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Dear Sirs

Response of the City Of London Law Society to the Consultation Paper CP4/09 "Controlling Costs In Defamation Proceedings", Published on 24 February 2009

I write on behalf of the City of London Law Society Litigation Committee in response to the Ministry of Justice Consultation Paper CP4/09: *Controlling Costs in Defamation Proceedings* published on 24 February 2009.

This letter contains our responses to the questions in the consultation questionnaire included in the Consultation Paper. We also set out at the end information about us.

Preamble

The Ministry of Justice consultation seeks views on "measures to control costs better" in the area of defamation and some other publication-related proceedings. The Ministry of Justice plans to implement its proposals from October 2009, unless it receives "compelling reasons not to".

The consultation follows on from the Constitutional Affairs Select Committee's enquiry into Compensation Culture in 2006. It is chiefly motivated by the high levels of legal

costs incurred in recent defamation cases, exacerbated by the uplift on those costs where the claimant is represented on a Conditional Fee Agreement (CFA) basis. A recent example highlighting this was the case of Tesco against the *Guardian*, which settled in September 2008 for an apology and £5,000 damages. Tesco's lawyers Carter-Ruck are now claiming over £800,000 in fees.

The rationale for the proposed changes is stated to be that the high level of costs may induce a more risk-averse approach to reporting, which could threaten freedom of expression. [1] Further, Parliamentary Under-Secretary of State for the Ministry of Justice, Bridget Prentice has said, "Excessive costs and their threat may force defendants to settle unwarranted claims."[2]

CFAs allow claimants to bring claims without paying any legal fees on the basis that, if successful, their lawyers can recover as a success fee from the losing party an uplift on their standard charges of up to 100%. The Ministry of Justice proposes an upper limit to cap the amount that can be recovered from a losing defendant, requiring the successful claimant to pay the difference. It is also argued that lawyers' hourly rates should be capped, as there is no incentive for claimants on a CFA to seek to limit their solicitors' fees.

Summary of the proposals

The Ministry of Justice has recommended the adoption of four specific measures it regards as necessary to control costs:

1. Limiting recoverable hourly rates;

2. Mandatory costs capping or mandatory consideration of costs capping;

3. Linking recoverability of ATE insurance premiums to notification to the other party and introducing a period of non-recoverability post notification;

4. On assessment, requiring the proportionality of total costs to be considered.

Commentary

1 Premature

In what appears to be unnecessary duplication, the Ministry of Justice has commissioned two simultaneous investigations into the costs of civil litigation. With the support of the Ministry of Justice, the Master of the Rolls has appointed Lord Justice Jackson to conduct a review of civil litigation costs and is due to report by December 2009. Both investigations are closely linked; amongst other things, the report will address the issue of CFAs. Lord Justice Jackson's report is likely to be more detailed, as the review is scheduled to take almost a year, in contrast with the 10 weeks allowed for the consultation on "controlling costs in defamation proceedings."

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[1] Consultation paper CP4/09, paragraph 2

[2] "Ministry of Justice consults on 'excessive' libel costs" by Dominic Ponsford, 24 February 2009, *Press Gazette*

However, Consultation Paper CP4/09 states that the Government believes "that reform in this specific area need not await more general or fundamental reforms that may follow from Lord Justice Jackson's review"[3]. The Ministry of Justice therefore appears to be making a decision before it has received relevant evidence.

2 Costs are already controlled

The reasonableness of costs incurred in all civil proceedings is assessed by the courts under the provisions of the Civil Procedure Rules and administered by specialist costs judges. Furthermore, where costs are granted on a standard basis, any doubt about reasonableness of work done will be resolved in favour of the paying party. The courts can cap costs under the new rules agreed by the Civil Procedure Rule Committee, introduced on 6 April 2009.

Costs incurred in defamation proceedings are subject to the same scrutiny as any other civil proceedings; they deserve no special treatment. It is not accepted that costs tend to be higher in defamation claims than in other types of case. Each case will depend upon its complexities. The vast majority of libel actions are settled without recourse to the courts. The structure of standard CFAs encourages swift resolution. They are based on staged payments, and the level of the success fee rises as parties proceed to trial, with a 100% success fee only being possible once trial is reached. The *Times* Carter-Ruck protocol[4] provides that where a dispute is settled within 14 days of initial complaint there will be no success fee.

In certain cases, the disparity between a relatively low damages award and a higher costs award is due to the fact that claimants are not seeking financial compensation, which is difficult and expensive to prove. The real remedy sought is repair to their reputation through public vindication.

3 Injustice to claimants

The proposals would undermine the concept of equal access to justice. CFAs were introduced to enable claimants who could not otherwise afford it to pursue a claim. The success fee element provides a necessary incentive for lawyers to take cases on behalf of impecunious claimants. A cap on costs would require claimants to cover the shortfall, the prospect of which might deter the less wealthy from seeking to assert their legal rights in the first place, and could reduce lawyers' willingness to act.

