specified in Part 45 in accordance with that Part.

**[1179]**

**44.7 Procedure for assessing costs**

Where the court orders a party to pay costs to another party (other than fixed costs) it may either–

- (a) make a summary assessment of the costs; or
- (b) order detailed assessment of the costs by a costs officer,

unless any rule, practice direction or other enactment provides otherwise.

(The [Costs Practice Direction] sets out the factors which will affect the court's decision under this rule)

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AMENDMENT

**[1179]** Civil Procedure Rules 1998, r 44.7

Paraphrase: words "Costs Practice Direction" in square brackets substituted by SI 2009/3390, r 22(a)(ii). Date in force: 6 April 2010; see SI 2009/3390, r 1(2).

**[1180]****44.8 Time for complying with an order for costs**

A party must comply with an order for the payment of costs within 14 days of –

- (a) the date of the judgment or order if it states the amount of those costs;
- (b) if the amount of those costs (or part of them) is decided later in accordance with Part 47, the date of the certificate which states the amount[; or]
- [(c) in either case, such later date as the court may specify.]

(Part 47 sets out the procedure for detailed assessment of costs)

**AMENDMENT**

Word omitted revoked and words in square brackets inserted by SI 2000/1317, r 16. Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date); see SI 2000/1317, rr 1, 39.

**[1181]****44.9 Costs on the small claims track and fast track**

(1) Part 27 (small claims) and Part 46 (fast track trial costs) contain special rules about –

- (a) liability for costs;
- (b) the amount of costs which the court may award; and
- (c) the procedure for assessing costs.

[(2) Once a claim is allocated to a particular track, those special rules shall apply to the period before, as well as after, allocation except where the court or a practice direction provides otherwise.]

**AMENDMENT**

Para (2): substituted by SI 1999/1008, r 17. Date in force: 26 April 1999; see SI 1999/1008, r 1.

**[1182]****44.10 Limitation on amount court may allow where a claim allocated to the fast track settles before trial**

(1) Where the court –

- (a) assesses costs in relation to a claim which –
  - (i) has been allocated to the fast track; and
  - (ii) settles before the start of the trial; and
- (b) is considering the amount of costs to be allowed in respect of a party's advocate for preparing for the trial,

it may not allow, in respect of those advocate's costs, an amount that exceeds the amount of fast track trial costs which would have been payable in relation to the claim had the trial taken place.

Civil Procedure Rules 1998, r 44.12A **[1185]**

- (2) When deciding the amount to be allowed in respect of the advocate's costs, the court shall have regard to –
- (a) when the claim was settled; and
  - (b) when the court was notified that the claim had settled.
- (3) In this rule, 'advocate' and 'fast track trial costs' have the meanings given to them by Part 46.  
(Part 46 sets out the amount of fast track trial costs which may be awarded)

**[1183]****44.11 Costs following allocation and re-allocation**

- (1) Any costs orders made before a claim is allocated will not be affected by allocation.
- (2) Where –
- (a) a claim is allocated to a track; and
  - (b) the court subsequently re-allocates that claim to a different track,
- then unless the court orders otherwise, any special rules about costs applying –
- (i) to the first track, will apply to the claim up to the date of re-allocation; and
  - (ii) to the second track, will apply from the date of re-allocation.
- (Part 26 deals with the allocation and re-allocation of claims between tracks).

**[1184]****44.12 Cases where costs orders deemed to have been made**

- (1) Where a right to costs arises under –
- (a) rule 3.7 (defendant's right to costs where claim struck out for non-payment of fees);
  - [(b) rule 36.10(1) or (2) (claimant's entitlement to costs where a Part 36 offer is accepted);]
  - (c) . . .
  - (d) rule 38.6 (defendant's right to costs where claimant discontinues),
- a costs order will be deemed to have been made on the standard basis.
- [(1A) Where such an order is deemed to be made in favour of a party with pro bono representation, that party may apply for an order under section 194(3) of the Legal Services Act 2007.]
- (2) Interest payable pursuant to section 17 of the Judgments Act 1838 or section 74 of the County Courts Act 1984 on the costs deemed to have been ordered under paragraph(1) shall begin to run from the date on which the event which gave rise to the entitlement to costs occurred.

**AMENDMENTS**

Para (1): sub-para (b) substituted by SI 2006/3435, r 10(b)(i). Date in force: 6 April 2007: see SI 2006/3435, r 1. Para (1): sub-para (c) revoked by SI 2006/3435, r 10(b)(ii). Date in force: 6 April 2007: see SI 2006/3435, r 1. Para (1A): inserted by SI 2008/2178, r 23(d). Date in force: 1 October 2008: see SI 2008/2178, r 1(2).

**[1185]****[44.12A Costs-only proceedings]**

- (1) This rule sets out a procedure which may be followed where –
- (a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs) which is made or confirmed in writing; but

**[1185]** Civil Procedure Rules 1998, r 44.12A

(b) they have failed to agree the amount of those costs; and

[(c) . . . no proceedings have been started.]

[(1A) . . . ]

(2) Either party to the agreement may start proceedings under this rule by issuing a claim form in accordance with Part 8.

(3) The claim form must contain or be accompanied by the agreement or confirmation.

(4) [Except as provided in paragraph (4A) [(and subject to rule 44.12B)], in] proceedings to which this rule applies the court –

(a) may

(i) make an order for costs [to be determined by detailed assessment]; or

(ii) dismiss the claim;

and

(b) must dismiss the claim if it is opposed.

[(4A) In proceedings to which Section II [or Section VI] of Part 45 applies, the court shall assess the costs in the manner set out in that Section.]

(5) Rule 48.3 (amount of costs where costs are payable pursuant to a contract) does not apply to claims started under the procedure in this rule.

Rule 7.2 provides that proceedings are started when the court issues a claim form at the request of the claimant)

(Rule 8.1(6) provides that a practice direction may modify the Part 8 procedure.)]

**AMENDMENT**

**Amendments** Inserted by SI 2000/1317, r 17. Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI 2000/1317, rr 1, 39. Para (1): sub-para (c) substituted by SI 2003/2113, r 11(a). Date in force: 6 October 2003: see SI 2003/2113, r 1(c). Para (1): in sub-para (c) words omitted revoked by SI 2004/3419, r 8(a). Date in force: 1 April 2005: see SI 2004/3419, r 1. Para (1A): inserted by SI 2003/2113, r 11(b). Date in force: 6 October 2003: see SI 2003/2113, r 1(c) and revoked by SI 2004/3419, r 8(b). Date in force: 1 April 2005: see SI 2004/3419, r 1. Para (4): words “Except as provided in paragraph (4A), in” in square brackets substituted by SI 2003/2113, r 11(c). Date in force: 6 October 2003: see SI 2003/2113, r 1(c). Para (4): words “(and subject to rule 44.12B)” in square brackets substituted by SI 2009/2092, r 7(c). Date in force: 1 October 2009: see SI 2009/2092, r 1(2). Para (4): in sub-para (a)(i) words “to be determined by detailed assessment” in square brackets inserted by SI 2002/2058, r 14. Date in force: 2 December 2002: see SI 2002/2058, r 1(b). Para (4A): inserted by SI 2003/2113, r 11(d). Date in force: 6 October 2003: see SI 2003/2113, r 1(c). Para (4A): words in square brackets inserted by SI 2010/621, r 7(a). Date in force: 30 April 2010: see SI 2010/621, r 1(2).

**[1185.1]****[Rule 44.12B Costs-only proceedings—costs in respect of insurance premium in publication cases**

(1) If in proceedings to which rule 44.12A applies it appears to the court that—

(a) if proceedings had been started, they would have been publication proceedings;

(b) one party admitted liability and made an offer of settlement on the basis of that admission;

(c) agreement was reached after that admission of liability and offer of settlement; and

(d) either—

Civil Procedure Rules 1998, r 44.13 **[1186]**

- (i) the party making the admission of liability and offer of settlement was not provided by the other party with the information about an insurance policy as required by the Practice Direction (Pre-Action Conduct); or
- (ii) that party made the admission of liability and offer of settlement before, or within 42 days of, being provided by the other party with that information, no costs may be recovered by the other party in respect of the insurance premium.
- (2) In this rule, “publication proceedings” means proceedings for—
- (a) defamation;
  - (b) malicious falsehood; or
  - (c) breach of confidence involving publication to the public at large.]

**AMENDMENTS**

Inserted by SI 2009/2092, r 7(d). Date in force: 1 October 2009; see SI 2009/2092, r 1(2).

**[1185.2]****[Rule 44.12C Costs-only application after a claim is started under Part 8 in accordance with Practice Direction 8B**

- (1) This rule sets out the procedure where—
- (a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs) which is made or confirmed in writing; but
  - (b) they have failed to agree the amount of those costs; and
  - (c) proceedings have been started under Part 8 in accordance with Practice Direction 8B.
- (2) Either party may make an application for the court to determine the costs.
- (3) Where an application is made under this rule the court will assess the costs in accordance with rule 45.34 or rule 45.37.
- (4) Rule 48.3 (amount of costs where costs are payable pursuant to a contract) does not apply to an application under this rule.

(Practice Direction 8B sets out the procedure for a claim where the parties have followed the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.)

**AMENDMENTS**

Inserted by SI 2010/621, r 7(b). Date in force: 30 April 2010; see SI 2010/621, r 1(2).

**[1186]****44.13 Special situations**

- [(1) Where the court makes an order which does not mention costs—
- [(a) subject to paragraphs (1A) and (1B), the general rule is that no party is entitled—
    - (i) to costs; or
    - (ii) to seek an order under section 194(3) of the Legal Services Act 2007, in relation to that order; but]

**[1186]** Civil Procedure Rules 1998, r 44.13

- (b) this does not affect any entitlement of a party to recover costs out of a fund held by [that party] as trustee or personal representative, or pursuant to any lease, mortgage or other security.]

[(1A) Where the court makes—

- (a) an order granting permission to appeal;  
 (b) an order granting permission to apply for judicial review; or  
 (c) any other order or direction sought by a party on an application without notice, and its order does not mention costs, it will be deemed to include an order for applicant's costs in the case.

(1B) Any party affected by a deemed order for costs under paragraph (1A) may apply at any time to vary the order.]

(2) The court hearing an appeal may, unless it dismisses the appeal, make orders about the costs of the proceedings giving rise to the appeal as well as the costs of the appeal.

(3) Where proceedings are transferred from one court to another, the court to which they are transferred may deal with all the costs, including the costs before the transfer.

(4) Paragraph (3) is subject to any order of the court which ordered the transfer.

**AMENDMENTS**

Para (1): substituted by SI 2001/4015, r 24. Date in force: 25 March 2002: see SI 2001/4015, r 1(c). Para (1): sub-para (a) substituted by SI 2008/2178, r 23(e)(i). Date in force: 1 October 2008: see SI 2008/2178, r 1(2). Para (1): in sub-para (b) words “that party” in square brackets substituted by SI 2008/2178, r 23(e)(ii). Date in force: 1 October 2008: see SI 2008/2178, r 1(2). Paras (1A), (1B): inserted by SI 2005/2292, r 38(b). Date in force: 1 October 2005: see SI 2005/2292, r 1(c).

**[1187]****44.14 Court's powers in relation to misconduct**

- (1) The court may make an order under this rule where –
- [(a) a party or his legal representative, in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or court order; or]
- (b) it appears to the court that the conduct of a party or his legal representative, before or during the proceedings which gave rise to the assessment proceedings, was unreasonable or improper.
- (2) Where paragraph (1) applies, the court may –
- (a) disallow all or part of the costs which are being assessed; or  
 (b) order the party at fault or his legal representative to pay costs which he has caused any other party to incur.
- (3) Where –
- (a) the court makes an order under paragraph (2) against a legally represented party; and  
 (b) the party is not present when the order is made,  
 the party's solicitor must notify his client in writing of the order no later than 7 days after the solicitor receives notice of the order.

**AMENDMENT**

Civil Procedure Rules 1998, r 44.16 **[1189]**

Para (1): sub-para (a) substituted by SI 2000/1317, r 18. Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI 2000/1317, rr 1, 39.

**[1188]****[44.15 Providing information about funding arrangements]**

(1) A party who seeks to recover an additional liability must provide information about the funding arrangement to the court and to other parties as required by a rule, practice direction or court order.

(2) Where the funding arrangement has changed, and the information a party has previously provided in accordance with paragraph (1) is no longer accurate, that party must file notice of the change and serve it on all other parties within 7 days.

(3) Where paragraph (2) applies, and a party has already filed –

(a) an allocation questionnaire; or

(b) a [pre-trial check list (listing questionnaire)],

he must file and serve a new estimate of costs with the notice.

(The [Costs Practice Direction] sets out –

the information to be provided when a party issues or responds to a claim form, files an allocation questionnaire, a [pre-trial check list], and a claim for costs;

the meaning of estimate of costs and the information required in it)

(Rule 44.3B sets out situations where a party will not recover a sum representing any additional liability)

**AMENDMENTS**

Inserted by SI 2000/1317, r 19. Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI 2000/1317, rr 1, 39. Para (3): in sub-para (b) words “pre-trial checklist (listing questionnaire)” in square brackets substituted by SI 2002/2058, r 15(a). Date in force: 2 December 2002: see SI 2002/2058, r 1(b). Parenthesis below para (3): first words in square brackets substituted by SI 2009/3390, r 22(a)(iii). Date in force: 6 April 2010: see SI 2009/3390, r 1(2). Parenthesis below para (3): second words in square brackets substituted by SI 2002/2058, r 15(b). Date in force: 2 December 2002: see SI 2002/2058, r 1(b).

**[1189]****[44.16]**

(1) This rule applies where the Conditional Fee Agreements Regulations 2000 or the Collective Conditional Fee Agreements Regulations 2000 continues to apply to an agreement which provides for a success fee.

Where –

(a) the court disallows any amount of a legal representative’s percentage increase in summary or detailed assessment proceedings; and

(b) the legal representative applies for an order that the disallowed amount should continue to be payable by his client,

the court may adjourn the hearing to allow the client to be—

(i) notified of the order sought; and

(ii) separately represented.

(Regulation 3(2)(b) of the Conditional Fee Agreements Regulations 2000 provides that a conditional fee agreement which provides for a success fee must state that any amount of a percentage increase disallowed on assessment ceases to be payable unless the court is satisfied that it should continue to be so payable) Regulation 5(2)(b) of

**[1189]** Civil Procedure Rules 1998, r 44.16

the Collective Conditional Fee Agreements Regulations 2000 makes similar provision in relation to collective conditional fee agreements.)]

**AMENDMENTS**

Substituted (for this Rule as inserted by SI 2000/1317, r 19) by SI 2005/3515, r 10. Date in force: 6 April 2006: see SI 2005/3515, r 1.

**[1190]****[44.17 Application of costs rules**

This Part and Part 45 (fixed costs), Part 46 (fast track trial costs), Part 47 (procedure for detailed assessment of costs and default provisions) and Part 48 (special cases), do not apply to the assessment of costs in proceedings to the extent that –

- (a) section 11 of the Access to Justice Act 1999, and provisions made under that Act, or
- (b) regulations made under the Legal Aid Act 1988,  
make different provision.

(The [Costs Practice Direction] sets out the procedure to be followed where a party was wholly or partially funded by the Legal Services Commission.)]

**AMENDMENTS**

Inserted by SI 2000/1317, r 19. Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI 2000/1317, rr 1, 39. Parenthesis: words in square brackets substituted by SI 2009/3390, r 22(a)(ii). Date in force: 6 April 2010: see SI 2009/3390, r 1(2).

**PART 45****FIXED COSTS****[II****ROAD TRAFFIC ACCIDENTS—FIXED RECOVERABLE COSTS . . . ]****AMENDMENT**

Inserted by SI 2003/2113, r 12(d), Sch 2, Pt II. Date in force: 6 October 2003 (except in relation to any costs-only proceedings arising out of a dispute, where the road traffic accident which gave rise to the dispute occurred before that date): see SI 2003/2113, rr 1(c), 18. Words omitted revoked by SI 2004/3419, r 10. Date in force: 1 April 2005: see SI 2004/3419, r 1.

**[1190.1]****[45.7 Scope and interpretation**

[(1) This Section sets out the costs which are to be allowed in—

- (a) costs-only proceedings under the procedure set out in rule 44.12A; or
- (b) proceedings for approval of a settlement or compromise under rule 21.10(2),

in cases to which this Section applies.]

⋮  
(2) This Section applies where—

Civil Procedure Rules 1998, r 45.9 **[1190.3]**

- (a) the dispute arises from a road traffic accident;
  - (b) the agreed damages include damages in respect of personal injury, damage to property, or both;
  - (c) the total value of the agreed damages does not exceed £10,000; and
  - (d) if a claim had been issued for the amount of the agreed damages, the small claims track would not have been the normal track for that claim.
- [(3) This Section does not apply where—
- (a) the claimant is a litigant in person; or
  - (b) Section VI of this Part applies.]
- (Rule 2.3 defines “personal injuries” as including any disease and any impairment of a person’s physical or mental condition).  
(Rule 26.6 provides for when the small claims track is the normal track).
- (4) In this Section—
- (a) “road traffic accident” means an accident resulting in bodily injury to any person or damage to property caused by, or arising out of, the use of a motor vehicle on a road or other public place in England and Wales;
  - (b) “motor vehicle” means a mechanically propelled vehicle intended for use on roads; and
  - (c) “road” means any highway and any other road to which the public has access and includes bridges over which a road passes.]

**AMENDMENT**

Inserted by SI 2003/2113, r 12(d), Sch 2, Pt II. Date in force: 6 October 2003 (except in relation to any costs-only proceedings arising out of a dispute, where the road traffic accident which gave rise to the dispute occurred before that date): see SI 2003/2113, rr 1(c), 18. Para (1): substituted by SI 2004/3419, r 11(a). Date in force: 1 April 2005: see SI 2004/3419, r 1. Para (1): words omitted revoked by SI 2004/3419, r 11(b). Date in force: 1 April 2005: see SI 2004/3419, r 1. Para (3): substituted by SI 2010/621, r 8(b). Date in force: 30 April 2010: see SI 2010/621, r 1(2)

**[1190.2]****[45.8 Application of fixed recoverable costs**

Subject to rule 45.12, the only costs which are to be allowed are—

- (a) fixed recoverable costs calculated in accordance with rule 45.9;
- (b) disbursements allowed in accordance with rule 45.10; and
- (c) a success fee allowed in accordance with rule 45.11.

(Rule 45.12 provides for where a party issues a claim for more than the fixed recoverable costs.)

**AMENDMENT**

Inserted by SI 2003/2113, r 12(d), Sch 2, Pt II. Date in force: 6 October 2003 (except in relation to any costs-only proceedings arising out of a dispute, where the road traffic accident which gave rise to the dispute occurred before that date): see SI 2003/2113, rr 1(c), 18.

**[1190.3]****[45.9 Amount of fixed recoverable costs**

(1) Subject to paragraphs (2) and (3), the amount of fixed recoverable costs is the total of—

- (a) £800;

**[1190.3]** Civil Procedure Rules 1998, r 45.9

- (b) 20% of the damages agreed up to £5,000; and
  - (c) 15% of the damages agreed between £5,000 and £10,000.
- (2) Where the claimant—
- (a) lives or works in an area set out in the [Costs Practice Direction]; and
  - (b) instructs a solicitor or firm of solicitors who practise in that area,
- the fixed recoverable costs shall include, in addition to the costs specified in paragraph (1), an amount equal to 12.5% of the costs allowable under that paragraph.
- (3) Where appropriate, value added tax (VAT) may be recovered in addition to the amount of fixed recoverable costs and any reference in this Section to fixed recoverable costs is a reference to those costs net of any such VAT.]

**AMENDMENT**

Inserted by SI 2003/2113, r 12(d), Sch 2, Pt II. Date in force: 6 October 2003 (except in relation to any costs-only proceedings arising out of a dispute, where the road traffic accident which gave rise to the dispute occurred before that date): see SI 2003/2113, rr 1(c), 18. Para (2): words in square brackets substituted by SI 2009/3390, art 23. Date in force: 6 April 2010: see r 1(2).

**[1190.4]****[45.10 Disbursements**

- (1) The court—
- (a) may allow a claim for a disbursement of a type mentioned in paragraph (2); but
  - (b) must not allow a claim for any other type of disbursement.
- (2) The disbursements referred to in paragraph (1) are—
- (a) the cost of obtaining—
    - (i) medical records;
    - (ii) a medical report;
    - (iii) a police report;
    - (iv) an engineer's report; or
    - (v) a search of the records of the Driver Vehicle Licensing Authority;
  - (b) the amount of an insurance premium [or, where a [membership organisation] undertakes to meet liabilities incurred to pay the costs of other parties to proceedings, a sum not exceeding such additional amount of costs as would be allowed under section 30 in respect of provision made against the risk of having to meet such liabilities];
  - (c) where they are necessarily incurred by reason of one or more of the claimants being a child or [protected party] as defined in Part 21—
    - (i) fees payable for instructing counsel; or
    - (ii) court fees payable on an application to the court;
  - (d) any other disbursement that has arisen due to a particular feature of the dispute.

(“insurance premium” is defined in rule 43.2).

[ (“membership organisation” is defined in rule 43.2(1)(n)). ]

**AMENDMENT**

Inserted by SI 2003/2113, r 12(d), Sch 2, Pt II. Date in force: 6 October 2003 (except in relation to any costs-only proceedings arising out of a dispute, where the road traffic accident which gave rise to the dispute occurred before that date): see SI 2003/2113, rr 1(c), 18. Para (2): in sub-para (b) words from “or, where a” to “meet such liabilities” in square brackets inserted by

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Civil Procedure Rules 1998, r 45.13 [1190.7]

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SI 2003/3361, r 8. Date in force: 1 February 2004: see SI 2003/3361, r 1(a). Para (2): in sub-para (b) words “membership organisation” in square brackets substituted by SI 2004/2072, r 11(a). Date in force: 1 October 2004: see SI 2004/2072, r 1(b). Para (2): in sub-para (c) words “protected party” in square brackets substituted by SI 2007/2204, r 13. Date in force: 1 October 2007: see SI 2007/2204, r 1. Para (2): words “(“membership organisation” is defined in rule 43.2(1)(n)).” in square brackets inserted by SI 2004/2072, r 11(b). Date in force: 1 October 2004: see SI 2004/2072, r 1(b).

