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31 March 2009

By email (contingency@lawsociety.org.uk) and by DX

Dear Mr Heskins

Response of the City of London Law Society Litigation Committee to the Law Society's paper on "Litigation funding: Key issues and background information" dated 18 December 2008

I write on behalf of the City of London Law Society Litigation Committee in response to the Law Society's 18 December 2008 paper headed "Litigation funding: Key issues and background information".

This letter contains our responses to the questions in the survey which accompanies the paper.

Contingency fees

*Please review our arguments in favour of contingency agreements (section 2.1).
Do you agree with these arguments?*

Whilst we have some concerns as to whether contingency fees would incentivise claimants' lawyers to too great a degree, with the potential to cause conflicts of interest and reputational damage to the legal profession, the majority of our Committee are cautiously in favour of the introduction of contingency fees and are therefore broadly in agreement with the arguments set out in section 2.1.

We consider that any contingency fee regime should be subject to appropriate controls / safeguards, which would need to be worked out through a process of detailed consultation.

Are there others that you would list?

An additional argument is that indications are that third party funding arrangements, which are often coupled with ATE and / or a CFA, can take a very long time (in some cases, several months) to negotiate and finalise. If contingency fee arrangements could be put in place more quickly on a given case, that could aid access to justice.

In relation to the fourth bullet point in section 2.1, it has been pointed out that UK lawyers are also able to (and do on occasions) act on a contingency fee basis in arbitrations with a non-UK seat.

*Please review our arguments against contingency agreements (section 2.3)
Do you agree that these are the main arguments against contingency fees?*

Yes, although in relation to the penultimate bullet point it should be kept in mind that the actual time incurred on a contingency fee case could still be disproportionate.

*Solicitors owe duties... criminal and family cases... would be particularly inappropriate for contingency fees.
Do you agree with these views?*

The law firms which we represent do not typically act in criminal or family cases, and we are therefore not in a position to comment.

*Please refer to sections 2.7 to 2.17 of the background document.
If costs were not recoverable, should certain types of cases be excluded from contingency fee funding?*

We consider that costs shifting should be retained if a contingency fee regime is introduced, albeit that we do not consider that the contingency fee itself should be recoverable from the losing party. In other words, the unsuccessful defendant could on our view only be required to pay, as costs, a reasonable sum in respect of the time spent by the claimant's lawyers (plus disbursements), in the usual way (and subject to the limitation that the amount recovered by way of an award of costs for the work done assessed on the usual basis may not exceed the amount that the receiving party has actually paid by way of the contingency fee).

If, contrary to our view, the costs shifting rule were to be abolished then we consider that the question of contingency fees would need to be revisited.

Do you agree that a mechanism needs to be set to limit the percentage of damages that can be claimed as contingency fee?

We do not consider that some form of cap would be appropriate. However, we consider that the trial judge should have the ability to review the contingency fee arrangement as to reasonableness, once he has completed the damages award (i.e. the third bullet point in section 2.7).

Do you agree that the existing mechanisms for conditional fees are sufficient for contingency fees?

No.

Should there be others?

Yes. Safeguards / controls concerning contingency fees would need to be worked out through consultation.

Should certain work, for example clinical negligence, be specifically excluded from any contingency fee arrangements?

The firms which we represent are largely engaged in commercial work, and we do not consider that commercial litigation should be excluded from any contingency fee arrangements. We are not in a position to comment as to whether other areas of work should be excluded from any contingency fee arrangements.

Do you agree that costs should follow the event where there is a contingency fee agreement?

We are of the view that costs shifting should remain alongside any contingency fee regime, but that the contingency fee itself should not be recoverable from the losing party: see above. Thus, the successful party should only be able to recover its reasonable time costs (and disbursements), in the usual way.

Are there additional safeguards needed to protect defendants from inappropriate high contingency fees?

No, because we consider that the contingency fee itself should not be recoverable from a losing defendant.

Do you agree that it is appropriate for solicitors to have access to a wide number of funding options in order to assure access to justice?

We consider that it is appropriate for clients to have access to a wide number of funding options in order to obtain access to justice.

Are you aware of any evidence to suggest that there are unmeritorious claims being put forward as a result of the existence of conditional fee arrangements?

No.

Conditional fees

The Law Society's view... the involvement of unregulated claims managers... the new arrangements to regulate these will address the concerns.

Do you agree with this view of conditional fees?

We are not aware of evidence of solicitors acting unethically in relation to conditional fees.

Do you consider that CFAs have led to a profusion of unmeritorious claims?

No.

Third party funding

What arrangements in your view are most suitable to ensure that claimants' interests are properly protected where a third party is funding the action?

The claimant should be advised by its solicitor as to the provisions which should be included for its protection in the agreement between it and the third party funder.

We consider that there should probably also be some form of regulation of third party funders. This could take the form of self-regulation by way of adherence to a voluntary code of conduct (you may be aware that third party funders presented a draft code of conduct at the CJC Away Day on this issue on 30-31 October 2008) or regulation by an appropriate body such as the Claims Management Regulator.

Should third party funders in an unsuccessful case be responsible for all of the successful parties' costs?

We consider that the court should have the ability to order the third party funder in an unsuccessful case to pay all of the successful defendant's costs, and that such ability should not be circumscribed by the Arkin principle.

Should third party funders be restricted to a maximum amount that they can charge on a contingency basis?

We consider that the reasonableness of the arrangement between the third party funder and the successful claimant should be subject to a similar mechanism of review by the trial judge as should in our view apply to any contingency fee arrangement (see above).

... should Solicitors Conduct Rule 9.01 (4) be removed?

We do not have sufficient experience of personal injury work to express a view on this question.

Should solicitors be permitted to engage in third party funding activities?

Yes.

Other costs issues

Should the indemnity principle be abolished?

No.

Should the costs shifting rule be retained?

Yes.

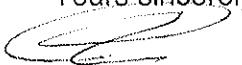
About us

The City of London Law Society ("CLLS") represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response to the Law Society's paper on "Litigation funding: Key issues and background information" has been prepared by the CLLS Litigation Committee. The Committee is made up of a number of solicitors from City of London firms who specialise in litigation. The Committee's purpose is to represent the interests of those members of the CLLS involved in this area of law.

If you have any questions about this response, please do not hesitate to contact Lindsay Marr, Chair of the CLLS Litigation Committee, at lindsay.marr@freshfields.com or on 0207 832 7317.

Yours sincerely



For David McIntosh
Chair

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