Capping costs in defamation proceedings would grant defendants special privileges at the expense of claimants. Defendants are not unfairly disadvantaged in defamation proceedings. The law offers them many protections, but if their journalism unfairly maligns another's good reputation then they must pay for the consequences. Moreover, CFAs are not exclusively available to claimants. Defendants can also use them. In many case, media defendants are wealthier than claimants and may have insurance. Many have in-house lawyers who work on a case without "charging". Where they instruct outside counsel, some are able to negotiate reduced fee rates with the law firms

[3] Consultation paper CP4/09, paragraph 13

[4] House of Commons Minutes of Evidence taken before Culture, Media and Sport Committee on 24 February 2009, Transcript of Oral Evidence, HC 275-I, Question 69 from the Chairman and response from Mr Thomson

representing them. Claimants do not have these advantages. If costs are capped, claimants will have to choose between risking liability for a shortfall in fees or not bringing the claim.

It is suggested that their either be mandatory cost capping or mandatory consideration of cost capping in the belief that this will reduce the costs of libel actions. On the contrary, the introduction of either will increase the amount of fees. In preparation for CMCs and direction hearings, both parties will need to produce evidence of the likely level of costs for each stage of the case and then argue as to what is the appropriate level. Cost capping will also inevitably lead to satellite litigation as to its effect upon CFAs.

4 Costs threat is only brake on media

The First Report of the House of Lords Select Committee on Communications questions the effectiveness of self-regulation of the media, and particularly the newspaper industry. The PCC "lacks independence from the industry" and, as "it was never designed or established proactively to promote journalistic standards or ethics"[5], it is not equipped to uphold these.

In the absence of strong, independent regulation of the industry, the ability of those damaged to sue and recover their legal costs is operating as the only brake on a powerful media. The enquiry conducted by the Culture, Media and Sport Committee into press standards, privacy and libel suggests that certain members of the media risk publication after calculating that the potential uplift in their circulation profits resulting from publication will outweigh the cost of defending legal action.[6]

If, because of the complexity of the particular issue in question, the successful claimant has incurred significant costs, the defendant that has to pay those costs. This is a fundamental and long-established principle of English legal practice.

5 Conclusion

Fees legitimately incurred in defamation proceedings should be recoverable. Costs must pass the proportionality test imposed during the courts' costs assessment procedure. A cap on costs would only serve to disadvantage claimants and undermine media standards by weakening the deterrent threat of defamation proceedings.

Question 1

Do you agree that a maximum recoverable hourly rate should be introduced?

Answer

Contrary to paragraph 2 of the Consultation Paper, there is no evidence that "costs in defamation proceedings tend to be higher than in other proceedings." Although the pleadings may be more technical in nature, we do not accept that they are necessarily

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[5] Chapter 5, Paragraph 226

[6] House of Commons Minutes of Evidence taken before Culture, Media and Sport Committee on 24 February 2009, Transcript of Oral Evidence, HC 275-I, Questions 90 and 91 from Mr Evans and responses from Mr Coad

more complex than those in other civil cases. We also consider that libel actions should be properly considered as the same as other commercial cases. With regards to hourly fees, as with any specialist area of commercial law, practitioners simply command the market rate. To contrast the rates charged for defamation action with those charged for non-commercial work is not to use a meaningful basis for comparison.

The Civil Procedure Rules already provide for the level of recoverable hourly rates to be controlled through cost assessment procedures. The assessment system (and, in particular, the costs switching rules) deals effectively with parties attempting to claim disproportionately high levels of costs. The costs incurred in defamation proceedings are subject to such assessment by costs judges to ensure proportionality, as in any other type of dispute. We do not believe that the supposed level of "uncertainty" is any higher in defamation actions than in other proceedings and do not agree that this area of law merits receiving any special treatment.

Question 2

Do you agree that costs capping is likely to be appropriate in all or most defamation proceedings? If so, (a) do you think costs capping should be made mandatory or (b) should its consideration be made mandatory?

Answer

No, we do not agree that costs capping is likely to be appropriate in all or most defamation proceedings. We do not believe that there is any more pressure to settle exercised on defendants to defamation claims than in other types of dispute. Moreover, the work involved in dealing with mandatory costs capping will increase the expense for all parties and more than make up for the projected saving referred to in the Consultation Paper.

The Consultation Paper alleges that there are "pressures towards disproportionate costs in defamation cases" (paragraph 27), but we consider that this is based on an incorrect evaluation of proportionality itself.