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**[1190.5]**

**[45.11 Success fee**

(1) A claimant may recover a success fee if he has entered into a funding arrangement of a type specified in rule 43.2(k)(i).

[(2) The amount of the success fee shall be 12.5% of the fixed recoverable costs calculated in accordance with rule 45.9(1), disregarding any additional amount which may be included in the fixed recoverable costs by virtue of rule 45.9(2).]

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**AMENDMENT**

Inserted by SI 2003/2113, r 12(d), Sch 2, Pt II. Date in force: 6 October 2003 (except in relation to any costs-only proceedings arising out of a dispute, where the road traffic accident which gave rise to the dispute occurred before that date): see SI 2003/2113, rr 1(c), 18. Para (2): substituted by SI 2003/3361, r 9. Date in force: 1 March 2004: see SI 2003/3361, r 1(b).

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**[1190.6]**

**[45.12 Claims for an amount of costs exceeding fixed recoverable costs**

(1) The court will entertain a claim for an amount of costs (excluding any success fee or disbursements) greater than the fixed recoverable costs but only if it considers that there are exceptional circumstances making it appropriate to do so.

(2) If the court considers such a claim appropriate, it may—

(a) assess the costs; or

(b) make an order for the costs to be assessed.

(3) If the court does not consider the claim appropriate, it must make an order for fixed recoverable costs only.]

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**AMENDMENT**

Inserted by SI 2003/2113, r 12(d), Sch 2, Pt II. Date in force: 6 October 2003 (except in relation to any costs-only proceedings arising out of a dispute, where the road traffic accident which gave rise to the dispute occurred before that date): see SI 2003/2113, rr 1(c), 18.

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**[1190.7]**

**[45.13 Failure to achieve costs greater than fixed recoverable costs**

(1) This rule applies where—

(a) costs are assessed in accordance with rule 45.12(2); and

(b) the court assesses the costs (excluding any VAT) as being an amount which is less than 20% greater than the amount of the fixed recoverable costs.

(2) The court must order the defendant to pay to the claimant the lesser of—

(a) the fixed recoverable costs; and

(b) the assessed costs.]

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**[1190.7]** Civil Procedure Rules 1998, r 45.13**AMENDMENT**

Inserted by SI 2003/2113, r 12(d), Sch 2, Pt II. Date in force: 6 October 2003 (except in relation to any costs-only proceedings arising out of a dispute, where the road traffic accident which gave rise to the dispute occurred before that date): see SI 2003/2113, rr 1(c), 18.

**[1190.8]****[45.14 Costs of the costs-only proceedings [or the detailed assessment]**

Where—

- (a) the court makes an order for fixed recoverable costs in accordance with rule 45.12(3); or
  - (b) rule 45.13 applies,
- the court must—
- (i) make no award for the payment of the claimant's costs in bringing the proceedings under rule 44.12A; and
  - (ii) order that the claimant pay the defendant's costs of defending those proceedings.]

**AMENDMENT**

Inserted by SI 2003/2113, r 12(d), Sch 2, Pt II. Date in force: 6 October 2003 (except in relation to any costs-only proceedings arising out of a dispute, where the road traffic accident which gave rise to the dispute occurred before that date): see SI 2003/2113, rr 1(c), 18. Provision heading: words "or the detailed assessment" in square brackets inserted by SI 2004/3419, r 12. Date in force: 1 April 2005: see SI 2004/3419, r 1.

**[III]****FIXED PERCENTAGE INCREASE IN ROAD TRAFFIC ACCIDENT CLAIMS]****AMENDMENT**

Inserted by SI 2004/1306, r 9(b), Sch 1, Pt II. Date in force: 1 June 2004: see SI 2004/1306, r 1(a).

**[1191]****[45.15 Scope and interpretation**

(1) This Section sets out the percentage increase which is to be allowed in the cases to which this Section applies.

(Rule 43.2(1)(l) defines 'percentage increase' as the percentage by which the amount of a legal representative's fee can be increased in accordance with a conditional fee agreement which provides for a success fee)

(2) This Section applies where—

- (a) the dispute arises from a road traffic accident; and
- (b) the claimant has entered into a funding arrangement of a type specified in rule 43.2(k)(i).

(Rule 43.2(k)(i) defines a funding arrangement as including an arrangement where a person has entered into a conditional fee agreement or collective conditional fee agreement which provides for a success fee)

Civil Procedure Rules 1998, r 45.17 **[1193]**

- (3) This Section does not apply if the proceedings are costs only proceedings to which Section II of this Part applies.
- (4) This Section does not apply—
- (a) to a claim which has been allocated to the small claims track;
  - (b) to a claim not allocated to a track, but for which the small claims track is the normal track; . . .
  - (c) where the road traffic accident which gave rise to the dispute occurred before 6th October 2003[; or]
- [ ~~(d)~~ a claim to which Section VI of this Part applies].
- (5) The definitions in rule 45.7(4) apply to this Section as they apply to Section II.
- (6) In this Section—
- (a) a reference to ‘fees’ is a reference to fees for work done under a conditional fee agreement or collective conditional fee agreement;
  - (b) a reference to ‘trial’ is a reference to the final contested hearing or to the contested hearing of any issue ordered to be tried separately;
  - (c) a reference to a claim concluding at trial is a reference to a claim concluding by settlement after the trial has commenced or by judgment; and
  - (d) ‘trial period’ means a period of time fixed by the court within which the trial is to take place and where the court fixes more than one such period in relation to a claim, means the most recent period to be fixed.]

**AMENDMENT**

Inserted by SI 2004/1306, r 9(b), Sch 1, Pt II. Date in force: 1 June 2004: see SI 2004/1306, r 1(a). Para (4): in sub-para (b) word omitted revoked by SI 2010/621, r 8(c)(i). Date in force: 30 April 2010: see SI 2010/621, r 1(2). Para (4): in sub-para (c) word “; or” in square brackets inserted by virtue of SI 2010/621, r 8(c)(ii). Date in force: 30 April 2010: see SI 2010/621, r 1(2). Para (4): sub-para (d) inserted by SI 2010/621, r 8(c)(iii). Date in force: 30 April 2010: see SI 2010/621, r 1(2).

**[1192]****[45.16 Percentage increase of solicitors’ fees**

Subject to rule 45.18, the percentage increase which is to be allowed in relation to solicitors’ fees is—

- (a) 100% where the claim concludes at trial; or
- (b) 12.5% where—
  - (i) the claim concludes before a trial has commenced; or
  - (ii) the dispute is settled before a claim is issued.]

**Amendment** Inserted by SI 2004/1306, r 9(b), Sch 1, Pt II. Date in force: 1 June 2004: see SI 2004/1306, r 1(a).

**[1193]****[45.17 Percentage increase of counsel’s fees**

(1) Subject to rule 45.18, the percentage increase which is to be allowed in relation to counsel’s fees is—

- (a) 100% where the claim concludes at trial;
- (b) if the claim has been allocated to the fast track—

**[1193]** Civil Procedure Rules 1998, r 45.17

- (i) 50% if the claim concludes 14 days or less before the date fixed for the commencement of the trial; or
  - (ii) 12.5% if the claim concludes more than 14 days before the date fixed for the commencement of the trial or before any such date has been fixed;
  - (c) if the claim has been allocated to the multi-track—
    - (i) 75% if the claim concludes 21 days or less before the date fixed for the commencement of the trial; or
    - (ii) 12.5% if the claim concludes more than 21 days before the date fixed for the commencement of the trial or before any such date has been fixed;
  - (d) 12.5% where—
    - (i) the claim has been issued but concludes before it has been allocated to a track; or
    - (ii) in relation to costs-only proceedings, the dispute is settled before a claim is issued.
- (2) Where a trial period has been fixed, if—
- (a) the claim concludes before the first day of that period; and
  - (b) no trial date has been fixed within that period before the claim concludes, the first day of that period is treated as the date fixed for the commencement of the trial for the purposes of paragraph (1).
- (3) Where a trial period has been fixed, if—
- (a) the claim concludes before the first day of that period; but
  - (b) before the claim concludes, a trial date had been fixed within that period, the trial date is the date fixed for the commencement of the trial for the purposes of paragraph (1).
- (4) Where a trial period has been fixed and the claim concludes—
- (a) on or after the first day of that period; but
  - (b) before commencement of the trial,
- the percentage increase in paragraph (1)(b)(i) or (1)(c)(i) shall apply as appropriate, whether or not a trial date has been fixed within that period.
- (5) For the purposes of this rule, in calculating the periods of time, the day fixed for the commencement of the trial (or the first day of the trial period, where appropriate) is not included.]

**AMENDMENT**

Inserted by SI 2004/1306, r 9(b), Sch 1, Pt II. Date in force: 1 June 2004: see SI 2004/1306, r 1(a).

**[1194]****[45.18 Application for an alternative percentage increase where the fixed increase is 12.5%**

- (1) This rule applies where the percentage increase to be allowed—
- (a) in relation to solicitors' fees under the provisions of rule 45.16; or
  - (b) in relation to counsel's fees under rule 45.17,
- is 12.5%.
- (2) A party may apply for a percentage increase greater or less than that amount if—
- (a) the parties agree damages of an amount greater than £500,000 or the court awards damages of an amount greater than £500,000; or

Civil Procedure Rules 1998, r 45.20 **[1196]**

- (b) the court awards damages of £500,000 or less but would have awarded damages greater than £500,000 if it had not made a finding of contributory negligence; or
- [(c) the parties agree damages of £500,000 or less and it is reasonable to expect that if the court had made an award of damages, it would have awarded damages greater than £500,000, disregarding any reduction the court may have made in respect of contributory negligence].
- (3) In paragraph (2), a reference to a lump sum of damages includes a reference to periodical payments of equivalent value.
- (4) If the court is satisfied that the circumstances set out in paragraph (2) apply it must—
- (a) assess the percentage increase; or
- (b) make an order for the percentage increase to be assessed.]

**AMENDMENT**

Inserted by SI 2004/1306, r 9(b), Sch 1, Pt II. Date in force: 1 June 2004: see SI 2004/1306, r 1(a). Para (2): sub-para (c) substituted by SI 2004/3419, r 13. Date in force: 1 April 2005: see SI 2004/3419, r 1.

**[1195]****[45.19 Assessment of alternative percentage increase**

- (1) This rule applies where the percentage increase of fees is assessed under rule 45.18(4).
- (2) If the percentage increase is assessed as greater than 20% or less than 7.5%, the percentage increase to be allowed shall be that assessed by the court.
- (3) If the percentage increase is assessed as no greater than 20% and no less than 7.5%—
- (a) the percentage increase to be allowed shall be 12.5%; and
- (b) the costs of the application and assessment shall be paid by the applicant.]

**AMENDMENT**

Inserted by SI 2004/1306, r 9(b), Sch 1, Pt II. Date in force: 1 June 2004: see SI 2004/1306, r 1(a).

## [IV

## FIXED PERCENTAGE INCREASE IN EMPLOYERS LIABILITY CLAIMS]

**AMENDMENT**

Inserted by SI 2004/2072, r 12, Schedule, Pt II. Date in force: 1 October 2004: see SI 2004/2072, r 1(b).

**[1196]****[45.20 Scope and interpretation**

- (1) Subject to paragraph (2), this Section applies where—
- (a) the dispute is between an employee and his employer arising from a bodily injury sustained by the employee in the course of his employment; and

**[1196]** Civil Procedure Rules 1998, r 45.20

- (b) the claimant has entered into a funding arrangement of a type specified in rule 43.2(1)(k)(i).
- (2) This Section does not apply—
- (a) where the dispute—
- (i) relates to a disease;
- (ii) relates to an injury sustained before 1st October 2004; or
- (iii) arises from a road traffic accident (as defined in rule 45.7(4)(a)); or
- [(iv) relates to an injury to which Section V of this Part applies; or]
- (b) to a claim—
- (i) which has been allocated to the small claims track; or
- (ii) not allocated to a track, but for which the small claims track is the normal track.
- (3) For the purposes of this Section—
- (a) “employee” has the meaning given to it by section 2(1) of the Employers’ Liability (Compulsory Insurance) Act 1969; and
- (b) a reference to “fees” is a reference to fees for work done under a conditional fee agreement or collective conditional fee agreement.]

**AMENDMENT**

Inserted by SI 2004/2072, r 12, Schedule, Pt II. Date in force: 1 October 2004: see SI 2004/2072, r 1(b). Para (2): sub-para (a)(iv) inserted by SI 2005/2292, r 39. Date in force: 1 October 2005: see SI 2005/2292, r 1(c).

**[1197]****[45.21 Percentage increase of solicitors’ and counsel’s fees**

In the cases to which this Section applies, subject to rule 45.22 the percentage increase which is to be allowed in relation to solicitors’ and counsel’s fees is to be determined in accordance with rules 45.16 and 45.17, subject to the modifications that—

- (a) the percentage increase which is to be allowed in relation to solicitors’ fees under rule 45.16(b) is—
- (i) 27.5% if a membership organisation has undertaken to meet the claimant’s liabilities for legal costs in accordance with section 30 of the Access to Justice Act 1999; and
- (ii) 25% in any other case; and
- (b) the percentage increase which is to be allowed in relation to counsel’s fees under rule 45.17(1)(b)(ii), (1)(c)(ii) or (1)(d) is 25%.
- (“membership organisation” is defined in rule 43.2(1)(n))

**AMENDMENT**

Inserted by SI 2004/2072, r 12, Schedule, Pt II. Date in force: 1 October 2004: see SI 2004/2072, r 1(b).

**[1198]****[45.22 Alternative percentage increase**

- (1) In the cases to which this Section applies, rule 45.18(2)–(4) applies where—
- (a) the percentage increase of solicitors’ fees to be allowed in accordance with rule 45.21 is 25% or 27.5%; or
- (b) the percentage increase of counsel’s fees to be allowed is 25%.

Civil Procedure Rules 1998, r 45.28 **[1199.1]**

- (2) Where the percentage increase of fees is assessed by the court under rule 45.18(4) as applied by paragraph (1) above—
- (a) if the percentage increase is assessed as greater than 40% or less than 15%, the percentage increase to be allowed shall be that assessed by the court; and
  - (b) if the percentage increase is assessed as no greater than 40% and no less than 15%—
    - (i) the percentage increase to be allowed shall be 25% or 27.5% (as the case may be); and
    - (ii) the costs of the application and assessment shall be paid by the applicant.]

**AMENDMENT**

Inserted by SI 2004/2072, r 12, Schedule, Pt II. Date in force: 1 October 2004: see SI 2004/2072, r 1(b).

**[VI – PRE-ACTION PROTOCOL FOR LOW VALUE PERSONAL INJURY  
CLAIMS IN ROAD TRAFFIC ACCIDENTS****[1199]****Rule 45.27 Scope and interpretation**

- (1) This Section applies to claims that have been or should have been started under Part 8 in accordance with Practice Direction 8B (“the Stage 3 Procedure”).
- (2) Where a party has not complied with the RTA Protocol rule 45.36 will apply.
- (3) “RTA Protocol” means the Pre-Action Protocol for Personal Injury Claims in Road Traffic Accidents.
- (4) A reference to “Claim Notification Form” is a reference to the form used in the RTA Protocol.]

**AMENDMENT**

Inserted, together with preceding heading, by SI 2010/621, r 8(d), Sch 2 as from 30 April 2010: see SI 2010/621, r 1(2).

**[1199.1]****[Rule 45.28 Application of fixed costs, disbursements and success fee**

The only costs allowed are—

- (a) fixed costs in rule 45.29;
- (b) disbursements in accordance with rule 45.30; and
- (c) a success fee in accordance with rule 45.31.]

**AMENDMENT**

Inserted by SI 2010/621, r 8(d), Sch 2 as from 30 April 2010: see SI 2010/621, r 1(2).

**[1199.2]** Civil Procedure Rules 1998, r 45.29**[1199.2]****[Rule 45.29 Amount of fixed costs]**

- (1) Subject to paragraph (4), the amount of fixed costs is set out in Table 1.
- (2) In Table 1—
  - (a) “Type A fixed costs” means the legal representative’s costs;
  - (b) “Type B fixed costs” means the advocate’s costs; and
  - (c) “Type C fixed costs” means the costs for the advice on the amount of damages where the claimant is a child.
- (3) Advocate has the same meaning as in rule 46.1(2)(a).
- (4) Subject to rule 45.36(2) the court will not award more or less than the amounts shown in Table 1.
- (5) Where the claimant—
  - (a) lives or works in an area set out in the Costs Practice Direction; and
  - (b) instructs a legal representative who practices in that area,
 the fixed costs will include, in addition to the costs set out in Table 1, an amount equal to 12.5% of the Stage 1 and 2 and Stage 3 Type A fixed costs.
- (6) Where appropriate, value added tax (VAT) may be recovered in addition to the amount of fixed costs and any reference in this Section to fixed costs is a reference to those costs net of any such VAT.

Table 1 – fixed costs in relation to the RTA Protocol

Stage 1 fixed costs	£400
Stage 2 fixed costs	£800
Stage 3—	
Type A fixed costs	£250
Type B fixed costs	£250
Type C fixed costs	£150

**AMENDMENT**

Inserted by SI 2010/621, r 8(d), Sch 2 as from 30 April 2010: see SI 2010/621, r 1(2).

**[1199.3]****[Rule 45.30 Disbursements]**

- (1) The court—
  - (a) may allow a claim for a disbursement of a type mentioned in paragraph (2); but
  - (b) must not allow a claim for any other type of disbursement.
- (2) The disbursements referred to in paragraph (1) are—
  - (a) the cost of obtaining—
    - (i) medical records;
    - (ii) a medical report or reports as provided for in the RTA Protocol;
    - (iii) an engineer’s report;
    - (iv) a search of the records of the—
      - (aa) Driver Vehicle Licensing Authority;
      - (bb) Motor Insurance Database;
  - (b) the amount of the insurance premium or, where a membership organisation undertakes to meet liabilities incurred to pay the costs of

Civil Procedure Rules 1998, r 45.31 **[1199.4]**

other parties to proceedings, a sum not exceeding such additional amount of costs as would be allowed under section 30 of the Access to Justice Act 1999 in respect of provision made against the risk of having to meet such liabilities;

- (c) court fees as a result of Part 21 being applicable;
- (d) court fees payable where proceedings are started as a result of a limitation period that is about to expire;
- (e) court fees in respect of the Stage 3 Procedure;
- (f) any other disbursement that has arisen due to a particular feature of the dispute.

(insurance premium is defined in rule 43.2(1)(m).)

(membership organisation is defined in rule 43.2(1)(n).)

**AMENDMENT**

Inserted by SI 2010/621, r 8(d), Sch 2 as from 30 April 2010: see SI 2010/621, r 1(2).

**[1199.4]****[Rule 45.31 Success fee]**

(1) A party who has entered into a funding arrangement of a type specified in rule 43.2(1)(k)(i) in respect of any element of the fixed costs in rule 45.29 may recover a success fee on that element of the fixed costs.

(2) A reference to a success fee in this Section is a reference to a success fee in accordance with paragraph (1).

(3) Where the court—

- (a) determines the claim at a Stage 3 hearing or on the papers; and
- (b) awards an amount of damages that is more than the defendant's RTA Protocol offer,

the amount of the claimant's success fee is—

- (i) 12.5% of the Stage 1 and 2 fixed costs; and
- (ii) 100% of the relevant Stage 3 fixed costs.

(RTA Protocol offer is defined in rule 36.17.)

(4) Where the court—

- (a) determines the claim at a Stage 3 hearing or on the papers; and
- (b) awards an amount of damages that is equal to or less than the defendant's RTA Protocol offer,

the amount of the defendant's success fee is 100% of the relevant Stage 3 fixed costs.

(5) Where the claimant is a child and the court—

- (a) does not approve a settlement at a settlement hearing;
- (b) determines the claim at a Stage 3 hearing; and
- (c) awards an amount of damages that is more than the amount of the settlement considered by the court at the first settlement hearing;

the amount of the claimant's success fee is—

- (i) 12.5% of the Stage 1 and 2 fixed costs;
- (ii) 100% of the relevant Stage 3 fixed costs.

(6) Where paragraphs (3) to (5) do not apply the success fee is—

- (a) 12.5% of Stage 1 and 2 fixed costs; and
- (b) 12.5% of the relevant Stage 3 fixed costs.

**[1199.4]** Civil Procedure Rules 1998, r 45.31

(7) The amount of the success fee set out in paragraphs (3) to (6) will be calculated without regard to any additional amount which may be included in the fixed costs by virtue of rule 45.29(5).]

**AMENDMENT**

Inserted by SI 2010/621, r 8(d), Sch 2 as from 30 April 2010: see SI 2010/621, r 1(2).

**[1199.5]**

**[Rule 45.32 Where the claimant obtains judgment for an amount more than the defendant's RTA Protocol offer**

- (1) Where rule 36.21(1)(b) or (c) applies, the court will order the defendant to pay—
- (a) where not already paid by the defendant, the Stage 1 and 2 fixed costs;
  - (b) where the claim is determined—
    - (i) on the papers, Stage 3 Type A fixed costs;
    - (ii) at a Stage 3 hearing, Stage 3 Type A and B fixed costs; or
    - (iii) at a Stage 3 hearing and the claimant is a child, Type A, B and C fixed costs;
  - (c) disbursements allowed in accordance with rule 45.30; and
  - (d) a success fee in accordance with rule 45.31(3).]

**AMENDMENT**

Inserted by SI 2010/621, r 8(d), Sch 2 as from 30 April 2010: see SI 2010/621, r 1(2).

**[1199.6]**

**[Rule 45.33 Settlement at Stage 2 where the claimant is a child**

- (1) This rule applies where—
- (a) the claimant is a child;
  - (b) there is a settlement at Stage 2 of the RTA Protocol; and
  - (c) an application is made to the court to approve the settlement.
- (2) Where the court approves the settlement at a settlement hearing it will order the defendant to pay—
- (a) the Stage 1 and 2 fixed costs;
  - (b) the Stage 3 Type A, B and C fixed costs;
  - (c) disbursements allowed in accordance with rule 45.30; and
  - (d) a success fee in accordance with rule 45.31(6).
- (3) Where the court does not approve the settlement at a settlement hearing it will order the defendant to pay the Stage 1 and 2 fixed costs.
- (4) Paragraphs (5) and (6) apply where the court does not approve the settlement at the first settlement hearing but does approve the settlement at a second settlement hearing.
- (5) At the second settlement hearing the court will order the defendant to pay—
- (a) the Stage 3 Type A and C fixed costs for the first settlement hearing;
  - (b) disbursements allowed in accordance with rule 45.30;
  - (c) the Stage 3 Type B fixed costs for one of the hearings; and
  - (d) a success fee in accordance with rule 45.31(6) on the Stage 1 and 2 fixed costs and the Stage 3 Type A, B and C fixed costs.
- (6) The court in its discretion may also order—

## Civil Procedure Rules 1998, r 45.34 [1199.7]

- (a) the defendant to pay—
  - (i) an additional amount of either or both the Stage 3—
    - (aa) Type A fixed costs;
    - (bb) Type B fixed costs; and
  - (ii) a success fee in accordance with rule 45.31(6) on the additional Stage 3 fixed costs in sub-paragraph (a)(i);
- (b) the claimant to pay an amount equivalent to either or both the Stage 3—
  - (i) Type A fixed costs;
  - (ii) Type B fixed costs.]

## AMENDMENT

Inserted by SI 2010/621, r 8(d), Sch 2 as from 30 April 2010: see SI 2010/621, r 1(2).

**[1199.7]****[Rule 45.34 Settlement at Stage 3 where the claimant is a child**

- (1) This rule applies where—
  - (a) the claimant is a child;
  - (b) there is a settlement after proceedings are started under the Stage 3 Procedure;
  - (c) the settlement is more than the defendant's RTA Protocol offer; and
  - (d) an application is made to the court to approve the settlement.
- (2) Where the court approves the settlement at the settlement hearing it will order the defendant to pay—
  - (a) the Stage 1 and 2 fixed costs;
  - (b) the Stage 3 Type A, B and C fixed costs;
  - (c) disbursements allowed in accordance with rule 45.30; and
  - (d) a success fee in accordance with rule 45.31(6).
- (3) Where the court does not approve the settlement at the settlement hearing it will order the defendant to pay the Stage 1 and 2 fixed costs.
- (3) Paragraphs (5) and (6) apply where the court does not approve the settlement at the first settlement hearing but does approve the settlement at the Stage 3 hearing.
- (5) At the Stage 3 hearing the court will order the defendant to pay—
  - (a) the Stage 3 Type A and C fixed costs for the settlement hearing;
  - (b) disbursements allowed in accordance with rule 45.30;
  - (c) the Stage 3 Type B fixed costs for one of the hearings; and
  - (d) a success fee in accordance with rule 45.31(6) on the Stage 1 and 2 fixed costs and the Stage 3 Type A, B and C fixed costs.
- (6) The court in its discretion may also order—
  - (a) the defendant to pay—
    - (i) an additional amount of either or both the Stage 3—
      - (aa) Type A fixed costs;
      - (bb) Type B fixed costs; and
    - (ii) a success fee in accordance with rule 45.31(6) on the additional Stage 3 fixed costs in sub-paragraph (a)(i); or
  - (b) the claimant to pay an amount equivalent to either or both of the Stage 3—
    - (i) Type A fixed costs;
    - (ii) Type B fixed costs.
- (7) Where the settlement is not approved at the Stage 3 hearing the court will order the defendant to pay the Stage 3 Type A fixed costs.]

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**[1199.7]** Civil Procedure Rules 1998, r 45.34

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**AMENDMENT**

Inserted by SI 2010/621, r 8(d), Sch 2 as from 30 April 2010: see SI 2010/621, r 1(2).

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**[1199.8]****[Rule 45.35 Where the court orders the claim is not suitable to be determined under the Stage 3 Procedure and the claimant is a child**

Where—

- (a) the claimant is a child; and
- (b) at a settlement hearing or the Stage 3 hearing the court orders that the claim is not suitable to be determined under the Stage 3 Procedure, the court will order the defendant to pay—
  - (i) the Stage 1 and 2 fixed costs; and
  - (ii) the Stage 3 Type A, B and C fixed costs.]

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**AMENDMENT**

Inserted by SI 2010/621, r 8(d), Sch 2 as from 30 April 2010: see SI 2010/621, r 1(2).

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**[1199.9]****[Rule 45.36 Failure to comply or electing not to continue with the RTA Protocol – costs consequences**

(1) This rule applies where the claimant—

- (a) does not comply with the process set out in the RTA Protocol;
- (b) elects not to continue with that process, and starts proceedings under Part 7.

(2) Where a judgment is given in favour of the claimant but—

- (a) the court determines that the defendant did not proceed with the process set out in the RTA Protocol because the claimant provided insufficient information on the Claim Notification Form;
- (b) the court considers that the claimant acted unreasonably—
  - (i) by discontinuing the process set out in the RTA Protocol and starting proceedings under Part 7;
  - (ii) by valuing the claim at more than £10,000, so that the claimant did not need to comply with the RTA Protocol; or
  - (iii) except for paragraph (2)(a), in any other way that caused the process in the RTA Protocol to be discontinued; or
- (c) the claimant did not comply with the RTA Protocol at all despite the claim falling within the scope of the RTA Protocol;

the court may order the defendant to pay no more than the fixed costs in rule 45.29 together with the disbursements allowed in accordance with rule 45.30 and success fee in accordance with rule 45.31(3).

(3) Where the claimant starts proceedings under paragraph 7.22 of the RTA Protocol and the court orders the defendant to make an interim payment of no more than the interim payment made under paragraph 7.14(2) or (3) of that Protocol the court will, on the final determination of the proceedings, order the defendant to pay no more than—

- (a) the Stage 1 and 2 fixed costs;
- (b) the disbursements allowed in accordance with rule 45.30; and

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Civil Procedure Rules 1998, r 45.38 **[1199.12]**

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(c) a success fee in accordance with rule 45.31(3).]

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AMENDMENT

Inserted by SI 2010/621, r 8(d), Sch 2 as from 30 April 2010: see SI 2010/621, r 1(2).

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**[1199.10]**

**[Rule 45.37 Where the parties have settled after proceedings have started**

(1) This rule applies where an application is made under rule 44.12C (costs-only application after a claim is started under Part 8 in accordance with Practice Direction 8B).

(2) Where the settlement is more than the defendant's RTA Protocol offer the court will order the defendant to pay—

- (a) the Stage 1 and 2 fixed costs where not already paid by the defendant;
- (b) the Stage 3 Type A fixed costs;
- (c) disbursements allowed in accordance with rule 45.30; and
- (d) a success fee in accordance with rule 45.31(6).

(3) Where the settlement is less than or equal to the defendant's RTA Protocol offer the court will order the defendant to pay—

- (a) the Stage 1 and 2 fixed costs where not already paid by the defendant;
- (b) disbursements allowed in accordance with rule 45.30; and
- (c) a success fee in accordance with rule 45.31(6).

(4) The court may, in its discretion, order either party to pay the costs of the application.]

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AMENDMENT

Inserted by SI 2010/621, r 8(d), Sch 2 as from 30 April 2010: see SI 2010/621, r 1(2).

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**[1199.11]**

**[Rule 45.38 Where the claimant obtains judgment for an amount equal to or less than the defendant's RTA Protocol offer**

Where rule 36.21(1)(a) applies, the court will order the claimant to pay—

- (a) where the claim is determined—
  - (i) on the papers, Stage 3 Type A fixed costs; or
  - (ii) at a hearing, Stage 3 Type A and B fixed costs;
- (b) disbursements allowed in accordance with rule 45.30; and
- (c) a success fee in accordance with rule 45.31(4).]

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AMENDMENT

Inserted by SI 2010/621, r 8(d), Sch 2 as from 30 April 2010: see SI 2010/621, r 1(2).

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**[1199.12]**

**[Rule 45.39 Adjournment**

Where the court adjourns a settlement hearing or a Stage 3 hearing it may, in its discretion, order a party to pay—

**[1199.12]** Civil Procedure Rules 1998, r 45.38

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- (a) an additional amount of the Stage 3 Type B fixed costs; and
- (b) any court fee for that adjournment.]

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**AMENDMENT**

Inserted by SI 2010/621, r 8(d), Sch 2 as from 30 April 2010: see SI 2010/621, r 1(2).

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**[1199.13]****[Rule 45.40 Account of payment of Stage 1 fixed costs**

Where a claim no longer continues under the RTA Protocol the court will, when making any order as to costs including an order for fixed recoverable costs under Section II of this Part, take into account the Stage 1 fixed costs together with any success fee on those costs that have been paid by the defendant.]

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**AMENDMENT**

Inserted by SI 2010/621, r 8(d), Sch 2 as from 30 April 2010: see SI 2010/621, r 1(2).

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**[VII****SCALE COSTS FOR CLAIMS IN A PATENTS COUNTY COURT]**

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**Amendment** Inserted by SI 2010/1953, r 5(b), Sch 2. Date in force: 1 October 2010: see SI 2010/1953, r 1(2).

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**[1199.14]****[45.41 Scope and interpretation**

- (1) Subject to paragraph (2) this Section applies to proceedings in a patents county court.
- (2) This Section does not apply where—
  - (a) the court considers that a party has behaved in a manner which amounts to an abuse of the court's process; or
  - (b) the claim concerns the infringement or revocation of a patent or registered design the validity of which has been certified by a court in earlier proceedings.
- (3) The court will make a summary assessment of the costs of the party in whose favour any order for costs is made. Rules 44.3(8), 44.3A(2)(b) and (c), 44.7(b) and Part 47 do not apply to this Section.
- (4) "Scale costs" means costs as defined in rule 43.2(1)(a).]

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**Amendment** Inserted by SI 2010/1953, r 5(b), Sch 2. Date in force: 1 October 2010: see SI 2010/1953, r 1(2).

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Civil Procedure Rules 1998, r 45.44 **[1199.17]****[1199.15]****[45.42 Amount of scale costs]**

(1) Subject to rule 45.43 the court will not order a party to pay total costs of more than—

- (a) £50,000 on the final determination of a claim in relation to liability; and
- (b) £25,000 on an inquiry as to damages or account of profits.

(2) The amounts in paragraph (1) apply after the court has applied the provision on set off in accordance with rule 44.3(9)(a).

(3) The maximum amount of scale costs that the court will award for each stage of the claim is set out in the Costs Practice Direction.

(4) The amount of the scale costs awarded by the court in accordance with paragraph (3) will depend on the nature and complexity of the claim.

(5) The amount of the scale costs awarded by the court in accordance with paragraph (3) will depend on the nature and complexity of the claim.]

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**Amendment** Inserted by SI 2010/1953, r 5(b), Sch 2. Date in force: 1 October 2010: see SI 2010/1953, r 1(2).

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**[1199.16]****[45.43 Summary assessment of the costs of an application where a party has behaved unreasonably]**

Costs awarded to a party under rule 63.26(2) are in addition to the total costs that may be awarded to that party under rule 45.42.]

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**Amendment** Inserted by SI 2010/1953, r 5(b), Sch 2. Date in force: 1 October 2010: see SI 2010/1953, r 1(2).

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## [VIII

## FIXED COSTS: HM REVENUE AND CUSTOMS]

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**Amendments** Inserted by SI 2011/88, r 11(b), Sch 1. Date in force: 6 April 2011: see SI 2011/88, r 1.

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**[1199.17]****[45.44 Scope, interpretation and application]**

(1) This Section sets out the amounts which, unless the court orders otherwise, are to be allowed in respect of HM Revenue & Customs charges (“HMRC charges”) in the cases to which this Section applies.

(2) For the purpose of this Section—

“HMRC Officer” means a person appointed by the Commissioners under section 2 of the Commissioners for Revenue and Customs Act 2005 and authorised to conduct county court proceedings for recovery of debt under section 25(1A) of that Act;

“debt” means any sum payable to the Commissioners under or by virtue of an enactment or under a contract settlement; and

“HMRC charges” means the fixed costs set out in Tables 9 and 10 in this Section.

**[1199.17]** Civil Procedure Rules 1998, r 45.44

- (3) HMRC charges shall, for the purpose of this Section, be claimed as “solicitor costs” on relevant court forms.
- (4) This Section applies where the only claim is a claim conducted by an HMRC Officer in the county court for recovery of a debt and the Commissioners obtain judgment on the claim
- (5) Any appropriate court fee will be allowed in addition to the costs set out in this Section.
- (6) The claim form may include a claim for fixed commencement costs.]

Amendments Inserted by SI 2011/88, r 11(b), Sch 1. Date in force: 6 April 2011: see SI 2011/88, r 1.

**[1199.18]****[45.45 Amount of fixed commencement costs in a county court claim for the recovery of money**

Where—

- (a) shall be calculated by reference to Table 9; and
- (b) the amount claimed in the claim form is to be used for determining which claim band in Table 9 applies.

**TABLE 9****FIXED COSTS ON COMMENCEMENT OF A COUNTY COURT CLAIM CONDUCTED BY AN HMRC OFFICER**

Where the value of the claim exceeds £25 but does not exceed £500	£33
Where the value of the claim exceeds £500 but does not exceed £1,000	£47
Where the value of the claim exceeds £1,000 but does not exceed £5,000	£56
Where the value of the claim exceeds £5,000 but does not exceed £15,000	£67
Where the value of the claim exceeds £15,000 but does not exceed £50,000	£90
Where the value of the claim exceeds £50,000 but does not exceed £100,000	£113
Where the value of the claim exceeds £100,000 but does not exceed £150,000	£127
Where the value of the claim exceeds £150,000 but does not exceed £200,000	£140
Where the value of the claim exceeds £200,000 but does not exceed £250,000	£153
Where the value of the claim exceeds £250,000 but does not exceed £300,000	£167
Where the value of the claim exceeds £300,000	£180]

Amendments Inserted by SI 2011/88, r 11(b), Sch 1. Date in force: 6 April 2011: see SI 2011/88, r 1.

Civil Procedure Rules 1998, r 46.1 **[1201]****[1199.19]****[45.46 Costs on entry of judgment in a county court claim for recovery of money**

Where—

- (a) an HMRC Officer has claimed fixed commencement costs under Rule 45.45; and
- (b) judgment is entered in a claim to which rule 45.44 applies the amount to be included in the judgment for HMRC charges is the total of—
  - (i) the fixed commencement costs; and
  - (ii) the amount in Table 10 relevant to the value of the claim.

**TABLE 10****FIXED COSTS ON ENTRY OF JUDGMENT IN A COUNTY COURT CLAIM CONDUCTED BY AN HMRC OFFICER**

Where the value of the claim does not exceed £5,000	£15
Where the value of the claim exceeds £5,000	£20]

**Amendments** Inserted by SI 2011/88, r 11(b), Sch 1. Date in force: 6 April 2011: see SI 2011/88, r 1.

**[1199.20]–[1200]****[45.47 When the defendant is only liable for fixed commencement costs**

Where—

- (a) the only claim is for a specified sum of money; and
- (b) the defendant pays the money claimed within 14 days after service of the particulars of claim, together with the fixed commencement costs stated in the claim form,

the defendant is not liable for any further costs unless the court orders otherwise.]

**Amendments** Inserted by SI 2011/88, r 11(b), Sch 1. Date in force: 6 April 2011: see SI 2011/88, r 1.

## PART 46

## FAST TRACK TRIAL COSTS

**[1201]****46.1 Scope of this part**

(1) This Part deals with the amount of costs which the court may award as the costs of an advocate for preparing for and appearing at the trial of a claim in the fast track (referred to in this rule as ‘fast track trial costs’).

(2) For the purposes of this Part –

- (a) ‘advocate’ means a person exercising a right of audience as a representative of, or on behalf of, a party;
- (b) ‘fast track trial costs’ means the costs of a party’s advocate for preparing for and appearing at the trial, but does not include –
  - (i) any other disbursements; or
  - (ii) any value added tax payable on the fees of a party’s advocate; and

**[1201]** Civil Procedure Rules 1998, r 46.1

- (c) ‘trial’ includes a hearing where the court decides an amount of money or the value of goods following a judgment under Part 12 (default judgment) or Part 14 (admissions) but does not include –
- (i) the hearing of an application for summary judgment under Part 24; or
  - (ii) the court’s approval of a settlement or other compromise under rule 21.10.

(Part 21 deals with claims made by or on behalf of, or against, children and [protected parties])

**AMENDMENT**

Para (2): words “protected parties” in square brackets substituted by SI 2007/2204, r 14(a).  
Date in force: 1 October 2007: see SI 2007/2204, r 1.

**[1202]****46.2 Amount of fast track trial costs**

(1) The following table shows the amount of fast track trial costs which the court may award (whether by summary or detailed assessment).

VALUE OF THE CLAIM	AMOUNT OF FAST TRACK TRIAL COSTS WHICH THE COURT MAY AWARD
[No more than £3,000]	[£485]
More than £3,000 but not more than £10,000	[£690]
More than £10,000 [but not more than £15,000]	[£1,035]
[For proceedings issued on or after 6th April 2009, more than £15,000]	£1,650]

(2) The court may not award more or less than the amount shown in the table except where—

- (a) it decides not to award any fast track trial costs; or
- (b) rule 46.3 applies,

but the court may apportion the amount awarded between the parties to reflect their respective degrees of success on the issues at trial.

- (3) Where the only claim is for the payment of money –
- (a) for the purpose of quantifying fast track trial costs awarded to a claimant, the value of the claim is the total amount of the judgment excluding—
    - (i) interest and costs; and
    - (ii) any reduction made for contributory negligence,
  - (b) for the purpose [of quantifying] fast track trial costs awarded to a defendant, the value of the claim is –
    - (i) the amount specified in the claim form (excluding interest and costs);
    - (ii) if no amount is specified, the maximum amount which the claimant reasonably expected to recover according to the statement of value included in the claim form under rule 16.3; or
    - (iii) more than [£15,000], if the claim form states that the claimant cannot reasonably say how much [is likely to be recovered].

(4) Where the claim is only for a remedy other than the payment of money the value of the claim is deemed to be more than £3,000 but not more than £10,000, unless the court orders otherwise.

Civil Procedure Rules 1998, r 46.3 **[1203]**

(5) Where the claim includes both a claim for the payment of money and for a remedy other than the payment of money, the value of the claim is deemed to be the higher of –

- (a) the value of the money claim decided in accordance with paragraph (3); or
- (b) the deemed value of the other remedy decided in accordance with paragraph (4),

unless the court orders otherwise.

(6) Where –

- (a) a defendant has made a counterclaim against the claimant;
- (b) the counterclaim has a higher value than the claim; and
- (c) the claimant succeeds at trial both on [the] claim and the counterclaim,

(Rule 20.4 sets out how a defendant may make a counterclaim)

**AMENDMENT**

Para (1): in table words “No more than £3,000” in square brackets substituted by SI 2007/2204, r 14(b)(i). Date in force: 1 October 2007 (except where the hearing of the fast track trial commences before that date): see SI 2007/2204, rr 1, 22. Para (1): in table sum “£485” in square brackets substituted by SI 2007/2204, r 14(b)(ii). Date in force: 1 October 2007 (except where the hearing of the fast track trial commences before that date): see SI 2007/2204, rr 1, 22. Para (1): in table sum “£690” in square brackets substituted by SI 2007/2204, r 14(b)(iii). Date in force: 1 October 2007 (except where the hearing of the fast track trial commences before that date): see SI 2007/2204, rr 1, 22. Para (1): in table sum “£1,035” in square brackets substituted by SI 2007/2204, r 14(b)(iv). Date in force: 1 October 2007 (except where the hearing of the fast track trial commences before that date): see SI 2007/2204, rr 1, 22. Para (1): in table words “but not more than £15,000” in square brackets inserted by SI 2008/3327, r 10(a)(i). Date in force: 6 April 2009: see SI 2008/3327, r 1. Para (1): in table entry beginning “For proceedings issued on or after 6th April 2009” inserted by SI 2008/3327, r 10(a)(ii). Date in force: 6 April 2009: see SI 2008/3327, r 1. Para (3): in sub-para (b) words “of quantifying” in square brackets substituted by SI 2008/3327, r 10(b)(i). Date in force: 6 April 2009: see SI 2008/3327, r 1. Para (3): in sub-para (b)(iii) sum “£15,000” in square brackets substituted by SI 2008/3327, r 10(b)(ii)(aa). Date in force: 6 April 2009: see SI 2008/3327, r 1. Para (3): in sub-para (b)(iii) words “is likely to be recovered” in square brackets substituted by SI 2008/3327, r 10(b)(ii)(bb). Date in force: 6 April 2009: see SI 2008/3327, r 1. Para (6): in sub-para (c) word “the” in square brackets substituted by SI 2008/3327, r 10(c). Date in force: 6 April 2009: see SI 2008/3327, r 1. Parenthesis below para (6) (omitted) revoked by SI 2008/3327, r 10(d). Date in force: 6 April 2009: see SI 2008/3327, r 1.

**[1203]****46.3 Power to award more or less than the amount of fast track trial costs**

(1) This rule sets out when a court may award –

- (a) an additional amount to the amount of fast track trial costs shown in the table in rule 46.2(1); and
- (b) less than those amounts.

(2) If –

- (a) in addition to the advocate, a party’s legal representative attends the trial;
- (b) the court considers that it was necessary for a legal representative to attend to assist the advocate; and

(c) the court awards fast track trial costs to that party,

the court may award an additional [£345] in respect of the legal representative’s attendance at the trial.