Proportionality should not be judged purely by reference to the contrast between the typically low damages awarded in defamation and the scale of solicitors' fees. This analysis does not take into account the (often unquantifiable) value to the successful claimant of receiving vindication.

The tort of defamation can have a devastating effect on an individual or business. Regulation of the media has been acknowledged to be ineffective. The First Report of the House of Lords Select Committee on Communications (paragraphs 221 – 227) criticised the journalism industry's self-regulation as defective. The PCC is described as "a self-regulatory organisation that will very seldom do anything that will discomfit [the press] or make its life difficult", according to Dr Moore, the Director of the Media Standards Trust (paragraph 222).

The prime motivation for claimants bringing a claim for defamation is to restore their reputation. Proving financial loss flowing from the libel is difficult and costly. Consequently, they only claim ordinary damages, the level of which does not act as a disincentive for journalists publishing defamatory material. Were claimants' costs to be

capped, journalists may be encouraged to be even more reckless as there would be even fewer financial repercussions.

Furthermore, if claimants cannot recover their costs, victims of defamation will be discouraged from bringing meritorious claims. Journalists may claim that the right to freedom of expression is under threat, but it should not be forgotten that the basic right to one's reputation also hangs in the balance in this consultation.

Question 3

Do you agree that there should be a requirement to notify the other party that ATE insurance has been entered into in the letter before claim or at the earliest opportunity thereafter?

Answer

This is already best practice.

Question 4

Would it also be helpful to require early notice of (a) whether the premiums are staged and, if so, the points at which increased premiums become payable (b) the amount of insurance cover and (c) any exclusion clauses?

Answer

We do not agree that this would be helpful. Providing early notice of staged payments and when increased premiums become payable may hinder early settlement by encouraging defendants to pursue their defence tactically up until the deadline for the next payment.

Question 5

Do you agree that the ATE insurance premium should not be recoverable where an offer of amends or admission of liability is made that leads to settlement of the substantive claim without court proceedings? If so (a) should a time period be specified during which the defendant must make the admission or offer of amends in order to avoid liability for an ATE insurance premium; (b) what should the period be?

Answer

No. The claimant would not have had to take out ATE insurance in order to enforce its rights had the defendant not published defamatory material in the first place. The defendant should be liable to pay for the premium as it took the risk when it published the defamatory material.

Question 6

Do you agree that the courts should apply the proportionality test to total costs not just base costs?

Answer

No. The costs total must be reasonable if the individual elements (base costs, success fee, ATE premium) are reasonable when evaluated separately. If the proportionality test is properly applied to base costs and the success fee is properly linked to the level of the solicitor's risk, it is not appropriate to apply a further test. There could be no proper basis for applying such a test of "reasonableness" to the global figure, so the outcome could only be arbitrary.

Question 7

Should the proposals apply to (a) defamation disputes only (b) a broader definition based on context or (c) disputes defined by way of a wider list of causes of action? Please say which option you prefer and why. If option (b) please suggest how you would define the scope and give reasons. If option (c) please say whether you agree with the definition suggested at paragraph 48 or propose an alternative definition.

Answer

We do not believe that the proposals should apply at all.

Question 8

Do you agree with the estimated costs and savings to legal businesses, media defendants, ATE insurers and the Courts? Will any additional costs or benefits arise from these proposals?

Answer

No. The introduction of any new rule creates opportunities (and in this case, a necessity) for additional legal work and possible satellite litigation. More costs will most likely be incurred than may be saved.

Impecunious claimants may lose access to justice, as solicitors will be deterred from taking on their cases if they are unable to pay the shortfall between the legal costs and the recoverable costs. ATE insurers will lose revenue.

Question 9

Do you agree with our initial view that the proposed changes will have no equality impacts? If not, please explain your reasons.

Answer

We have no information on whether any particular group is more likely to be involved in defamation proceedings, so cannot comment.

Question 10

What would be the potential costs/savings to your business of the proposals? Please explain how these costs or savings will arise, indicate the size of your

business; micro (1–9), small (10–49), medium (50–250) and also which sector you operate in.

Answer

Not applicable.

Question 11

Are there any competition impacts arising from these proposals? Please give details.

Answer

These proposals may deter solicitors from acting for clients who cannot make up the shortfall between the costs incurred and the recoverable costs. This will reduce the number of solicitors available to take on claims, which will impair competition. Paragraph 15 of the Consultation Paper states that "the area of defamation law is a small market in which few solicitors operate", in which case, a reduction in this number could have a grave impact on competition.

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 Ministry of Justice Consultation Paper CP4/09: *Controlling Costs in Defamation Proceedings* published on 24 February 2009 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, chairman of the CLLS Litigation Committee, at lindsay.marr@freshfields.com or on 020 7832 7317.

Yours sincerely

David McIntosh
Chairman