(Legal representative is defined in rule 2.3)

[(2A) The court may in addition award a sum representing an additional liability.

**[1203]** Civil Procedure Rules 1998, r 46.3

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(The requirements to provide information about a funding arrangement where a party wishes to recover any additional liability under a funding arrangement are set out in the [Costs Practice Direction])

(‘Additional liability’ is defined in rule 43.2)]

(3) If the court considers that it is necessary to direct a separate trial of an issue then the court may award an additional amount in respect of the separate trial but that amount is limited in accordance with paragraph (4) of this rule.

(4) The additional amount the court may award under paragraph 3 must not exceed two-thirds of the amount payable for that claim, subject to a minimum award of [£485].

(5) Where the party to whom fast track trial costs are to be awarded is a litigant in person, the court will award –

(a) if the litigant in person can prove financial loss, two-thirds of the amount that would otherwise be awarded; or

(b) if the litigant in person fails to prove financial loss, an amount in respect of the time spent reasonably doing the work at the rate specified in the [Costs Practice Direction].

(6) Where a defendant has made a counterclaim against the claimant, and—

(a) the claimant has succeeded on his claim; and

(b) the defendant has succeeded on his counterclaim, the court will quantify the amount of the award of fast track trial costs to which –

(i) but for the counterclaim, the claimant would be entitled for succeeding on his claim; and

(ii) but for the claim, the defendant would be entitled for succeeding on his counterclaim,

and make one award of the difference, if any, to the party entitled to the higher award of costs.

(7) Where the court considers that the party to whom fast track trial costs are to be awarded has behaved unreasonably or improperly during the trial, it may award that party an amount less than would otherwise be payable for that claim, as it considers appropriate.

(8) Where the court considers that the party who is to pay the fast track trial costs has behaved improperly during the trial the court may award such additional amount to the other party as it considers appropriate.

Civil Procedure Rules 1998, r 46.4 **[1204]****AMENDMENT**

Para (2): sum “£345” in square brackets substituted by SI 2007/2204, r 14(c). Date in force: 1 October 2007 (except where the hearing of the fast track trial commences before that date): see SI 2007/2204, rr 1, 22. Para (2A): inserted by SI 2000/1317, r 21. Date in force: 3 July 2000 (with transitional provisions relating to proceedings started in respect of a claim the subject of a funding arrangement entered into before that date): see SI 2000/1317, rr 1, 39. First parenthesis below para (2A): words in square brackets substituted by SI 2009/3390, r 24(a). Date in force: 6 April 2010: see SI 2009/3390, r 1(2). Para (4): sum “£485” in square brackets substituted by SI 2007/2204, r 14(d). Date in force: 1 October 2007 (except where the hearing of the fast track trial commences before that date): see SI 2007/2204, rr 1, 22. Para (5): words in square brackets substituted by SI 2009/3390, r 24(b). Date in force: 6 April 2010: see SI 2009/3390, r 1(2).

**[1204]–[1220]****46.4 Fast track trial costs where there is more than one claimant or defendant**

- (1) Where the same advocate is acting for more than one party –
  - (a) the court may make only one award in respect of fast track trial costs payable to that advocate; and
  - (b) the parties for whom the advocate is acting are jointly entitled to any fast track trial costs awarded by the court.
- (2) Where –
  - (a) the same advocate is acting for more than one claimant; and
  - (b) each claimant has a separate claim against the defendant,
 the value of the claim, for the purpose of quantifying the award in respect of fast track trial costs is to be ascertained in accordance with paragraph (3).
- (3) The value of the claim in the circumstances mentioned in paragraph (2) is –
  - (a) where the only claim of each claimant is for the payment of money –
    - (i) if the award of fast track trial costs is in favour of the claimants, the total amount of the judgment made in favour of all the claimants jointly represented; or
    - (ii) if the award is in favour of the defendant, the total amount claimed by the claimants,
 and in either case, quantified in accordance with rule 46.2(3);
  - (b) where the only claim of each claimant is for a remedy other than the payment of money, deemed to be more than £3,000 but not more than £10,000; and
  - (c) where claims of the claimants include both a claim for the payment of money and for a remedy other than the payment of money, deemed to be—
    - (i) more than £3,000 but not more than £10,000; or
    - (ii) if greater, the value of the money claims calculated in accordance with sub paragraph (a) above.
- (4) Where—
  - (a) there is more than one defendant; and
  - (b) any or all of the defendants are separately represented,
 the court may award fast track trial costs to each party who is separately represented.
- (5) Where—
  - (a) there is more than one claimant; and
  - (b) a single defendant,
 the court may make only one award to the defendant of fast track trial costs, for which the claimants are jointly and severally liable.

**[1204]** Civil Procedure Rules 1998, r 46.4

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(6) For the purpose of quantifying the fast track trial costs awarded to the single defendant under paragraph (5), the value of the claim is to be calculated in accordance with paragraph (3) of this rule.

## PRACTICE DIRECTION ABOUT COSTS

### SECTION 8 COURT'S DISCRETION AND CIRCUMSTANCES TO BE TAKEN INTO ACCOUNT WHEN EXERCISING ITS DISCRETION AS TO COSTS: RULE 44.3

#### [1221]

#### 8.3

- (1) The court may make an order about costs at any stage in a case.
- (2) In particular the court may make an order about costs when it deals with any application, makes any order or holds any hearing and that order about costs may relate to the costs of that application, order or hearing.
- (3) Rule 44.3A(1) provides that the court will not assess any additional liability until the conclusion of the proceedings or the part of the proceedings to which the funding arrangement relates. (Paragraphs 2.4 and 2.5 above explain when proceedings are concluded. As to the time when detailed assessment may be carried out see paragraphs 28.1, below.)

### SECTION 9 COSTS ORDERS RELATING TO FUNDING ARRANGEMENTS: RULE 44.3A

#### [1222]

9.1 Under an order for payment of 'costs' the costs payable will include an additional liability incurred under a funding arrangement.

9.2 (1) If before the conclusion of the proceedings the court carries out a summary assessment of the base costs it may identify separately the amount allowed in respect of: solicitors' charges; counsels' fees; other disbursements; and any value added tax (VAT). (Sections 13 and 14 of this Practice Direction deal with summary assessment.)

(2) If an order for the base costs of a previous application or hearing did not identify separately the amounts allowed for solicitor's charges, counsel's fees and other disbursements, a court which later makes an assessment of an additional liability may apportion the base costs previously ordered.

### SECTION 10 LIMITS ON RECOVERY UNDER FUNDING ARRANGEMENTS: RULE 44.3B

#### [1223]

10.1 In a case to which rule 44.3B(1)(c) or (d) applies the party in default may apply for relief from the sanction. He should do so as quickly as possible after he becomes aware of the default. An application, supported by evidence, should be made under Part 23 to a costs judge or district judge of the court which is dealing with the case. (Attention is drawn to rules 3.8 and 3.9 which deal with sanctions and relief from sanctions).

10.2 Where the amount of any percentage increase recoverable by counsel may be affected by the outcome of the application, the solicitor issuing the application must serve on counsel a copy of the application notice and notice of the hearing as soon as practicable and in any event at least 2 days before the hearing. Counsel may make written submissions or may attend and make oral submissions at the hearing. (Paragraph 1.4 contains definitions of the terms 'counsel' and 'solicitor'.)

**[1223]** Practice Direction about Costs**SECTION 13 SUMMARY ASSESSMENT: GENERAL PROVISIONS****[1224]**

**13.12** (1) Attention is drawn to rule 44.3A which prevents the court from making a summary assessment of an additional liability before the conclusion of the proceedings or the part of the proceedings to which the funding arrangement relates. Where this applies, the court should nonetheless make a summary assessment of the base costs of the hearing or application unless there is a good reason not to do so.

(2) Where the court makes a summary assessment of the base costs all statements of costs and costs estimates put before the judge will be retained on the court file.

**SECTION 14 SUMMARY ASSESSMENT WHERE COSTS CLAIMED INCLUDE AN ADDITIONAL LIABILITY****Orders made before the conclusion of the proceedings****[1225]**

**14.1** The existence of a conditional fee agreement or other funding arrangement within the meaning of rule 43.2 is not by itself a sufficient reason for not carrying out a summary assessment.

**14.2** Where a legal representative acting for the receiving party has entered into a conditional fee agreement the court may summarily assess all the costs (other than any additional liability).

**14.3** Where costs have been summarily assessed an order for payment will not be made unless the court has been satisfied that in respect of the costs claimed, the receiving party is at the time liable to pay to his legal representative an amount equal to or greater than the costs claimed. A statement in the form of the certificate appended at the end of Form N260 may be sufficient proof of liability. The giving of information under rule 44.15 (where that rule applies) is not sufficient.

**14.4** The court may direct that any costs, for which the receiving party may not in the event be liable, shall be paid into court to await the outcome of the case, or shall not be enforceable until further order, or it may postpone the receiving party's right to receive payment in some other way.

**Orders made at the conclusion of the proceedings**

**14.5** Where there has been a trial of one or more issues separately from other issues, the court will not normally order detailed assessment of the additional liability until all issues have been tried unless the parties agree.

**14.6** Rule 44.3A(2) sets out the ways in which the court may deal with the assessment of the costs where there is a funding arrangement. Where the court makes a summary assessment of the base costs:

- (1) The order may state separately the base costs allowed as (a) solicitor's charges, (b) counsel's fees, (c) any other disbursements and (d) any VAT;
- (2) the statements of costs upon which the judge based his summary assessment will be retained on the court file.

**14.7** Where the court makes a summary assessment of an additional liability at the conclusion of proceedings, that assessment must relate to the whole of the proceedings; this will include any additional liability relating to base costs allowed by the court when making a summary assessment on a previous application or hearing.

## Practice Direction about Costs [1226]

14.8 Paragraph 13.13 applies where the parties are agreed about the total amount to be paid by way of costs, or are agreed about the amount of the base costs that will be paid. Where they disagree about the additional liability the court may summarily assess that liability or make an order for a detailed assessment.

14.9 In order to facilitate the court in making a summary assessment of any additional liability at the conclusion of the proceedings the party seeking such costs must prepare and have available for the court a bundle of documents which must include –

- (1) a copy of every notice of funding arrangement (Form N251) which has been filed by him;
- (2) a copy of every estimate and statement of costs filed by him;
- (3) a copy of the risk assessment prepared at the time any relevant funding arrangement was entered into and on the basis of which the amount of the additional liability was fixed.

## SECTION 17 COSTS – ONLY PROCEEDINGS: RULE 44.12A

## [1226]

17.1 A claim form under this rule should be issued in the court which would have been the appropriate office in accordance with rule 47.4 had proceedings been brought in relation to the substantive claim. A claim form under this rule should not be issued in the High Court unless the dispute to which the agreement relates was of such a value or type that had proceedings been begun they would have been commenced in the High Court.

17.2 A claim form which is to be issued in the High Court at the Royal Courts of Justice will be issued in the [Costs Office].

17.3 Attention is drawn to rule 8.2 (in particular to paragraph (b)(ii)) and to rule 44.12A(3). The claim form must:

- (1) identify the claim or dispute to which the agreement to pay costs relates;
- (2) state the date and terms of the agreement on which the claimant relies;
- (3) set out or have attached to it a draft of the order which the claimant seeks;
- (4) state the amount of the costs claimed; and,
- (5) state whether the costs are claimed on the standard or indemnity basis. If no basis is specified the costs will be treated as being claimed on the standard basis.

17.4 The evidence to be filed and served with the claim form under Rule 8.5 must include copies of the documents on which the claimant relies to prove the defendant's agreement to pay costs.

17.5 A costs judge or a district judge has jurisdiction to hear and decide any issue which may arise in a claim issued under this rule irrespective of the amount of the costs claimed or of the value of the claim to which the agreement to pay costs relates. A court officer may make an order by consent under paragraph 17.7, or an order dismissing a claim under paragraph 17.9 below.

17.6 When the time for filing the defendant's acknowledgement of service has expired, the claimant may by letter request the court to make an order in the terms of his claim, unless the defendant has filed an acknowledgement of service stating that he intends to contest the claim or to seek a different order.

17.7 Rule 40.6 applies where an order is to be made by consent. An order may be made by consent in terms which differ from those set out in the claim form.

17.8 (1) An order for costs made under this rule will be treated as an order for the amount of costs to be decided by a detailed assessment to which Part 47 and the practice directions relating to it apply. Rule 44.4(4) (determination of basis of assessment) also applies to the order.

**[1226]** Practice Direction about Costs

. . .

17.9 A claim will be treated as opposed for the purposes of rule 44.12A(4)(b) if the defendant files an acknowledgement of service stating that he intends to contest the proceedings or to seek a different remedy. An order dismissing it will be made as soon as such an acknowledgement is filed. The dismissal of a claim under rule 44.12A(4) does not prevent the claimant from issuing another claim form under Part 7 or Part 8 based on the agreement or alleged agreement to which the proceedings under this rule related.

17.10 (1) Rule 8.9 (which provides that claims issued under Part 8 shall be treated as allocated to the multi-track) shall not apply to claims issued under this rule. A claim issued under this rule may be dealt with without being allocated to a track.

(2) Rule 8.1(3) and Part 24 do not apply to proceedings brought under rule 44.12A.

17.11 Nothing in this rule prevents a person from issuing a claim form under Part 7 or Part 8 to sue on an agreement made in settlement of a dispute where that agreement makes provision for costs, nor from claiming in that case an order for costs or a specified sum in respect of costs.

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**AMENDMENT**

Para 17.2: words in square brackets substituted by the 50th Practice Direction update, with effect from 1 October 2009. Para 17.8(2): omitted by the 51st Practice Direction update, with effect from 6 April 2010.

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**SECTION 19 PROVIDING INFORMATION ABOUT FUNDING  
ARRANGEMENTS: RULE 44.15****[1227]**

19.1 (1) A party who wishes to claim an additional liability in respect of a funding arrangement must give any other party information about that claim if he is to recover the additional liability. There is no requirement to specify the amount of the additional liability separately nor to state how it is calculated until it falls to be assessed. That principle is reflected in rules 44.3A and 44.15, in the following paragraphs and in Sections 6, 13, 14 and 31 of this Practice Direction. Section 6 deals with estimates of costs, Sections 13 and 14 deal with summary assessment and Section 31 deals with detailed assessment.

(2) In the following paragraphs a party who has entered into a funding arrangement is treated as a person who intends to recover a sum representing an additional liability by way of costs.

(3) Attention is drawn to paragraph 57.9 of this Practice Direction which sets out time limits for the provision of information where a funding arrangement is entered into between 31 March and 2 July 2000 and proceedings relevant to that arrangement are commenced before 3 July 2000.

**Method of giving information**

19.2 (1) In this paragraph, 'claim form' includes petition and application notice, and the notice of funding to be filed or served is a notice containing the information set out in Form N251.

(2)

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### Practice Direction about Costs [1227]

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- (a) A claimant who has entered into a funding arrangement before starting the proceedings to which it relates must provide information to the court by filing the notice when he issues the claim form.
- (b) He must provide information to every other party by serving the notice. If he serves the claim form himself he must serve the notice with the claim form. If the court is to serve the claim form, the court will also serve the notice if the claimant provides it with sufficient copies for service.
- (3) A defendant who has entered into a funding arrangement before filing any document
- (a) must provide information to the court by filing notice with his first document. A 'first document' may be an acknowledgement of service, a defence, or any other document, such as an application to set aside a default judgment.
- (b) must provide information to every party by serving notice. If he serves his first document himself he must serve the notice with that document. If the court is to serve his first document the court will also serve the notice if the defendant provides it with sufficient copies for service.
- (4) In all other circumstances a party must file and serve notice within 7 days of entering into the funding arrangement concerned.

[(Practice Direction (Pre-Action Conduct) provides that a party must inform any other party as soon as possible about a funding arrangement entered into prior to the start of proceedings.)]

#### Notice of change of information

- 19.3 (1) Rule 44.15 imposes a duty on a party to give notice of change if the information he has previously provided is no longer accurate. To comply he must file and serve notice containing the information set out in Form N251. Rule 44.15(3) may impose other duties in relation to new estimates of costs.
- (2) Further notification need not be provided where a party has already given notice:
- (a) that he has entered into a conditional fee agreement with a legal representative and during the currency of that agreement either of them enters into another such agreement with an additional legal representative; or
- (b) of some insurance cover, unless that cover is cancelled or unless new cover is taken out with a different insurer.
- (3) Part 6 applies to the service of notices.
- (4) The notice must be signed by the party or by his legal representative.

#### Information which must be provided

- 19.4 (1) Unless the court otherwise orders, a party who is required to supply information about a funding arrangement must state whether he has –
- entered into a conditional fee agreement which provides for a success fee within the meaning of section 58(2) of the Courts and Legal Services Act 1990; taken out an insurance policy to which section 29 of the Access to Justice Act 1999 applies;
- made an arrangement with a body which is prescribed for the purpose of section 30 of that Act;
- or more than one of these.
- (2) Where the funding arrangement is a conditional fee agreement, the party must state the date of the agreement and identify the claim or claims to which it relates (including Part 20 claims if any).

**[1227]** Practice Direction about Costs

[(3) Where the funding arrangement is an insurance policy, the party must—

- (a) state the name and address of the insurer, the policy number and the date of the policy and identify the claim or claims to which it relates (including Part 20 claims if any);
- (b) state the level of cover provided by the insurance; and
- (c) state whether the insurance premiums are staged and, if so, the points at which an increased premium is payable.]

(4) Where the funding arrangement is by way of an arrangement with a relevant body the party must state the name of the body and set out the date and terms of the undertaking it has given and must identify the claim or claims to which it relates (including Part 20 claims if any).

(5) Where a party has entered into more than one funding arrangement in respect of a claim, for example a conditional fee agreement and an insurance policy, a single notice containing the information set out in Form N251 may contain the required information about both or all of them

19.5 Where the court makes a Group Litigation Order, the court may give directions as to the extent to which individual parties should provide information in accordance with rule 44.15.

[(Part 19 deals with Group Litigation Orders.)]

**AMENDMENT**

Paras 19.2, 19.4(3), 19.5: words in square brackets substituted by the 50th Practice Direction update, with effect from 1 October 2009.

**SECTION 20 PROCEDURE WHERE LEGAL REPRESENTATIVE WISHES TO****Recover from his Client an Agreed percentage Increase Which has been Disallowed or Reduced on Assessment: Rule 44.16****[1228]**

20.1 Attention is drawn to Regulation 3(2)(b) of the Conditional Fee Agreements Regulations 2000, which provides that any amount of an agreed percentage increase, which is disallowed on assessment, ceases to be payable under that agreement unless the court is satisfied that it should continue to be so payable. Rule 44.16 allows the court to adjourn a hearing at which the legal representative acting for the receiving party applies for an order that a disallowed amount should continue to be payable under the agreement.

20.2 In the following paragraphs ‘counsel’ means counsel who has acted in the case under a conditional fee agreement which provides for a success fee. A reference to counsel includes a reference to any person who appeared as an advocate in the case and who is not a partner or employee of the solicitor or firm which is conducting the claim or defence (as the case may be) on behalf of the receiving party.

**Procedure following summary assessment**

20.3 (1) If the court disallows any amount of a legal representative’s percentage increase, the court will, unless sub-paragraph(2) applies, give directions to enable an application to be made by the legal representative for the disallowed amount to be payable by his client, including, if appropriate, a direction that the application will be determined by a costs judge or district judge of the court dealing with the case.

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Practice Direction about Costs [1228]

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(2) The court that has made the summary assessment may then and there decide the issue whether the disallowed amount should continue to be payable, if:

- (a) the receiving party and all parties to the relevant agreement consent to the court doing so;
- (b) the receiving party (or, if corporate, an officer) is present in court; and
- (c) the court is satisfied that the issue can be fairly decided then and there.

**Procedure following detailed assessment**

20.4 (1) Where detailed assessment proceedings have been commenced, and the paying party serves points of dispute (as to which see Section 34 of this Practice Direction), which show that he is seeking a reduction in any percentage increase charged by counsel on his fees, the solicitor acting for the receiving party must within 3 days of service deliver to counsel a copy of the relevant points of dispute and the bill of costs or the relevant parts of the bill.

(2) Counsel must within 10 days thereafter inform the solicitor in writing whether or not he will accept the reduction sought or some other reduction. Counsel may state any points he wishes to have made in a reply to the points of dispute, and the solicitor must serve them on the paying party as or as part of a reply.

(3) Counsel who fails to inform the solicitor within the time limits set out above will be taken to accept the reduction unless the court otherwise orders.

20.5 Where the paying party serves points of dispute seeking a reduction in any percentage increase charged by a legal representative acting for the receiving party, and that legal representative intends, if necessary, to apply for an order that any amount of the percentage disallowed as against the paying party shall continue to be payable by his client, the solicitor acting for the receiving party must, within 14 days of service of the points of dispute, give to his client a clear written explanation of the nature of the relevant point of dispute and the effect it will have if it is upheld in whole or in part by the court, and of the client's right to attend any subsequent hearings at court when the matter is raised.

20.6 Where the solicitor acting for a receiving party files a request for a detailed assessment hearing it must if appropriate, be accompanied by a certificate signed by him stating:

- (1) that the amount of the percentage increase in respect of counsel's fees or solicitor's charges is disputed;
- (2) whether an application will be made for an order that any amount of that increase which is disallowed should continue to be payable by his client;
- (3) that he has given his client an explanation in accordance with paragraph 20.5; and,
- (4) whether his client wishes to attend court when the amount of any relevant percentage increase may be decided.

20.7 (1) The solicitor acting for the receiving party must within 7 days of receiving from the court notice of the date of the assessment hearing, notify his client, and if appropriate, counsel in writing of the date, time and place of the hearing.

(2) Counsel may attend or be represented at the detailed assessment hearing and may make oral or written submissions.

20.8 (1) At the detailed assessment hearing, the court will deal with the assessment of the costs payable by one party to another, including the amount of the percentage increase, and give a certificate accordingly.

(2) The court may decide the issue whether the disallowed amount should continue to be payable under the relevant conditional fee agreement without an adjournment if:

**[1228]** Practice Direction about Costs

- (a) the receiving party and all parties to the relevant agreement consent to the court deciding the issue without an adjournment,
  - (b) the receiving party (or, if corporate, an officer or employee who has authority to consent on behalf of the receiving party) is present in court, and
  - (c) the court is satisfied that the issue can be fairly decided without an adjournment.
- (3) In any other case the court will give directions and fix a date for the hearing of the application.

**SECTION 55 CONDITIONAL FEES: RULE 48.9****[1229]**

**55.1** (1) Attention is drawn to rule 48.9(1) as amended by the Civil Procedure (Amendment No 3) Rules 2000 (SI 2000/1317) with effect from 3 July 2000. Rule 48.9 applies only where the solicitor and the client have entered into a conditional fee agreement as defined in section 58 of the Courts and Legal Services Act 1990 as it was in force before 1 April 2000. A client who has entered into a conditional fee agreement with a solicitor may apply for assessment of the base costs (which is carried out in accordance with rule 48.8(2) as if there were no conditional fee agreement) or for assessment of the percentage increase (success fee) or both.

(2) Where the court is to assess the percentage increase the court will have regard to all the relevant factors as they appeared to the solicitor or counsel when the conditional fee agreement was entered into.

**55.2** Where the client applies to the court to reduce the percentage increase which the solicitor has charged the client under the conditional fee agreement, the client must set out in his application notice:

- (a) the reasons why the percentage increase should be reduced; and
- (b) what the percentage increase should be.

**55.3** The factors relevant to assessing the percentage increase include –

- (a) the risk that the circumstances in which the fees or expenses would be payable might not occur;
- (b) the disadvantages relating to the absence of payment on account;
- (c) whether the amount which might be payable under the conditional fee agreement is limited to a certain proportion of any damages recovered by the client;
- (d) whether there is a conditional fee agreement between the solicitor and counsel;
- (e) the solicitor's liability for any disbursements.

**55.4** When the court is considering the factors to be taken into account, it will have regard to the circumstances as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into.

**SECTION 57 TRANSITIONAL ARRANGEMENTS:****[1230]–[1240]**

**57.1** In this section 'the previous rules' means the Rules of the Supreme Court 1965 ('RSC') or County Court Rules 1981 ('CCR'), as appropriate.

**General scheme of transitional arrangements concerning costs proceedings**

**57.2** (1) Paragraph 18 of [Practice Direction Part 51A] provides that the CPR govern any assessments of costs which take place on or after 26th April 1999 and states a presumption to be applied in respect of costs for work undertaken before 26th April 1999.

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## Practice Direction about Costs [1230]

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(2) The following paragraphs provide five further transitional arrangements:

- (a) to provide an additional presumption to be applied when assessing costs which were awarded by an order made in a county court before 26th April 1999 which allowed costs 'on Scale 1' to be determined in accordance with CCR Appendix A, or 'on the lower scale' to be determined in accordance with CCR Appendix C.
- (b) to preserve the effect of CCR Appendix B Part III, paragraph 2;
- (c) to clarify the approach to be taken where a bill of costs was provisionally taxed before 26th April 1999 and the receiving party is unwilling to accept the result of the provisional taxation.
- (d) to preserve the right to carry in objections or apply for a reconsideration in all taxation proceedings commenced before 26th April 1999.
- (e) to deal with funding arrangements made before 3 July 2000.

### Scale 1 or lower scale costs

57.3 Where an order was made in county court proceedings before 26th April 1999 under which the costs were allowed on Scale 1 or the lower scale, the general presumption is that no costs will be allowed under that order which would not have been allowed in a taxation before 26th April 1999.

### Fixed costs on the lower scale

57.4 The amount to be allowed as fixed costs for making or opposing an application for a rehearing to set aside a judgment given before 26th April 1999 where the costs are on lower scale is £11.25.

### Bills provisionally taxed before 26th April 1999

57.5 In respect of bills of costs provisionally taxed before 26th April 1999:

- (1) The previous rules apply on the question who can request a hearing and the time limits for doing so; and
- (2) The CPR govern any subsequent hearing in that case.

### Bills taxed before 26th April 1999

57.6 Where a bill of costs was taxed before 26th April 1999, the previous rules govern the steps which can be taken to challenge that taxation.

### Other taxation proceedings

57.7 (1) This paragraph applies to taxation proceedings which were commenced before 26th April 1999, were assigned for taxation to a Taxing Master or District Judge, and which were still pending on 26th April 1999.

(2) Any assessment of costs that takes place in cases to which this paragraph applies which is conducted on or after 26th April 1999, will be conducted in accordance with the CPR.

(3) In addition to the possibility of appeal under rules 47.20 to 47.23 and Part 52 any party to a detailed assessment who is dissatisfied with any decision on a detailed assessment made by a costs judge or district judge may apply to that costs judge or district judge for a review of the decision. The review shall, for procedural purposes, be treated as if it were an appeal from an authorised court officer.

### [1230] Practice Direction about Costs

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(4) The right of review provided by paragraph (3) above, will not apply in cases in which, at least 28 days before the date of the assessment hearing, all parties were served with notice that the rights of appeal in respect of that hearing would be governed by Part 47 Section VIII (Appeals from Authorised Court Officers in Detailed Assessment Proceedings) and Part 52 (Appeals).

(5) An order for the service of notice under sub-paragraph(4) above may be made on the application of any party to the detailed assessment proceedings or may be made by the court of its own initiative.

#### Transitional provisions concerning the Access to Justice Act 1999 sections 28 to 31

57.8 (1) Sections 28 to 31 of the Access to Justice Act 1999, the Conditional Fee Agreements Regulations 2000, the Access to Justice (Membership Organisations) Regulations 2000, and the Access to Justice Act 1999 (Transitional Provisions) Order 2000 came into force on 1 April 2000. The Civil Procedure (Amendment No. 3) Rules come into force on 3 July 2000.

(2) The Access to Justice Act 1999 (Transitional Provisions) Order 2000 provides that no conditional fee agreement or other arrangement about costs entered into before 1 April 2000 can be a funding arrangement, as defined in rule 43.2 The order also has the effect that where an conditional fee agreement or other funding arrangement has been entered into before 1 April 2000 and a second or subsequent funding arrangement is entered into on or after 1 April 2000, the second or subsequent funding arrangement does not give rise to an additional liability which is recoverable from a paying party.

57.9 (1) Rule 39 of the Civil Procedure (Amendment No 3) Rules 2000 applies where between 1 April and 2 July 2000 (including both dates) –

a funding arrangement is entered into, and proceedings are started in respect of a claim which is the subject of that agreement.

(2) Attention is drawn to the need to act promptly so as to comply with the requirements of the Rules and the Practice Directions by 31 July 2000 (i.e. within the 28 days from 3 July 2000 permitted by Rule 39) if that compliance is to be treated as compliance with the relevant provision. Attention is drawn in particular to Rule 44.15 (Providing Information about Funding Arrangements) and Section 19 of this Practice Direction.

(3) Nothing in the legislation referred to above makes provision for a party who has entered into a funding arrangement to recover from another party any amount of an additional liability which relates to anything done or any costs incurred before the arrangement was entered into.

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#### AMENDMENT

Para 57.2: words in square brackets substituted by the 51st Practice Direction update, with effect from 6 April 2010.

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Practice Direction about Costs [1241]

[1241]-[1242]

**Notice of funding of case or claim**

Notice of funding by means of a conditional fee agreement, insurance policy or undertaking given by a prescribed body should be given to the court and all other parties to the case:

- on commencement of proceedings
- on filing an acknowledgment of service, defence or other first document; and
- at any later time that such an arrangement is entered into, changed or terminated.

Take notice that in respect of

- all claims herein
- the following claims  
[ ]
- the case of (specify name of party)  
[ ]

[is now][was] being funded by:

(Please tick those boxes which apply)

- a conditional fee agreement  
Dated [ ]  
which provides for a success fee
- an insurance policy issued on  
Date [ ] Policy no. [ ]  
Name and address of insurer [ ]

Level of cover  
[ ]

Are the insurance premiums staged?

- Yes  No

If Yes, at which point is an increased premium payable

[ ]

<b>In the</b>	
The court office is open between 10 am and 4 pm Monday to Friday. When writing to the court, please address forms or letters to the Court Manager and quote the claim number.	
<b>Claim No.</b>	[ ]
<b>Claimant</b> <small>(include Ref.)</small>	[ ]
<b>Defendant</b> <small>(include Ref.)</small>	[ ]

- an undertaking given on  
Date [ ]  
by  
Name of prescribed body [ ]  
in the following terms  
[ ]

The funding of the case has now changed:

- the above funding has now ceased
- the conditional fee agreement has been terminated
- a conditional fee agreement  
Dated [ ]  
which provides for a success fee has been entered into;
- an insurance policy  
Date [ ]  
has been cancelled
- an insurance policy has been issued on  
Date [ ] Policy no. [ ]  
Name and address of insurer [ ]

continued over the page [▶](#)

**[1241] Practice Direction about Costs**

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Level of cover

Are the insurance premiums staged?

Yes  No

If Yes, at which point is an increased premium payable

an undertaking given on

Date

has been terminated

an undertaking has been given on

Date

Name of prescribed body

in the following terms

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Signed

Dated

Solicitor for the (claimant) (defendant)  
(Part 20 defendant) (respondent) (appellant)

## THE LAW SOCIETY RULES OF PROFESSIONAL CONDUCT 1996

### IN FORCE 1996

#### Practice Rule 8

##### [1251]

(1) A solicitor who is retained or employed to prosecute or defend any action, suit or other contentious proceeding shall not enter into any arrangement to receive a contingency fee in respect of that proceeding.

(1A) Paragraph (1) of this rule shall not apply to a conditional fee agreement relating to specified proceedings as defined in s 58 of the Courts and Legal Services Act 1990, provided the agreement complies with all the requirements of that section and any order made thereunder.

(2) Paragraph (1) of this rule shall not apply to an arrangement in respect of an action, suit or other contentious proceeding in any country other than England and Wales to the extent that a local lawyer would be permitted to receive a contingency fee in respect of that proceeding.

#### Practice Rule 18(2)(c)

##### [1252]-[1253]

A contingency fee is any sum (whether fixed, or calculated either as a percentage of the proceeds or otherwise howsoever) payable only in the event of success in the prosecution or defence of any action, suit or other contentious proceeding.

In force 7 January 1999

#### RULE 8

- (1) A solicitor who is retained or employed to prosecute or defend any action, suit or other contentious proceeding shall not enter into any arrangement to receive a contingency fee in respect of that proceeding, save one permitted under statute or by the common law.
- (2) Paragraph (1) of this rule shall not apply to an arrangement in respect of an action, suit or other contentious proceeding in any country other than England and Wales to the extent that a local lawyer would be permitted to receive a contingency fee in respect of that proceeding.

#### Rule 18 (2)

##### [1254]-[1260]

(c) 'contingency fee' means any sum (whether fixed, or calculated either as a percentage of the proceeds or otherwise howsoever) payable only in the event of success in the prosecution or defence of any action, suit or other contentious proceeding.

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[ST: 277] [ED: 100000] [REL: 96]  
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## Law Society Model Conditional Fee Agreement

For use in personal injury cases, but not clinical negligence

### [1261]–[1270]

This agreement is a binding legal contract between you and your solicitor/s. Before you sign, please read everything carefully.

Words like ‘our disbursements’, ‘basic charges’, ‘win’ and ‘lose’ are explained in condition 3 of the Law Society Conditions which you should also read carefully.

#### Agreement date

[. . . . .]

#### I/We, the solicitor/s

[. . . . .]

#### You, the client

[. . . . .]

What is covered by this agreement

- Your claim against [. . . . .] for damages for personal injury suffered on [. . . . .].
- Any appeal by your opponent.
- Any appeal you make against an interim order during the proceedings.
- Any proceedings you take to enforce a judgment, order or agreement.

#### What is not covered by this agreement

- Any counterclaim against you.
- Any appeal you make against the final judgment order.

#### Paying us

If you win your claim, you pay our basic charges, our disbursements and a success fee. The amount of these is not based on or limited by the damages. You are entitled to seek recovery from your opponent of part or all of our basic charges, our disbursements, a success fee and insurance premium. Please also see conditions 4 and 6.

It may be that your opponent makes a Part 36 offer or payment which you reject and, on our advice, your claim for damages goes ahead to trial where you recover damages that are less than that offer or payment. We will not add our success fee to the basic charges for the work done after we received notice of the offer or payment.

If you receive interim damages, we may require you to pay our disbursements at that point and a reasonable amount for our future disbursements.

If you receive provisional damages, we are entitled to payment of our basic charges our disbursements and success fee at that point.

If you win but on the way lose an interim hearing, you may be required to pay your opponent’s charges of that hearing. Please see conditions 3(h) and 5.

If on the way to winning or losing you win an interim hearing, then we are entitled to payment of our basic charges and disbursements related to that hearing together with a success fee on those charges if you win overall.

If you lose, you pay your opponent’s charges and disbursements. You may be able to take out an insurance policy against this risk. Please also see conditions 3(j) and 5. If you lose, you do not pay our charges but we may require you to pay our disbursements.

If you end this agreement before you win or lose, you pay our basic charges. If you go on to win, you pay a success fee. Please also see condition 7(a).

We may end this agreement before you win or lose. Please also see condition 7(b) for details.

**[1261] Law Society Model Conditional Fee Agreement**

**Basic charges**

These are for work done from now until this agreement ends.

**How we calculate our basic charges**

These are calculated for each hour engaged on your matter [from now until the review date on [. . . . .]. . . . .]. Routine letters and telephone calls will be charged as units of one tenth of an hour. Other letters and telephone calls will be charged on a time basis. The hourly rates are:

- Solicitors with over four years' experience after qualification  
£ [. . . . .]
- Other solicitors and legal executives and other staff of equivalent experience  
£ [. . . . .]
- Trainee solicitors and other staff of equivalent experience  
£ [. . . . .]

[We will review the hourly rate on the review date and on each anniversary of the review date. We will not increase the rate by more than the rise in the Retail Prices Index and will notify you of the increased rate in writing.]

**Success fee**

This is [. . . . .]% of our basic charges

The reasons for calculating the success fee at this level are set out in Schedule 1 to this agreement.

You cannot recover from your opponent the part of the success fee that relates to the cost to us of postponing receipt of our charges and disbursements (as set out at paragraphs (a) and (b) at Schedule 1). This part of the success fee remains payable by you.

**Value added tax (VAT)**

We add VAT, at the rate (now [. . . . .]%) that applies when the work is done, to the total of the basic charges and success fee.

**Law Society Conditions**

The Law Society Conditions are attached because they are part of this agreement. Any amendments or additions to them will apply to you. You should read the conditions carefully and ask us about anything you find unclear.

**Other points**

**Immediately before you signed this agreement, we verbally explained to you the effect of this agreement and in particular the following:**

- (a) the circumstances in which you may be liable to pay our disbursements and charges;
- (b) the circumstances in which you may seek assessment of our charges and disbursements and the procedure for doing so;
- (c) whether we consider that your risk of becoming liable for any costs in these proceedings is insured under an existing contract of insurance;
- (d) other methods of financing those costs, including private funding, Community Legal Service funding, legal expenses insurance, trade union funding;
- (e)
  - (i) In all the circumstances, on the information currently available to us, we believe that a contract of insurance with [. . . . .] is appropriate. Detailed reasons for this are set out in Schedule 2.
  - (ii) In any event, we believe it is desirable for you to insure your opponent's charges and disbursements in case you lose.

Law Society Model Conditional Fee Agreement **[1261]**

(iii) We confirm that we do not have an interest in recommending this particular insurance agreement.

**Signatures**

Signed for the solicitor/s

Signed by the client

I confirm that my solicitor has verbally explained to me the matters in paragraphs (a) to (e) under “Other points” above.

Signed. . . . . (Client)

I specifically confirm that I verbally explained to the client the matters in paragraphs (a) to (e) under “Other points” and confirm the matters at (e) in writing in Schedule 2.

Signed. . . . . (Solicitors)

This agreement complies with the Conditional Fee Agreements Regulations 2000 (SI 2000 No.692).

**Schedule 1**

**The Success Fee**

The success fee is set at [. . . . . ]% of basic charges and cannot be more than 100% of the basic charges.

The percentage reflects the following:

- (a) the fact that if you win we will not be paid our basic charges until the end of the claim;
- (b) our arrangements with you about paying disbursements;
- (c) the fact that if you lose, we will not earn anything;
- (d) our assessment of the risks of your case. These include the following:
- (e) any other appropriate matters.

The matters set out at paragraphs (a) and (b) above together make up [. . . . . ]% of the increase on basic charges. The matters at paragraphs (c), (d) [and (e)] make up [. . . . . ]% of the increase on basic charges. So the total success fee is [. . . . . ]% as stated above.

**Schedule 2**

**The Insurance Policy**

In all the circumstances and on the information currently available to us, we believe, that a contract of insurance with [. . . . . ] is appropriate to cover your opponent’s charges and disbursements in case you lose.

This is because

We are not, however, insurance brokers and cannot give advice on all products which may be available.

**Law Society Conditions**

**1. Our responsibilities**

We must:

- always act in your best interests, subject to our duty to the court;
- explain to you the risks and benefits of taking legal action;
- give you our best advice about whether to accept any offer of settlement;
- give you the best information possible about the likely costs of your claim for damages.

## [1261] Law Society Model Conditional Fee Agreement

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### 2. Your responsibilities

You must:

- give us instructions that allow us to do our work properly;
- not ask us to work in an improper or unreasonable way;
- not deliberately mislead us;
- co-operate with us;
- go to any medical or expert examination or court hearing.

### 3. Explanation of words used

(a) *Advocacy*

Appearing for you at court hearings.

(b) *Basic charges*

Our charges for the legal work we do on your claim for damages.

(c) *Claim*

Your demand for damages for personal injury whether or not court proceedings are issued.

(d) *Counterclaim*

A claim that your opponent makes against you in response to your claim.

(e) *Damages*

Money that you win whether by a court decision or settlement.

(f) *Our disbursements*

Payment we make on your behalf such as:

- court fees;
- experts' fees;
- accident report fees;
- travelling expenses.

(g) *Interim damages*

Money that a court says your opponent must pay or your opponent agrees to pay while waiting for a settlement or the court's final decision.

(h) *Interim hearing*

A court hearing that is not final.

(i) *Lien*

Our right to keep all papers, documents, money or other property held on your behalf until all money due to us is paid. A lien may be applied after this agreement ends.

(j) *Lose*

The court has dismissed your claim or you have stopped it on our advice.

(k) *Part 36 offers or payments*

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Law Society Model Conditional Fee Agreement [1261]

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An offer to settle your claim made in accordance with Part 36 of the Civil Procedure Rules.

(l) *Provisional damages*

Money that a court says your opponent must pay or your opponent agrees to pay, on the basis that you will be able to go back to court at a future date for further damages if:

- you develop a serious disease; or
- your condition deteriorates;  
in a way that has been proved or admitted to be linked to your personal injury claim.

(m) *Success fee*

The percentage of basic charges that we add to your bill if you win your claim for damages and that we will seek to recover from your opponent.

(n) *Win*

Your claim for damages is finally decided in your favour, whether by a court decision or an agreement to pay you damages. 'Finally' means that your opponent:

- is not allowed to appeal against the court decision; or
- has not appealed in time; or
- has lost any appeal.

4. **What happens if you win?**

If you win:

- You are then liable to pay all our basic charges, our disbursements and success fee – please see condition 3(n).
- Normally, you will be entitled to recover part or all of our basic charges, our disbursements and success fee from your opponent.
- If you and your opponent cannot agree the amount, the court will decide how much you can recover. If the amount agreed or allowed by the court does not cover all our basic charges and our disbursements, then you pay the difference.
- You will not be entitled to recover from your opponent the part of the success fee that relates to the cost to us of postponing receipt of our charges and our disbursements. This remains payable by you.
- You agree that after winning, the reasons for setting the success fee at the amount stated may be disclosed:
  - (i) to the court and any other person required by the court;
  - (ii) to your opponent in order to gain his or her agreement to pay the success fee.
- If the court carries out an assessment and disallows any of the success fee percentage because it is unreasonable in view of what we knew or should have known when it was agreed, then that amount ceases to be payable unless the court is satisfied that it should continue to be payable.
- If we agree with your opponent that the success fee is to be paid at a lower percentage than is set out in this agreement, then the success fee

## [1261] Law Society Model Conditional Fee Agreement

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percentage will be reduced accordingly unless the court is satisfied that the full amount is payable.

- It may happen that your opponent makes an offer that includes payment of our basic charges and a success fee. If so, unless we consent, you agree not to tell us to accept the offer if it includes payment of the success fee at a lower rate than is set out in this agreement.
- If your opponent is receiving Community Legal Service funding, we are unlikely to get any money from him or her. So if this happens, you have to pay us our basic charges, disbursements and success fee.

You remain ultimately responsible for paying our success fee.

You agree to pay into a designated account any cheque received by you or by us from your opponent and made payable to you. Out of the money, you agree to let us take the balance of the basic charges; success fee; insurance premium; our remaining disbursements; and VAT. You take the rest.

We are allowed to keep any interest your opponent pays on the charges.

Payment for advocacy is explained in condition 6.

*If your opponent fails to pay*

If your opponent does not pay any damages or charges owed to you, we have the right to take recovery action in your name to enforce a judgment, order or agreement. The charges of this action become part of the basic charges.

### 5. What happens if you lose?

If you lose, you do not have to pay any of our basic charges or success fee. You do have to pay:

- us for our disbursements;
- your opponent's legal charges and disbursements.

If you are insured against payment of these amounts by your insurance policy, we will make a claim on your behalf and receive any resulting payment in your name. We will give you a statement of account for all money received and paid out.

If your opponent pays the charges of any hearing, they belong to us.

Payment for advocacy is dealt with in condition 6.

### 6. Payment for advocacy

The cost of advocacy and any other work by us, or by any solicitor agent on our behalf, forms part of our basic charges. We shall discuss with you the identity of any barrister instructed, and the arrangements made for payment.

*Barristers who have a conditional fee agreement with us*

If you win, you are normally entitled to recover their fee and success fee from your opponent. The barrister's success fee is shown in the separate conditional fee agreement we make with the barrister. We will discuss the barrister's success fee with you before we instruct him or her. If you lose, you pay the barrister nothing.

*Barristers who do not have a conditional fee agreement with us*

If you win, then you will normally be entitled to recover all or part of their fee from your opponent. If you lose, then you must pay their fee.

### 7. What happens when this agreement ends before your claim for damages ends?

#### (a) *Paying us if you end this agreement*

You can end the agreement at any time. We then have the right to decide whether you must:

- pay our basic charges and our disbursements including barristers' fees when we ask for them; or

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Law Society Model Conditional Fee Agreement [1261]

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- pay our basic charges, and our disbursements including barristers' fees and success fees if you go on to win your claim for damages.
- (b) *Paying us if we end this agreement*
- (i) We can end this agreement if you do not keep to your responsibilities in condition 2. We then have the right to decide whether you must:
    - pay our basic charges and our disbursements including barristers' fees when we ask for them; or
    - pay our basic charges and our disbursements including barristers' fees and success fees if you go on to win your claim for damages.
  - (ii) We can end this agreement if we believe you are unlikely to win. If this happens, you will only have to pay our disbursements. These will include barristers' fees if the barrister does not have a conditional fee agreement with us.
  - (iii) We can end this agreement if you reject our opinion about making a settlement with your opponent. You must then:
    - pay the basic charges and our disbursements, including barristers' fees;
    - pay the success fee if you go on to win your claim for damages.

If you ask us to get a second opinion from a specialist solicitor outside our firm, we will do so. You pay the cost of a second opinion.

- (iv) We can end this agreement if you do not pay your insurance premium when asked to do so.
- (c) *Death*

This agreement automatically ends if you die before your claim for damages is concluded. We will be entitled to recover our basic charges up to the date of your death from your estate.

If your personal representatives wish to continue your claim for damages, we may offer them a new conditional fee agreement, as long as they agree to pay the success fee on our basic charges from the beginning of the agreement with you.

## 8. What happens after this agreement ends

After this agreement ends, we will apply to have our name removed from the record of any court proceedings in which we are acting unless you have another form of funding and ask us to work for you.

We have the right to preserve our lien unless another solicitor working for you undertakes to pay us what we are owed including a success fee if you win.

### Notes for Accident Line Protect cases

- For Accident Line Protect cases, you need to annex the following clause to the agreement  
'Accident Line Protect insurance (ALP)  
Accident Line Protect is an insurance policy only made available to you by solicitors who have joined the Accident Line Protect scheme.

**[1261]** Law Society Model Conditional Fee Agreement

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You agree to pay a premium of £[. . . . .] for Accident Line Protect Insurance when you sign this agreement. We undertake to send this to the broker on your behalf. If you lose after proceedings have been issued, Accident Line Protect will cover our disbursements and your opponent’s charges and disbursements. It will not cover fees to your barristers or advocates. The maximum cover is £100,000.

If this agreement ends before your claim for damages ends, Accident Line Protect ends automatically at the same time.’

## Checklist for use with Law Society Model CFA

### [1271]–[1290]

The following is a non-exhaustive list of issues which should be considered before signing the conditional fee agreement.

HAVE YOU. . . . .

1. TAKEN into account the overriding objective and proportionality in considering the potential net benefit of the case to your client?
2. CONSIDERED whether the case could be allocated to the Small Claims Track and the costs implications if that occurred.
3. CHECKED that you have the correct model agreement for this type of case?
4. UNDERTAKEN a thorough risk assessment.
5. APPLIED your risk assessment to your success fee, taking account of:
  - the prospects of success/failure;
  - payments on account/financial subsidy;
  - the risk that losing cases often have higher costs than winning ones and when setting your success fee;
  - considered the element of the success fee relating to financial subsidy separately;
  - recorded your reasons in writing and provided a copy to your client.
6. CONSIDERED the possibility of achieving success on liability but failure on enforceability?
7. DISCUSSED with your client whether a barrister will be used? If so, have you discussed:
  - whether the barrister will be instructed on a conditional fee agreement?
  - whether the conditional fee agreement with the barrister will be on the same terms as the conditional fee agreement with the client eg success fee
8. EXPLAINED to your client the information required by the Conditional Fee Regulations:
  - the circumstances which will make them liable to pay your costs or disbursements and discussed how the client will fund these amounts;
  - when they can seek assessment of your costs and the procedure for doing so;
  - the circumstances which will make them liable to pay the costs of any other party;
  - whether their risk of becoming liable for costs is insured under an existing contract of insurance;
  - other methods of financing costs;
  - whether you believe a particular contract of insurance is appropriate (This should be confirmed in writing);
  - the requirement of their consent to disclose to the court or opponent at the end of the case the reasons for setting the success fee.

**[1271]** Checklist for use with Law Society Model CFA

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9. CHECKED whether your client's proposed insurance will meet the other side's costs, if a Part 36 offer or payment is not beaten?
10. THOUGHT through the different clauses which can be used regarding Part 36 offers and payments? (There are two possible options if ALP insurance is used. Other insurers may have different approaches. Check the requirements of your AEI – they may specify the approach you must take).
11. EXPLAINED to your client the information on costs required by the Solicitors' Costs Information and Client Care Code 1999?  
Remember the Code imposes a duty on you to:
  - give to your client the best costs information possible – paragraphs 4 (a) and (c);
  - keep your client updated about costs as the matter progresses – paragraph 6.
12. EXPLAINED to your client that the agreement prevents the client from instructing you to accept an offer to settle which does not provide for your full success fee.
13. MADE SURE the agreement:
  - specifies the proceedings to which it relates;
  - will be signed by you and your client;
  - specifies the reasons for setting the success fee, and specifies how much of the success fee, if any, relates to the cost of financial subsidy;
  - deals with appropriate funding methods and the insurance position.

**APIL/PIBA 5**  
**Conditional Fee Agreement**

**INDEX TO PARAGRAPHS**

**[1290.1]**

The nature of the agreement:

- (1) The parties
- (2) The claim
- (3) The issues covered
- (4) Enforceability
- (5) Papers provided to counsel
- (6) client's consent
- (7) Binding counsel

Obligations:  
Of counsel

- (8) To act diligently
- (9) Inappropriate instructions
- (10) Obligations of the solicitor

Termination

- (11) Termination of the agreement by counsel
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Counsel's Fees:

- (16) Counsel's normal fees
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- (19) Success
- (20) Part 36 offers and payments
- (21) Failure
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Counsel's entitlement to fees on termination of the agreement:

- (23) Fees on termination
- (24) Challenge to fees
- (25) Return of work

Assessment and payment of fees:

- (26) Costs Assessment
- (27) Solicitors obligation to pay
- (28) Interest
- (29) Challenge to Success Fee

Disclosing the reasons for the success fee

- (30) Disclosing the reasons for the success fee

**[1290.1]** APIL/PIBA 5

Counsel's fees in the event of assessment or agreement:

- (31) Reduction on assessment
- (32) Agreement of fees

NOTES: These paragraphs need to be completed by counsel or counsel's clerk: 1; 2; 3; 10(10); 16; 17(1), (2) & (3); 25(1).

**CONDITIONAL FEE AGREEMENT  
BETWEEN  
SOLICITORS AND COUNSEL**

**The Nature of the Agreement**

1. In this agreement:

'Counsel means: \_\_\_\_\_

and any other counsel either from Chambers or recommended by counsel in accordance with clause 25 who signs this agreement at any time at the solicitors request;

'the solicitor' means the firm:

Messrs: \_\_\_\_\_

'the client means: \_\_\_\_\_

[acting by his Litigation Friend \_\_\_\_\_]

'Chambers' means members of chambers at \_\_\_\_\_

2. This agreement forms the basis on which instructions are accepted by counsel from the solicitor to act on a conditional fee basis for the client in his/her claim against: \_\_\_\_\_ ('the Opponent(s)') for damages for personal injuries suffered on: \_\_\_\_\_ until

- (1) the claim is won, lost or otherwise concluded or
- (2) this agreement is terminated.

3. This agreement relates to

- (1) issues of jurisdiction;
- (2) issues of breach of duty;
- (3) issues of causation;
- (4) issues of limitation
- (5) issues of damages;
- (6) any appeal by the client's opponent(s);
- (7) any appeal by the client against an interim order;
- (8) any appeal by the client advised by counsel;
- (9) any proceedings to enforce a judgment or order.

It does not cover:

- (10) any other appeal by the client;
- (11) any counterclaim or defence by way of set-off;
- (12) any part 20 claim
- (13) part only of the proceedings unless specifically incorporated in this agreement.

[NOTE: delete those parts of the proceedings to which the agreement does NOT relate]

4. This agreement is not a contract enforceable at law. The relationship of counsel and solicitor shall be governed by the Terms of Work under which barristers offer their services to solicitors and the Withdrawal of Credit Scheme as authorised by the

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CFA between solicitors and counsel [1290.1]

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General Council of the Bar as from time to time amended and set out in the Code of Conduct of the Bar of England and Wales, save that where such terms of work are inconsistent with the terms of this agreement the latter shall prevail.

5. Counsel has been provided with:

- (1) A copy of the conditional fee agreement between the solicitor and the client and the Law Society's Conditions as they apply to the claim;
- (2) written confirmation that 'after the event' or other similar insurance is in place, or a written explanation why it is not; and
- (3) where more than one defendant is sued, copies of correspondence between the solicitor and the 'after the event' insurers clarifying whether and when defendants costs are to be covered if the claimant does not succeed or win against all of the defendants; and
- (4) all relevant papers and risk assessment material, including all advice from experts and other solicitors or barristers to the client or any Litigation Friend in respect of the claim, which is currently available to the solicitor.
- (5) Any offers of settlement already made by the client or the defendant.

6. The solicitor confirms that:

- (1) he/she has complied with Regulation 4 of the Conditional Fee Agreements Regulations 2000 no 692 and the client has confirmed by signing the solicitor/client agreement that Regulation 4 has been complied with; and
- (2) the client or any Litigation Friend has consented to the terms and conditions set out in this agreement insofar as they relate to the client.
- (3) Either:
  - (a) there are no other methods of financing costs available to the client, or
  - (b) Notwithstanding there are other methods of financing costs available to the client, namely. . . . ., the client has reasonably decided to fund this claim with conditional fees.

7. Counsel is not bound to act on a conditional fee basis until he/she has signed this agreement.

**Obligations of Counsel**

8. Counsel agrees to act diligently on all proper instructions from the solicitor subject to paragraph 9 hereof.

9. Counsel is not bound to accept instructions:

- (1) to appear at an interlocutory hearing where it would be reasonable
  - (a) to assume that counsel's fees would not be allowed on assessment or
  - (b) to instruct a barrister of less experience and seniority, provided that counsel has first used his/her best endeavours to ensure that an appropriate barrister will act for the client on the same terms as this agreement;
- (2) to draft documents or advise if a barrister of similar seniority would not ordinarily be instructed so to do if not instructed on a conditional fee basis;
- (3) outside the scope of this agreement.

**Obligations of the Solicitor**

10. The solicitor agrees:

- (1) promptly to supply a copy of this agreement to the client or any Litigation Friend;
- (2) to comply with all the requirements of the CPR, the practice direction about costs supplementing parts 43 to 48 of the CPR (PD Costs), the relevant

**[1290.1]** CFA between solicitors and counsel

- pre-action protocol and any court order relating to conditional fee agreements and in particular promptly to notify the Court and the opponent of the existence and any subsequent variation of the CFA with the client and whether he / she has taken out an insurance policy or made an arrangement with a membership organisation and of the fact that additional liabilities are being claimed from the opponent.
- (3) promptly to apply for relief from sanction pursuant to CPR part 3.8 if any default under part 44.3B(1)(c) or (d) occurs and to notify counsel of any such default.
  - (4) to act diligently in all dealings with counsel and the prosecution of the claim;
  - (5) to consult counsel on the need for advice and action following:
    - (a) the service of statements of case and if possible before the allocation decision; and
    - (b) the exchange of factual and expert evidence;
  - (6) to deliver within a reasonable time papers reasonably requested by counsel for consideration;
  - (7) promptly to bring to counsel's attention:
    - (a) any priority or equivalent report to insurers;
    - (b) any Part 36 or other offer to settle;
    - (c) any Part 36 payment into Court;
    - (d) any evidence information or communication which may materially affect the merits of any issue in the case;
    - (e) any other factor coming to the solicitor's attention which may affect counsel's entitlement to success fees whether before or after the termination of this agreement.
  - (8) promptly to communicate to the client any advice by counsel:
    - (a) to make, accept or reject any Part 36 or other offer;
    - (b) to accept or reject any Part 36 payment in;
    - (c) to incur, or not incur, expenditure in obtaining evidence or preparing the case;
    - (d) to instruct Leading counsel or a more senior or specialised barrister;
    - (e) that the case is likely to be lost;
    - (f) that damages and costs recoverable on success make it unreasonable or uneconomic for the action to proceed;
  - (9) promptly to inform counsel's clerk of any listing for trial;
  - (10) to deliver the brief for trial not less than . . . . . weeks/days before the trial;
  - (11) if any summary assessment of costs takes place in the absence of counsel, to submit to the court a copy of counsel's risk assessment and make representations on counsel's behalf in relation to his/her fees;
  - (12) to inform counsel in writing within 2 days of any reduction of counsel's fees on summary assessment in the absence of counsel and of any directions given under PDCosts 20.3(1) or alternatively to make application for such directions on counsel's behalf;
  - (13) where points of dispute are served pursuant to CPR part 47.9 seeking a reduction in any percentage increase charged by counsel on his fees, to give the client the written explanation required by PDCosts 20.5 on counsel's behalf;
  - (14) where more than one defendant is sued, the solicitor will write to the 'after the event' insurers clarifying whether and when defendants costs are to be covered if the claimant does not succeed or win against all of the defendants, and send that correspondence to counsel.
  - (15) When drawing up a costs bill at any stage of the case to include in it a claim for interest on counsel's fees.

**Termination of the Agreement By Counsel**

11. Counsel may terminate the agreement if :

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CFA between solicitors and counsel [1290.1]

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- (1) Counsel discovers that the solicitor is in breach of any obligation in paragraph 10 hereof;
- (2) the solicitor client or any Litigation Friend rejects counsel's advice in any respect set out in paragraph 10(8) hereof;
- (3) Counsel is informed or discovers the existence of any set-off or counter-claim which materially affects the likelihood of success and/or the amount of financial recovery in the event of success;
- (4) Counsel is informed or discovers the existence of information which has been falsified or knowingly withheld by the solicitor client or any Litigation Friend, of which counsel was not aware and which counsel could not reasonably have anticipated, which materially affects the merits of any substantial issue in the case;
- (5) Counsel is required to cease to act by the Code of Conduct of the Bar of England and Wales or counsel's professional conduct is being impugned;

provided that counsel may not terminate the agreement if so to do would be a breach of that Code, and notice of any termination must be communicated promptly in writing to the solicitor.

**Termination of the Agreement by the Solicitor**

12. The solicitor may terminate the agreement at any time on the instructions of the client or any Litigation Friend.

**Automatic Termination of the Agreement**

13. This agreement shall automatically terminate if:
- (1) Counsel accepts a full-time judicial appointment;
  - (2) Counsel retires from practice;
  - (3) the solicitor's agreement with the client is terminated before the conclusion of the case;
  - (4) Legal Services Commission funding is granted to the client;
  - (5) the client dies;
  - (6) The court makes a Group Litigation Order covering this claim.

**Client Becoming Under a Disability**

14. If the client at any time becomes under a disability then the solicitor will:
- (1) consent to a novation of his Conditional Fee Agreement with the client to the Litigation Friend and
  - (2) where appropriate, apply to the Court to obtain its consent to acting under a conditional fee agreement with the Litigation Friend.

Thereafter, the Litigation Friend shall, for the purposes of this agreement, be treated as if he/she was and has always been the client.

**Counsel Taking Silk**

15. If counsel becomes Queen's Counsel during the course of the agreement then either party may terminate it provided he/she does so promptly in writing.

**Counsel's Normal Fees**

- (1) Counsel's fees upon which a success fee will be calculated (the normal fees) will be as follows:-

**[1290.1]** CFA between solicitors and counsel

- (a) Advisory work and drafting  
In accordance with counsel's hourly rate obtaining for such work in this field currently £. . . . . per hour.
- (b) Court appearances
  - (i) Brief fee
    - (a) Trial  
For a trial whose estimated duration is up to 2 days (including — hours of preparation) £. . . . ., 3 to 5 days (including — hours of preparation) £ . . . . ., 5 to 8 days (including — hours of preparation) £. . . . . 8 to 12 days (including — hours of preparation), £. . . . ., and 13 to 20 days (including — — hours of preparation) £ . . . . .
    - (b) Interlocutory hearings  
For an interlocutory hearing whose estimated duration is up to 1 hour (including — hours of preparation), £ . . . . ., 1 hour to 1/2 day (including — hours of preparation) £. . . . ., 1/2 day to 1 day (including hrs of preparation) £. . . . ., over 1 day (including — hours of preparation) will be charged as if it was a trial.
  - (ii) Refreshers  
In accordance with counsel's daily rate obtaining for such work in this field, currently £. . . . ., per day.
  - (iii) Renegotiating counsel's fees
    - (a) To the extent that the hours of preparation set out above are reasonably exceeded then counsel's hourly rate will apply to each additional hour of preparation.
    - (b) If the case is settled or goes short counsel will consider the solicitor's reasonable requests to reduce his/her brief fees set out above.
- (2) The normal fees will be subject to review with effect from each successive anniversary of the date of this agreement but counsel will not increase the normal fees by more than any increase in the rate of inflation measured by the Retail Prices Index.

**Counsel's Success Fee**

- (1) The rate of counsel's success fee will be . . . . . % of counsel's normal fees;
- (2) The reasons, briefly stated, for counsel's success fee are that at the time of entry into this agreement:
  - (i) the prospects of success are estimated by counsel as . . . . . (X)% as more fully set out in counsel's risk assessment, and a percentage increase of . . . . . (Y)% reflects those prospects
  - (ii) the length of postponement of the payment of counsel's fees and expenses is estimated at . . . . . year, and a further increase of . . . . . (Z)% relates to that postponement  
[Note: the success fee at paragraph 17(1) must be the sum of Y% and Z%]
- (3) The reasons for counsel's success fee are more fully set out in counsel's risk assessment which is\* / is not\* (\*please delete as appropriate) attached to this agreement.

## CFA between solicitors and counsel [1290.1]

**Counsel's Expenses**

18. If a hearing, conference or view takes place more than 25 miles from counsel's chambers the solicitor shall pay counsel's reasonable travel and accommodation expenses which shall:

- (1) appear separately on counsel's fee note;
- (2) attract no success fee and
- (3) subject to paragraph 21 be payable on the conclusion of the claim or earlier termination of this agreement.

**Counsel's Entitlement to Fees — Winning and Losing  
[if the Agreement is not Terminated]**

- (1) 'Success' means the same as 'win' in the Conditional Fee Agreement between the solicitor and the client.
  - (2) Subject to paragraphs 20, 23 & 26 hereof, in the event of success the solicitor will pay counsel his/her normal and success fees.
  - (3) If the client is successful at an interim hearing counsel may apply for summary assessment of solicitors basics costs and counsels normal fees.
20. If the amount of damages and interest awarded by a court is less than a Part 36 payment into Court or effective Part 36 offer then:
- (1) if counsel advised its rejection he/she is entitled to normal and success fees for work up to receipt of the notice of Part 36 payment into Court or offer but only normal fees for subsequent work;
  - (2) if counsel advised its acceptance he/she is entitled to normal and success fees for all work done.
21. Subject to paragraph 22(1) hereof, if the case is lost or on counsel's advice ends without success then counsel is not entitled to any fees or expenses.

**Errors and Indemnity for Fees**

- (1) If, because of a breach by the solicitor but not counsel of his/her duty to the client, the client's claim is dismissed or struck out:
  - (a) for non compliance with an interlocutory order; or
  - (b) for want of prosecution, or
  - (c) by rule of court or the Civil Procedure Rules; or becomes unenforceable against the MIB for breach of the terms of the Uninsured Drivers Agreement:  
the solicitor shall (subject to sub paragraphs (3) — (6) hereof) pay counsel such normal fees as would have been recoverable under this agreement.
- (2) If, because of a breach by counsel but not the solicitor of his/her duty to the client, the client's claim is dismissed or struck out:
  - (a) for non compliance with an interlocutory order; or
  - (b) for want of prosecution, or
  - (c) by rule of court or the Civil Procedure Rules  
counsel shall (subject to sub paragraphs (3) -(6) hereof) pay the solicitor such basic costs as would have been recoverable from the client under the solicitor's agreement with the client.
- (3) If, because of non-compliance by the solicitor but not by counsel of the obligations under sub-paragraphs (2), (3), (11), (12) or (13) of paragraph 10 above, counsel's success fee is not payable by the Opponent or the client then the solicitor shall (subject to sub-paragraphs (5) to (7) hereof) pay counsel such success fees as would have been recoverable under this agreement.
- (4) No payment shall be made under sub paragraph (1), (2) or (3) hereof in respect of any breach by the solicitor or counsel which would not give rise to a claim for damages if an action were brought by the client;

**[1290.1]** CFA between solicitors and counsel**Adjudication on disagreement**

- (5) In the event of any disagreement as to whether there has been an actionable breach by either the solicitor or counsel, or as to the amount payable under sub paragraph (1), (2) or (3) hereof, that disagreement shall be referred to adjudication by a panel consisting of a Barrister nominated by PIBA and a solicitor nominated by APIL who shall be requested to resolve the issue on written representations and on the basis of a procedure laid down by agreement between PIBA and APIL. The costs of such adjudication shall, unless otherwise ordered by the panel, be met by the unsuccessful party.
- (6) In the event of a panel being appointed pursuant to sub paragraph (5) hereof:
  - (a) if that panel considers, after initial consideration of the disagreement, that there is a real risk that they may not be able to reach a unanimous decision, then the panel shall request APIL (where it is alleged there has been an actionable breach by the solicitor) or PIBA (where it is alleged that there has been an actionable breach by counsel) to nominate a third member of the panel;
  - (b) that panel shall be entitled if it considers it reasonably necessary, to appoint a qualified costs draftsman, to be nominated by the President for the time being of the Law Society, to assist the panel;
  - (c) the solicitor or counsel alleged to be in breach of duty shall be entitled to argue that, on the basis of information reasonably available to both solicitor and barrister, the claim would not have succeeded in any event. The panel shall resolve such issue on the balance of probabilities, and if satisfied that the claim would have been lost in any event shall not make any order for payment of fees or costs.

**Cap**

- (7) the amount payable in respect of any claim under sub paragraph (1) or (2) or (3) shall be limited to a maximum of £25,000.

**Counsel's Entitlement to Fees on Termination of the Agreement**

- (1) Termination by counsel If counsel terminates the agreement under paragraph 11 then, subject to sub-paragraphs (b) and (c) hereof, counsel may elect either:
  - (a) to receive payment of normal fees without a success fee which the solicitor shall pay not later than three months after termination: ('Option A'), or
  - (b) to await the outcome of the case and receive payment of normal and success fees if it ends in success: ('Option B').
- (2) If counsel terminates the agreement because the solicitor, client or Litigation Friend rejects advice under paragraph 10(8)(e) hereof counsel is not entitled to any fee.
- (3) If counsel terminates the agreement because the solicitor, client or Litigation Friend rejects advice under paragraph 10(8)(f) counsel is entitled only to 'Option B'.
- (4) Termination by the solicitor If the solicitor terminates the agreement under paragraph 12, counsel is entitled to elect between 'Option A' and 'Option B'.
- (5) Automatic Termination and counsel taking silk
  - (a) If the agreement terminates under paragraph 13(1) (judicial appointment) or 13(2) (retirement) or 15 (counsel taking silk) counsel is entitled only to 'Option B'.
  - (b) If the agreement terminates under paragraph 13(3) (termination of the solicitor/client agreement) then counsel is entitled to elect between 'Option A' and 'Option B' save that:

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CFA between solicitors and counsel [1290.1]

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- (i) if the solicitor has ended the solicitor/client agreement because he considers that the client is likely to lose and at the time of that termination counsel considers that the client is likely to win, and the client goes on to win, the solicitor will pay counsel's normal and success fees;
  - (ii) if the solicitor has ended the solicitor/client agreement because the client has rejected the advice of the solicitor or counsel about making a settlement the solicitor will pay counsel's normal fee in any event and, if the client goes on to win the case, will also pay counsel's success fee.
  - (c) If the agreement terminates under paragraph 13(4) (Legal Services Commission) or paragraph 13(5) (death of client) or paragraph 13 (6) (group litigation order) counsel is entitled only to 'Option B'.
24. If the client or any Litigation Friend wishes to challenge:
- (a) the entitlement to fees of counsel or the level of such fees following termination of the agreement or
  - (b) any refusal by counsel after signing this agreement to accept instructions the solicitor must make such challenge in accordance with the provisions of paragraphs 14 and 15 of the Terms of Work upon which barristers offer their services to solicitors (Annexe D to the Code of Conduct of the Bar of England and Wales).

**Return of Work**

25. If counsel in accordance with the Bar's Code of Conduct is obliged to return any brief or instructions in this case to another barrister, then:
- (1) Counsel will use his/her best endeavours to ensure that an appropriate barrister agrees to act for the client on the same terms as this agreement; if counsel is unable to secure an appropriate replacement barrister to act for the client on the same terms as this agreement counsel will
    - (a) \*be responsible for any additional barristers' fees reasonably incurred by the solicitor or client and shall pay the additional fees to the solicitor promptly upon request and in any event within 3 months of such a request by the solicitor
    - (b) \*not be responsible for any additional fee incurred by the solicitor or client.
  - (2) Subject to paragraph 25(3) hereof, if the case ends in success counsel's fees for work done shall be due and paid on the conditional fee basis contained in this agreement whether or not the replacement barrister acts on a conditional fee basis; but
  - (3) if the solicitor or client rejects any advice by the replacement barrister of the type described in paragraph 10(8) hereof, the solicitor shall immediately notify counsel whose fees shall be paid as set out in paragraph 23(1) hereof.

[NOTE: delete 25(1)(a) or 25(1)(b)]

**Assessment and Payment of Costs / Fees**

- (1) If:
  - (a) a costs order is anticipated or made in favour of the client at an interlocutory hearing and the costs are summarily assessed at the hearing; or
  - (b) the costs of an interlocutory hearing are agreed between the parties in favour of the client; or

**[1290.1]** CFA between solicitors and counsel

- (c) an interlocutory order or agreement for costs to be assessed in detail and paid forthwith is made in favour of the client:
    - then
      - (i) the solicitor will include in the statement of costs a full claim for counsel's normal fees; and
      - (ii) the solicitor will promptly conclude by agreement or assessment the question of such costs; and
      - (iii) within one month of receipt of such costs the solicitor will pay to counsel the amount recovered in respect of his/her fees, such sum to be set off against counsel's entitlement to normal fees by virtue of this agreement.
  - (1) The amounts of fees and expenses payable to counsel under this agreement
    - (a) are not limited by reference to the damages which may be recovered on behalf of the client and
    - (b) are payable whether or not the solicitor is or will be paid by the client or opponent.
  - (2) Upon success the solicitor will promptly conclude by agreement or assessment the question of costs and within one month after receipt of such costs the solicitor will pay to counsel the full sum due under this agreement.
28. The solicitor will use his best endeavours to recover interest on costs from any party ordered to pay costs to the client and shall pay counsel the share of such interest that has accrued on counsel's outstanding fees.
- (1) The solicitor will inform counsel's clerk in good time of any challenge made to his success fee and of the date, place and time of any detailed costs assessment the client or opponent has taken out pursuant to the Civil Procedure Rules and unless counsel is present or represented at the assessment hearing will place counsel's risk assessment, relevant details and any written representations before the assessing judge and argue counsel's case for his/her success fee.
  - (2) If counsel's fees are reduced on any assessment then:
    - (a) the solicitor will inform counsel's clerk within seven days and confer with counsel whether to apply under Regulation 3(2)(b) of the CFA Regulations 2000 for an order that the client should pay the success fee and make such application on counsel's behalf;
    - (b) subject to any appeal, counsel will accept such fees as are allowed on that assessment and will repay forthwith to the solicitor any excess previously paid.
30. Disclosing the reasons for the success fee
- (1) If
    - (a) a success fee becomes payable as a result of the client's claim and
    - (b) any fees subject to the increase provided for by paragraph 17 (1) hereof are assessed and
    - (c) Counsel, the solicitor or the client is required by the court to disclose to the court or any other person the reasons for setting such increase as the level stated in this agreement,  
he / she may do so.
31. Counsel's fees in the event of assessment or agreement If any fees subject to the said percentage increase are assessed and any amount of that increase is disallowed on assessment on the ground that the level at which the increase was set was unreasonable in view of the facts which were or should have been known to counsel at the time it was set, such amount ceases to be payable under this agreement unless the court is satisfied that it should continue to be so payable.
32. If the Opponent offers to pay the client's legal fees at a lower sum than is due under this agreement then the solicitor:

CFA between solicitors and counsel [1290.1]

- (a) will calculate the proposed pro-rata reductions of the normal and success fees of both solicitor and counsel, and
- (b) inform counsel of the offer and the calculations supporting the proposed pro-rata reductions referred to in paragraph (a) above, and
- (c) will not accept the offer without counsel's express consent.

If such an agreement is reached on fees, then counsel's fees shall be limited to the agreed sum unless the court orders otherwise.

Dated: \_\_\_\_\_

Signed by counsel \_\_\_\_\_

or by his/her clerk [with counsel's authority] \_\_\_\_\_

\*[ Additional interlocutory counsel \_\_\_\_\_]

\*[ Additional interlocutory counsel \_\_\_\_\_]

\*see paragraph 1

Signed by : \_\_\_\_\_

Solicitor/employee in Messrs: \_\_\_\_\_

The solicitors firm acting for the client:

By signing and today returning to counsel the last page of this agreement by fax the solicitor agrees to instruct counsel under the terms of this agreement and undertakes to furnish counsel within 14 days of today with hard copies of the signed agreement together with any documents under paragraph 5 of this agreement which are not already in counsel's possession.

0012

[ST: 289] [ED: 100000] [REL: 96]  
XPP 8.4C.1 SC\_00MDD nllp BCS

**Composed:** Fri Sep 21 16:27:55 EDT 2012

**VER:** [SC\_00MDD-Local:14 Feb 12 09:43][MX-SECNDARY: 16 Aug 12 07:51][TT: 19 Jan 11 08:07 loc=gbr unit=bcs\_binder\_01\_e\_0020]

**0**

APIL/PIBA 6  
Conditional Fee Agreement

CONDITIONAL FEE AGREEMENT  
BETWEEN  
SOLICITORS AND COUNSEL

[1291]-[1300]

This agreement forms the basis on which instructions are accepted by counsel from the solicitor to act under a conditional fee agreement and incorporates the standard terms agreed between APIL and PIBA on 31.10.05, which is available on both the APIL and PIBA websites and is incorporated in, but not annexed to this agreement. \*Paragraphs . . . of the standard terms and conditions have been amended as shown and underlined on the copy annexed hereto.

This agreement is not a contract enforceable at law. The relationship of counsel and solicitor shall be governed by the Terms of Work under which barristers offer their services to solicitors and the Withdrawal of Credit Scheme as authorised by the General Council of the Bar as from time to time amended and set out in the Code of Conduct of the Bar of England and Wales, save that where such terms of work are inconsistent with the terms of this agreement the latter shall prevail.

Csl's Ref: . . . . . Sol's Ref . . . . .

In this agreement "Counsel" means: \_\_\_\_\_ and any other counsel either from Chambers or recommended by counsel in accordance with clause 20 who signs this agreement at any time at the solicitor's request. "The solicitor" means the firm: \_\_\_\_\_ .

"The client" means: \_\_\_\_\_

[\*acting by his/her Litigation Friend. \_\_\_\_\_]

"Chambers" means members of chambers at \_\_\_\_\_

The solicitor provided Counsel with instructions, see copy attached, date stamped \_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_ and the documents listed there.

What is covered by this agreement

- The client's claim for damages for personal injuries against \_\_\_\_\_ suffered on \_\_\_\_\_ until the claim is won, lost or otherwise concluded, or this agreement is terminated,\* or part only of proceedings as set out below. *[If either the name of the opponent or the date of the incident are unclear then set out here as much detail as possible to give sufficient information for the client and solicitor to understand the basis of the claim pursued.]*
- Part only of proceedings, specifically: \_\_\_\_\_;
- Any appeal by the opponent(s);
- Any appeal the client makes against an interim order advised by Counsel;
- Negotiations about and/or a court assessment of the costs of this claim.

What is not covered by this agreement

- Any Part 20 claim against the client;
- Any appeal the client makes against the final judgment order;
- Any application under any award of provisional damages that might be obtained in these proceedings or to vary any order for periodical payments that might be obtained in the proceedings.

[NOTE: delete those parts of the proceedings to which the agreement relates or does not relate as appropriate]

**[1291]** APIL/PIBA 6

The case is likely to be allocated to the \*multi-track \*fast track and damages are likely to be in excess of \*£500,000\* £250,000, disregarding any possible reduction for contributory negligence.

**DELIVERY OF BRIEF FOR TRIAL:** The solicitor agrees to deliver the brief for trial of any issue including the assessment of damages not less than . . . . . weeks\*days before the date fixed for hearing.

COUNSEL'S NORMAL FEES are as follows:

Advisory work and drafting; in accordance with counsel's hourly rate obtaining for such work in this field currently: (hourly rate) £100.00  
Court appearances:- [insert hourly rate]

**Brief fees** for a trial (allowing 5 hours per day in court) whose duration and hours of preparation are estimated as follows:

<u>Time estimate for trial</u>	<u>Hours of Preparation</u>	<u>Estimated Fee</u>
Up to 2 days	6	£1,600.00
3 to 5 days	12	£3,200.00
6 to 8 days	18	£5,050.00
9 to 12 days	24	£7,650.00
13 to 20 days	30	£11,400.00

**Brief fees** for interlocutory hearings whose duration and hours of preparation are estimated as follows:

<u>Estimated duration</u>	<u>Hours of preparation</u>	<u>Estimated fee</u>
Up to one hour	2	£300.00
One hour to half a day	3	£450.00
Half a day to one day	4	£650.00

Over one day will be charged as if it were a trial.

**Refreshers**, estimated at 5 hours in court at counsel's hourly rate currently obtaining for such work in this field: £500.00

**Renegotiating Counsel's fees:** to the extent that the hours of preparation set out above are reasonably exceeded then counsel's hourly rate will apply to each additional hour of preparation. If the case is settled or goes short, counsel will consider the solicitor's reasonable requests to reduce his/her brief fee set out above.

<b>Counsels Success Fees:</b>			<b>Case Concludes:</b>		
		at trial:	14 or 21 days before date fixed for trial	more than 14 or 21 days before date fixed for trial	Applicable row marked with a tick:
<b>CPR</b>	<b>Track</b>	<b>%</b>	<b>%</b>	<b>%</b>	
<b>Road Traffic Accident Claims (for accident after 6.10.03)</b>					
45.17	Multi Track:	100	75	12.5	
	Fast Tack:	100	50	12.5	

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45.18(2); 45.19 (over £500,000)		100	75	More than 20 or less than 7.5	
<b>Employers Liability Claims (for injury sustained after 1.10.04)</b>					
45.21	Multi Track:	100	75	25	
	Fast Tack:	100	50	25	
45.22 (over £ 500, 000)		100	75	More than 40 or less than 15	
<b>Employers Liability Disease Claims (when letter of claim sent after 1.10.05)</b>					
45.23 (3)(a) Asbestos	Multi Track:	100	75	27.5	
	Fast Tack:	100	50	27.5	
45.26 Asbestos Over £ 250, 000		100	75	More than 40/ less than 15	
45.23(3)(d) RSI & Stress	Multi Track:	100	100	100	
	Fast Tack:	100	100	100	
45.26 RSI & Stress Over £ 250, 000		100	100	Less than 75	
45.23(e) Other disease claim	Multi Track	100	75	62.5	
	Fast Track	100	62.5	62.5	
45.26 Other disease claim Over £250,000		100	. . .	More than 75 or less than 50	
<b>Other Type of PI Claim</b>					
	Multi Track:	100	. . .	. . .	
	Fast Track:	100	. . .	. . .	

The reasons, briefly stated, for counsel’s success fee are that at the time of entry into this agreement:

- ? the percentage increase is fixed by CPR 45. . . . . [specify];
- ? the percentage increase is fixed by CPR 45 . . . . [specify] but CPR 45.18\*, CPR 45.22\*, or CPR 45.26\* applies to this claim;
- ? the percentage increase sought is consistent with an industry-wide agreement for this type of case reached by representatives of both Claimants and Defendants under the supervision of the Civil Justice Council and there is no special reason to apply a different uplift in this case;
- ? the percentage increase reflects the prospects of success estimated in counsel’s risk assessment which is\* not attached to this agreement
- ? the length of postponement of the payment of counsel’s fees and expenses is estimated at \_\_\_\_\_ year(s), and a further increase of . . . . . % relates to that postponement and cannot be recovered from the opponent.

The success fee inclusive of any additional % relating to postponement cannot be more than 100% of counsel’s normal fees in total.

Dated: \_\_\_\_\_

Signed by counsel \_\_\_\_\_

or by his/her clerk [with counsel’s authority] \_\_\_\_\_

[Additional counsel\*] \_\_\_\_\_

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Date signed \_\_\_\_\_

Signed by: \_\_\_\_\_

Solicitor/employee in Messrs: \_\_\_\_\_

The solicitors firm acting for the client

By signing and today returning to counsel the last page of this agreement the solicitor agrees to instruct counsel under the terms of this agreement and confirms that the Conditional Fee Agreement between the solicitor and client complies with ss. 58 and 58A of the Courts and Legal Services Act 1990 as amended.

**DISCLAIMER:** Counsel is not bound to act on a conditional fee basis until both parties have signed this agreement.

Counsel's Risk Assessment

[To help counsel make a Risk Assessment and give a Statement of Reasons for Conditional Fees in Personal Injury Cases]

- (1) The Solicitor has agreed with the client a \*one-stage uplift, namely . . . . . % or a two-stage uplift, namely . . . . . % where the claim concludes at trial; or . . . . . % where the claim concludes before a trial has commenced. The solicitor has\*not included an element relating to the postponement of payment of basic charges.
- (2) The following stages of the proceedings have been completed: \*pre-action protocol, statements of case, disclosure, exchange of evidence as to fact, exchange of expert evidence, case management conference(s), other (please specify). . . . . Attempts to settle the claim have failed; the defendant's latest offer (if any) was . . . . . ; the client's latest offer (if any) was . . . . . (see letter(s) dated . . . . .).
- (3) Counsel estimates the overall **prospects of success**, taking all risk factors into account, in the region of . . . . . %. This overall assessment is made irrespective of the date for delivery of the brief.
- (4) Csl's reasons for setting the % increase at the level(s) stated in the agreement are: *[N.B. The ordinary risks of litigation and facts set out elsewhere in this form are deemed to be incorporated into this statement of reasons and do not need to be repeated here.]*
- (5) **Further considerations:**

Current APIL/PIBA 5 Agreement?	√/x
Case requiring screening?	√/x
Csl has reason to believe the client is/may be, a child or patient	√/x
A leader is likely to be needed	√/x
This Statement of Reasons is to be attached to the CFA	√/x

- (6) Csl's **decision:** \* Accepted; Rejected &/or advised alternative funding / ADR

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(7) Csl's note of the next step due to be taken (if instructed on conditional fees) & any comment: .....

Screened by ..... on ..... Signed by screener .....

Signed by Csl. .... Dated .....

The ready reckoner is included for use only as a familiar aide-memoire when assessing a one stage uplift from the overall prospects of success:

READY RECKONER

Prospects of "Success"	% Increase
100%	0%
95%	5%
90%	11%
80%	25%
75%	33%
70%	43%
67%	50%
60%	67%
55%	82%
50%	100%

STANDARD TERMS AND CONDITIONS

POSTED ON THE APIL AND PIBA WEBSITES AND TREATED AS ANNEXED TO THE CONDITIONAL FEE AGREEMENT BETWEEN SOLICITOR AND COUNSEL

For Use After 1 November 2005

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**Part One****Conditions Precedent***Papers provided to Counsel*

1. The solicitor should have provided counsel with the following documents:
  - (1) a copy of the conditional fee agreement between the solicitor and the client and the Law Society's Conditions as they apply to the claim;
  - (2) written confirmation that "after the event" or other similar insurance is in place, or a written explanation why it is not;
  - (3) all relevant papers and risk assessment material, including all advice from experts and other solicitors or barristers to the client or any Litigation Friend in respect of the claim, which is currently available to the solicitor; and
  - (4) any offers of settlement already made by the client or the defendant.

*Solicitor's Compliance with Statute*

2. The solicitor confirms that the conditional fee agreement between the solicitor and the client complies with sections 58 and 58A of the Courts and legal Services Act 1990 and the Conditional Fee Agreements Order 2000.

**Part Two****Obligations of Counsel***To act diligently*

3. Counsel agrees to act diligently on all proper instructions from the solicitor subject to paragraph 4 hereof.

*Inappropriate Instructions*

4. Counsel is not bound to accept instructions:

- (1) to appear at any hearing where it would be reasonable
  - (a) to assume that counsel's fees would not be allowed on assessment or
  - (b) to instruct a barrister of less experience and seniority, (albeit that counsel shall use his/her best endeavours to ensure that an appropriate barrister will act for the client on the same terms as this agreement);
- (2) to draft documents or advise if a barrister of similar seniority would not ordinarily be instructed so to do if not instructed on a conditional fee basis;
- (3) outside the scope of this agreement.

**Part Three****Obligations of the Solicitor**

5. The solicitor agrees:

- (1) to comply with all the requirements of the CPR, the practice direction about costs supplementing parts 43 to 48 of the CPR (PD Costs), the relevant pre-action protocol, and any court order relating to conditional fee agreements, and in particular promptly to notify the Court and the opponent of the existence and any subsequent variation of the CFA with the client and of this agreement and whether he / she has taken out an insurance policy or made an arrangement with a membership organisation and of the fact that additional liabilities are being claimed from the opponent;
- (2) promptly to apply for relief from sanction pursuant to CPR part 3.8 if any default under part 44.3B(1)(c) or (d) occurs and to notify counsel of any such default;
- (3) to act diligently in all dealings with counsel and the prosecution of the claim;
- (4) to liaise with or consult counsel about the likely amount of counsel's fees before filing any estimate of costs in the proceedings, and to provide a copy of any such estimate to counsel;
- (5) to consult counsel on the need for advice and action following:
  - (a) the service of statements of case and if possible before the allocation decision; and
  - (b) the exchange of factual and expert evidence;
- (6) to deliver within a reasonable time papers reasonably requested by counsel for consideration;
- (7) promptly to bring to counsel's attention:
  - (a) any priority or equivalent report to insurers;
  - (b) any Part 36 or other offer to settle;
  - (c) any Part 36 payment into Court;

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- (d) any evidence information or communication which may materially affect the merits of any issue in the case;
  - (e) any application by any party to have the client's costs capped;
  - (f) any costs capping order;
  - (g) any other factor coming to the solicitor's attention which may affect counsel's entitlement to success fees whether before or after the termination of this agreement;
- (8) promptly to communicate to the client any advice by counsel:
    - (a) to make, accept or reject any Part 36 or other offer;
    - (b) to accept or reject any Part 36 payment in;
    - (c) to incur, or not incur, expenditure in obtaining evidence or preparing the case;
    - (d) to instruct Leading counsel or a more senior or specialised barrister;
    - (e) that the case is likely to be lost;
    - (f) that damages and costs recoverable on success make it unreasonable or uneconomic for the action to proceed;
  - (9) promptly to inform counsel's clerk of any listing for trial;
  - (10) to deliver the brief to counsel in accordance with the agreement between the solicitor and counsel;
  - (11) to inform Counsel promptly if the case concludes 14 days before the date fixed for trial if the claim is allocated to the fast-track or 21 days if allocated to the multi-track;
  - (12) if any summary assessment of costs takes place in the absence of counsel, to submit to the court a copy of counsel's risk assessment and make representations on counsel's behalf in relation to his/her fees;
  - (13) to inform counsel in writing within 2 days of any reduction of counsel's fees on summary assessment in the absence of counsel and of any directions given under PDCosts 20.3(1) or alternatively to make application for such directions on counsel's behalf;
  - (14) where points of dispute are served pursuant to CPR part 47.9 seeking a reduction in any percentage increase charged by counsel on his fees, to give the client the written explanation required by PDCosts 20.5 on counsel's behalf;
  - (15) where more than one defendant is sued, the solicitor will write to the "after the event" insurers clarifying whether and when defendants' costs are to be covered if the claimant does not succeed or win against all of the defendants, and send that correspondence to counsel; and
  - (16) when drawing up a costs bill at any stage of the case to include in it a claim for interest on counsel's fees.

**Part Four**  
**Termination***Termination by Counsel*

6. Counsel may terminate the agreement if:
  - (1) Counsel discovers the existence of any document which should have been disclosed to him under clause 1 above and which materially affects Counsel's view of the likelihood of success and/or the amount of financial recovery in the event of success;
  - (2) Counsel discovers that the solicitor is in breach of any obligation in paragraph 5 hereof;
  - (3) the solicitor, client or any Litigation Friend rejects counsel's advice in any respect set out in paragraph 5(8) hereof;

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- (4) Counsel is informed or discovers the existence of any set-off or counter-claim which materially affects the likelihood of success and/or the amount of financial recovery in the event of success;
- (5) Counsel is informed or discovers the existence of information which has been falsified or should have been but has not been provided by the solicitor, client or any Litigation Friend, of which counsel was not aware and which counsel could not reasonably have anticipated, which materially affects the merits of any substantial issue in the case;
- (6) Counsel is required to cease to act by the Code of Conduct of the Bar of England and Wales or counsel's professional conduct is being impugned; provided that counsel may not terminate the agreement if so to do would be a breach of that Code, and notice of any termination must be communicated promptly in writing to the solicitor;
- (7) A costs capping order is made which counsel reasonably believes may adversely affect the recoverability of his or her normal fees and/or his or her percentage increase.
- (8) If the opponent receives Community Legal Service funding.

*Termination by the Solicitor*

7. The solicitor may terminate the agreement at any time on the instructions of the client or any Litigation Friend.

*Automatic Termination*

8. This agreement shall automatically terminate if:

- (1) Counsel accepts a full-time judicial appointment;
- (2) Counsel retires from practice;
- (3) the solicitor's agreement with the client is terminated before the conclusion of the case;
- (4) Legal Services Commission funding is granted to the client;
- (5) the client dies;
- (6) the court makes a Group Litigation Order covering this claim.

*Client becoming under a Disability*

9. If the client at any time becomes under a disability then the solicitor will:

- (1) consent to a novation of his Conditional Fee Agreement with the client to the Litigation Friend and
- (2) where appropriate, apply to the Court to obtain its consent to acting under a conditional fee agreement with the Litigation Friend.

Thereafter, the Litigation Friend shall, for the purposes of this agreement, be treated as if he/she was and has always been the client.

*Counsel taking Silk*

10. If counsel becomes Queen's Counsel during the course of the agreement then either party may terminate it provided he/she does so promptly in writing.

**Part Five****Counsel's Fees and Expenses***Counsel's Normal Fees*

11.

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- (1) Counsel's fees upon which a success fee will be calculated (the normal fees) will be calculated on the basis of the figures contained in the agreement between the Solicitor and Counsel.
- (2) To the extent that the hours of preparation set out in that agreement are reasonably exceeded then counsel's hourly rate will apply to each additional hour of preparation.
- (3) If the case is settled or goes short counsel will consider the solicitor's reasonable requests to reduce his/her brief fees as set out in the agreement.
- (4) Counsel's normal fees will be subject to review with effect from each successive \*anniversary of / \* first day of February from the date of this agreement but Counsel will not increase the normal fees by more than any increase in the rate of inflation measured by the Retail Prices Index.

*Counsel's Success Fee*

12. The rate of counsel's success fee and reasons will be as set out in the agreement between the Solicitor and Counsel.

*Counsel's Expenses*

13. If a hearing, conference or view takes place more than 25 miles from counsel's chambers the solicitor shall pay counsel's reasonable travel and accommodation expenses which shall:

- (1) appear separately on counsel's fee note;
- (2) attract no success fee and
- (3) subject to paragraph 16 be payable on the conclusion of the claim or earlier termination of this agreement.

**Part Six****Counsel's Entitlement to Fees***(A) If the Agreement is not Terminated*

## Definition of "success"

**14.**

- (1) "Success" means the same as "win" in the Conditional Fee Agreement between the solicitor and the client.
- (2) Subject to paragraphs 15, 18 & 21 hereof, in the event of success the solicitor will pay counsel his/her normal and success fees.
- (3) If the client is successful at an interim hearing counsel may apply for summary assessment of solicitor's basics costs and counsel's normal fees.

## Part 36 Offers and Payments

15. If the amount of damages and interest awarded by a court is less than a Part 36 payment into Court or effective Part 36 offer then:

- (1) if counsel advised its rejection he/she is entitled to normal and success fees for work up to receipt of the notice of Part 36 payment into Court or offer but only normal fees for subsequent work;
- (2) if counsel advised its acceptance he/she is entitled to normal and success fees for all work done.

## Failure

16. Subject to paragraph 17 (1) hereof, if the case is lost or on counsel's advice ends without success then counsel is not entitled to any fees or expenses.

## APIL/PIBA 6 [1291]

## Errors and Indemnity for Fees

17.

- (1) If, because of a breach by the solicitor of his/her duty to the client, the client's claim is dismissed or struck out:
  - (a) for non compliance with an interlocutory order; or
  - (b) for want of prosecution, or
  - (c) by rule of court or the Civil Procedure Rules; orbecomes unenforceable against the MIB for breach of the terms of the Uninsured Drivers Agreement:  
the solicitor shall (subject to sub paragraphs (3)-(6) hereof) pay counsel such normal fees as would have been recoverable under this agreement.
- (2) If, because of a breach by counsel of his/her duty to the client, the client's claim is dismissed or struck out:
  - (a) for non compliance with an interlocutory order; or
  - (b) for want of prosecution, or
  - (c) by rule of court or the Civil Procedure Rulescounsel shall (subject to sub paragraphs (3)-(6) hereof) pay the solicitor such basic costs as would have been recoverable from the client under the solicitor's agreement with the client.
- (3) If, because of non-compliance by the solicitor of the obligations under sub-paragraphs (1), (2), (11), (12) or (13) of paragraph 5 above, counsel's success fee is not payable by the Opponent or the client then the solicitor shall (subject to sub-paragraphs (5) to (7) hereof) pay counsel such success fees as would have been recoverable under this agreement.
- (4) No payment shall be made under sub paragraph (1), (2) or (3) hereof in respect of any non-negligent breach by the solicitor or counsel.

Adjudication on disagreement

- (5) In the event of any disagreement as to whether there has been an actionable breach by either the solicitor or counsel, or as to the amount payable under sub paragraph (1), (2) or (3) hereof, that disagreement shall be referred to adjudication by a panel consisting of a Barrister nominated by PIBA and a solicitor nominated by APIL who shall be requested to resolve the issue on written representations and on the basis of a procedure laid down by agreement between PIBA and APIL. The costs of such adjudication shall, unless otherwise ordered by the panel, be met by the unsuccessful party.
- (6) In the event of a panel being appointed pursuant to sub paragraph (5) hereof:
  - (a) if that panel considers, after initial consideration of the disagreement, that there is a real risk that they may not be able to reach a unanimous decision, then the panel shall request APIL (where it is alleged there has been an actionable breach by the solicitor) or PIBA (where it is alleged that there has been an actionable breach by counsel) to nominate a third member of the panel;
  - (b) that panel shall be entitled if it considers it reasonably necessary, to appoint a qualified costs draftsman, to be nominated by the President for the time being of the Law Society, to assist the panel;
  - (c) the solicitor or counsel alleged to be in breach of duty shall be entitled to argue that, on the basis of information reasonably available to both solicitor and barrister, the claim would not have succeeded in any event. The panel shall resolve such issue on the balance of probabilities, and if satisfied that the claim would have been lost in any event shall not make any order for payment of fees or costs.

Cap

- (7) the amount payable in respect of any claim under sub paragraph (1) or (2) or (3) shall be limited to a maximum of £25,000.

**[1291]** APIL/PIBA 6

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*(B) On Termination of the Agreement*

## Termination by Counsel

**18.**

- (1) If counsel terminates the agreement under paragraph 6 then, subject to sub-paragraph 2 hereof, counsel may elect either:
  - (a) to receive payment of normal fees without a success fee which the solicitor shall pay not later than three months after termination: (“Option A”), or
  - (b) to await the outcome of the case and receive payment of normal and success fees if it ends in success: (“Option B”).
- (2) If counsel terminates the agreement because the solicitor, client or Litigation Friend rejects advice under paragraph 5(8) (e) or 5(8)(f) counsel is entitled only to “Option B”.

## Termination by the Solicitor

- (4) If the solicitor terminates the agreement under paragraph 7, counsel is entitled to elect between “Option A” and “Option B”.

## Automatic Termination and Counsel taking silk

- (5) If the agreement terminates under paragraphs 8 or 10 counsel is entitled only to “Option B”.

## Challenge to fees

- 19.** If the client or any Litigation Friend wishes to challenge:
  - (a) the entitlement to fees of counsel or the level of such fees following termination of the agreement ;or
  - (b) any refusal by counsel after signing this agreement to accept instructions the solicitor must make such challenge in accordance with the provisions of paragraphs 14 and 15 of the Terms of Work upon which barristers offer their services to solicitors (Annexe D to the Code of Conduct of the Bar of England and Wales).

## Return of Work

- 20.** If counsel in accordance with the Bar’s Code of Conduct is obliged to return any brief or instructions in this case to another barrister, then:
  - (1) Counsel will use his/her best endeavours to ensure that an appropriate barrister agrees to act for the client on the same terms as this agreement;  
If counsel is unable to secure an appropriate replacement barrister to act for the client on the same terms as this agreement counsel will not be responsible for any additional fee incurred by the solicitor or client.
  - (2) Subject to paragraph 20(3) hereof, if the case ends in success counsel’s fees for work done shall be due and paid on the conditional fee basis contained in this agreement whether or not the replacement barrister acts on a conditional fee basis; but
  - (3) If the solicitor or client rejects any advice by the replacement barrister of the type described in paragraph 5(8) hereof, the solicitor shall immediately notify counsel who shall be entitled to terminate this agreement under paragraph 6(3).

**Part Seven**  
**Assessment and Payment of Costs / Fees**

*Costs Assessment*

**21.**

- (1) If:
- (a) a costs order is anticipated or made in favour of the client at an interlocutory hearing and the costs are summarily assessed at the hearing; or
  - (b) the costs of an interlocutory hearing are agreed between the parties in favour of the client; or
  - (c) an interlocutory order or agreement for costs to be assessed in detail and paid forthwith is made in favour of the client:  
then
    - (i) the solicitor will include in the statement of costs a full claim for counsel's normal fees; and
    - (ii) the solicitor will promptly conclude by agreement or assessment the question of such costs; and
    - (iii) within one month of receipt of such costs the solicitor will pay to counsel the amount recovered in respect of his/her fees, such sum to be set off against counsel's entitlement to normal fees by virtue of this agreement.

*Solicitor's Obligation to pay*

**22.**

- (1) The amounts of fees and expenses payable to counsel under this agreement
- (a) are not limited by reference to the damages which may be recovered on behalf of the client and
  - (b) are payable whether or not the solicitor is or will be paid by the client or opponent.
- (2) Upon success the solicitor will promptly conclude by agreement or assessment the question of costs and will pay Counsel promptly and in any event not later than one month after receipt of such costs the full sum due under this agreement.

*Interest*

- 23.** The solicitor will use his best endeavours to recover interest on costs from any party ordered to pay costs to the client and shall pay counsel the share of such interest that has accrued on counsel's outstanding fees.

*Challenge to Success Fee*

**24.**

- (1) The solicitor will inform counsel's clerk in good time of any challenge made to his success fee and of the date, place and time of any detailed costs assessment the client or opponent has taken out pursuant to the Civil Procedure Rules and unless counsel is present or represented at the assessment hearing will place counsel's risk assessment, relevant details and any written representations before the assessing judge and argue counsel's case for his/her success fee.
- (2) If counsel's fees are reduced on any assessment then:
- (a) the solicitor will inform counsel's clerk within seven days and confer with counsel whether to apply for an order that the client should pay the success fee and make such application on counsel's behalf;
  - (b) subject to any appeal or order, counsel will accept such fees as are allowed on that assessment and will repay forthwith to the solicitor any excess previously paid.

**[1291]** APIL/PIBA 6

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*Disclosing the reasons for the success fee***25.**

- (1) If
- (a) a success fee becomes payable as a result of the client's claim and
  - (b) any fees subject to the increase provided for by paragraph 12 hereof are assessed and
  - (c) Counsel, the solicitor or the client is required by the court to disclose to the court or any other person the reasons for setting such increase as the level stated in this agreement, he / she may do so.

*Reduction on Assessment*

**26.** If any fees subject to the said percentage increase are assessed and any amount of that increase is disallowed on assessment on the ground that the level at which the increase was set was unreasonable in view of the facts which were or should have been known to counsel at the time it was set, such amount ceases to be payable under this agreement unless the court is satisfied that it should continue to be so payable.

*Agreement on Fees*

**27.** If the Opponent offers to pay the client's legal fees or makes an offer of one amount that includes payment of Counsel's normal fees at a lower sum than is due under this agreement then the solicitor:

- (a) will calculate the proposed pro-rata reductions of the normal and success fees of both solicitor and counsel, and
  - (b) inform counsel of the offer and the calculations supporting the proposed pro-rata reductions referred to in paragraph (a) above, and
  - (c) will not accept the offer without counsel's express consent.
- If such an agreement is reached on fees, then counsel's fees shall be limited to the agreed sum unless the court orders otherwise.

SI 2005/2305

## CONDITIONAL FEE AGREEMENTS (REVOCATION) REGULATIONS 2005

### [1301]–[1309]

#### 1 Citation and commencement

These Regulations may be cited as the Conditional Fee Agreements (Revocation) Regulations 2005 and shall come into force on 1st November 2005.

#### 2 Revocation

Subject to regulation 3, the Conditional Fee Agreements Regulations 2000 (the “CFA Regulations”), the Collective Conditional Fee Agreements Regulations 2000 (the “CCFA Regulations”), the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003, and the Conditional Fee Agreements (Miscellaneous Amendments) (No 2) Regulations 2003 are revoked.

#### 3 Savings and transitional provisions

(1) The CFA Regulations shall continue to have effect for the purposes of a conditional fee agreement entered into before 1st November 2005.

(2) Paragraph (1) shall apply in relation to a collective conditional fee agreement as if there were substituted for a reference to the CFA Regulations a reference to the CCFA Regulations.

### EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations revoke the Conditional Fee Agreements Regulations 2000 (SI 2000/692), the Collective Conditional Fee Agreements Regulations 2000 (SI 2000/2988), the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003 (SI 2003/1240) and the Conditional Fee Agreements (Miscellaneous Amendments) (No 2) Regulations 2003 (SI 2003/3344) in respect of conditional fee agreements and collective conditional fee agreements entered into on or after 1st November 2005.

Parties may enter into Conditional Fee Agreements and Collective Conditional Fee Agreements on or after that date based on the primary legislation.

0002

[ST: 315] [ED: 100000] [REL: 96]  
XPP 8.4C.1 SC\_00MDD nllp BCS

**Composed:** Fri Sep 21 16:29:11 EDT 2012

**VER:** [SC\_00MDD-Local:14 Feb 12 09:43][MX-SECNDARY: 16 Aug 12 07:51][TT: 19 Jan 11 08:07 loc=gbr unit=bcs\_binder\_01\_e\_0022]

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SI 2005/2306

## ACCESS TO JUSTICE (MEMBERSHIP ORGANISATION) REGULATIONS 2005

### **[1310]–[1319]**

#### **1 Citation, commencement and interpretation**

- (1) These Regulations may be cited as the Access to Justice (Membership Organisation) Regulations 2005 and shall come into force on 1st November 2005.
- (2) In these Regulations a reference to a section by number alone is a reference to the section so numbered in the Access to Justice Act 1999.

#### **2 Revocation and transitional**

- (1) Subject to paragraph (2), the Access to Justice (Membership Organisation) Regulations 2000 (the “2000 Regulations”) are revoked.
- (2) The 2000 Regulations shall continue to have effect for the purposes of arrangements entered into before 1st November 2005 as if these Regulations had not come into force.

#### **3 Bodies of a prescribed description**

The bodies which are prescribed for the purpose of section 30 (recovery where body undertakes to meet costs liabilities) are those bodies which are for the time being approved by the Secretary of State for that purpose.

#### **4 Requirements for arrangements to meet costs liabilities**

- (1) Section 30(1) applies to arrangements which satisfy the following conditions.
- (2) The arrangements must be in writing.
- (3) The arrangements must contain a statement specifying the circumstances in which the member may be liable to pay costs of the proceedings.

#### **5 Recovery of additional amount for insurance costs**

- (1) Where an additional amount is included in costs by virtue of section 30(2) (costs payable to a member of a body or other person party to the proceedings to include an additional amount in respect of provision made by the body against the risk of having to meet the member’s or other person’s liabilities to pay other parties’ costs), that additional amount must not exceed the following sum.
- (2) That sum is the likely cost to the member of the body or, as the case may be, the other person who is a party to the proceedings in which the costs order is made of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings.

### EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations revoke the Access to Justice (Membership Organisation) Regulations 2000 in respect of arrangements entered into after 1st November 2005, and make new, simplified client-care provisions for the purposes of arrangements entered into on or after that date.

Section 30 of the Access to Justice Act 1999 applies where a body of a description to be specified in regulations undertakes (in accordance with arrangements satisfying conditions to be so specified) to meet liabilities which members of the body or other persons who are parties to proceedings may incur to pay the costs of other parties.

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**[1310]** Access to Justice (MO) Regulations 2005, reg 5

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Regulation 3 of these Regulations specifies bodies which are for the time being approved by the Secretary of State for this purpose. Regulation 4 specifies the conditions which the arrangements must satisfy.

Under section 30(2) of that Act an additional amount may be included in costs payable to a member of such a body or other person to cover insurance or other provision made by the body against the risk of having to meet those liabilities of the member or other person. Under section 30(3) of that Act that additional amount must not exceed a sum determined in a way specified by regulations. Regulation 5 of these Regulations specifies that sum as the likely cost to the member or other person of the premium of an insurance policy against the risk in question.

[1320]–[1399]

## LS New Model CFA for PI Cases from 1 Nov 2005

For use in personal injury and clinical negligence cases only.

This agreement is a binding legal contract between you and your solicitor/s. Before you sign, please read everything carefully. This agreement must be read in conjunction with the Law Society document “What you need to know about a CFA”.

### Agreement date

[. . . . .]

I/We, the solicitor/ [. . . . .]  
s

You, the client [. . . . .]

### What is covered by this agreement

- Your claim against [. . . . .] for damages for personal injury suffered on [. . . . .].(if either the name of the opponent or the date of the incident are unclear then set out here in as much detail as possible to give sufficient information for the client and solicitor to understand the basis of the claim being pursued)
- Any appeal by your opponent.
- Any appeal you make against an interim order.
- Any proceedings you take to enforce a judgment, order or agreement.
- Negotiations about and/or a court assessment of the costs of this claim.

### What is not covered by this agreement

- Any counterclaim against you.
- Any appeal you make against the final judgment order.

### Paying us

If you win your claim, you pay our basic charges, our disbursements and a success fee. You are entitled to seek recovery from your opponent of part or all of our basic charges, our disbursements, a success fee and insurance premium as set out in the document “What you need to know about a CFA.”

It may be that your opponent makes a Part 36 offer or payment which you reject on our advice, and your claim for damages goes ahead to trial where you recover damages that are less than that offer or payment. If this happens, we will *[not add our success fee to the basic charges] [not claim any costs]* for the work done after we received notice of the offer or payment.

If you receive interim damages, we may require you to pay our disbursements at that point and a reasonable amount for our future disbursements.

If you receive provisional damages, we are entitled to payment of our basic charges our disbursements and success fee at that point.

If you lose you remain liable for the other sides costs.

**[1320]** LS New Model CFA for PI Cases from 1 Nov 2005

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**The Success Fee**

The success fee is set at [. . . . .]% of basic charges, where the claim concludes at trial; or [. . . . .] % where the claim concludes before a trial has commenced. In addition [. . . . .]% relates to the postponement of payment of our fees and expenses and can not be recovered from your opponent. The Success fee inclusive of any additional percentage relating to postponement cannot be more than 100% of the basic charges in total.

**Other points**

The parties acknowledge and agree that this agreement is not a Contentious Business Agreement within the terms of the Solicitors Act 1974.

**Signatures**

Signed by the solicitor(s): . . . . .  
Signed by the client: . . . . .