The City of London Law Society

4 College Hill
London EC4R 2RB
Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 – Cheapside 2
mail@citysolicitors.org.uk
www.citysolicitors.org.uk

City of London Law Society Litigation Committee: Response to the Consultation Paper

INTRODUCTION

1. The City of London Law Society ("CLLS") represents approximately 14,000 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.

2. The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response in respect of the Ministry of Justice's November 2010 Consultation Paper on the Proposals for Reform of Civil Litigation Funding and Costs in England and Wales (the "**Consultation**") has been prepared by the CLLS Litigation Committee.

3. We put in a response date 29 July 2009 to Lord Justice Jackson's Preliminary Report dated 8 May 2009 (the "**Preliminary Report**"), a copy of which can be supplied if that would be helpful.

4. In this response we address the points insofar as they concern commercial litigation, including litigation in the Commercial Court but keeping in mind that commercial cases also take place in other parts of the High Court including the Chancery Division and the general Queen's Bench Division.

5. It is important in our view to keep at the forefront of this review that London is a popular venue of choice for international business clients for the resolution of their disputes. Any recommendations for reform of the civil justice regime in this jurisdiction should therefore be designed to ensure that this jurisdiction remains attractive to such clients for the resolution of their disputes.

2.1 CONDITIONAL FEE AGREEMENTS AND SUCCESS FEES

The proposal: that CFA success fees should no longer be recoverable from the losing party.

Q1 – Do you agree that CFA success fees should no longer be recoverable from the losing party in any case?

6. Yes, so far as commercial litigation is concerned.

7. There is an argument that the recoverability of success fees has promoted access to justice for claimants (see, for example, Chapter 47, paragraph 4.1, page 481 of the Preliminary Report). However, we do not understand the available statistics to show the number of claims being issued to be rising each year. So it is not apparent, purely as a matter of empirical evidence, that such recoverability has resulted in greater access to justice.

8. In our view there is no reason of principle why success fees should be recoverable in commercial cases. It is neither fair nor proportionate that a defendant in a commercial case should bear the burden of success fees. Private arrangements negotiated by the claimant should not be visited on the defendant in that way. Further, if non-recoverable contingency fees (or "DBAs" as referred to in the Consultation) are permitted, they will be unlikely to gain traction if recoverability is retained for success fees (under CFAs) and ATE premiums.

Q2 – If your answer to Q1 is no, do you consider that success fees should remain recoverable from the losing party in those categories of case (road traffic accident and employer's liability) where the recoverable success fee has been fixed?

9. There may be a case for some form of recoverability in personal injury cases, on which we would not be qualified to comment.

Q3 – Do you consider that success fees should remain recoverable from the losing party in cases where damages are not sought, e.g. judicial review, housing disrepair (which the primary remedy is specific performance rather than damages)?

10. No.

Q4 – Do you consider that if success fees remain recoverable from the losing party in cases where damages are not sought, a maximum recoverable success fee of 25% (with any success fee above 25% being paid by the client) would provide a workable model?

11. In the light of our opposition to recoverability, we do not comment on this.

Q5 – Do you consider that success fees should remain recoverable from the losing party in certain categories of case where damages are sought e.g. complex clinical negligence cases? Please explain how the categories of case should be defined.

12. As indicated above, we confine ourselves in this response to comments on commercial litigation. It may be that a separate regime as regards recoverability should operate in personal injury litigation (including clinical negligence cases), on which we would not be qualified to comment.

Q6 – If success fees remain recoverable from the losing party in certain categories of case where damages are sought, (i) what should the maximum recoverable success fee be and (ii) should it be different in different categories of case?

13. As indicated above, we do not consider that recoverability should remain for commercial litigation. If it is to remain for personal injury litigation, it may be that the maximum recoverable success fee in that area should be reviewed, but we are not qualified to comment. We do not consider that it should remain for any other type of case.

Q7 – Do you agree that the maximum success fee that lawyers can charge a claimant should remain at 100%?

14. Yes, for now. In relation to high value business disputes, there is as yet insufficient evidence to make detailed comments about the appropriateness of success fees which are being allowed at present. This may need to be reviewed if DBAs are permitted, once their impact has been felt.

Q8 – Do you agree that there should be a cap on the amount of damages which may be charged as a success fee in personal injury claims, excluding any damages relating to future care or future losses?

15. As is addressed further at 29 below, we believe that it would be wrong in principle for a percentage of damages to be charged as a "success fee" even in personal injury claims.

Q9 – If your answer to Q8 is yes, should the cap be (i) 25%, or (ii) some other figure (please state with reasons)?

16. N/A.

Q10 – If your answer to Q8 is yes then should such a cap be binding in all personal injury cases or should there be exceptions, and if so what and how should they operate?

17. N/A.

2.2 AFTER THE EVENT INSURANCE PREMIUMS

The proposal: that the ATE insurance premium should no longer be recoverable from the losing party.

Q11 – Do you agree that ATE insurance premiums should no longer be recoverable from the losing party across all categories of civil litigation?

18. Yes, so far as commercial litigation is concerned.

19. Again, there is an argument that the recoverability of ATE premiums has promoted access to justice for claimants (see, for example, Chapter 47, paragraph 4.1, page 481 the Preliminary Report). However, we do not understand the available statistics to show the number of claims being issued rising each year. So we do not believe, purely as a matter of empirical evidence, that such recoverability has resulted in greater access to justice.

20. We do not believe that there is any reason of principle why ATE premiums should be recoverable in commercial cases. In our view it is neither fair nor proportionate that a defendant in a commercial case should bear the burden of ATE premiums. Private arrangements negotiated by the claimant should not be visited on the defendant in that way. Further, if DBAs are permitted, they will be unlikely to gain traction if recoverability is retained for success fees (under CFAs) and ATE premiums.

Q12 – If your answer to Q11 is no, please state in which categories of case ATE insurance premiums should remain recoverable and why.

21. As indicated above, we confine ourselves in this response to comments on commercial litigation. It may be that a separate regime as regards recoverability should operate in personal injury litigation, on which we would not be qualified to comment.

Q13 – If your answer to Q11 is no, should recoverability of ATE insurance premiums be limited to circumstances where the successful party can show that no other form of funding is available?

22. N/A.

Q14 – Do you consider that ATE insurance premiums relating to disbursements only should remain recoverable in any categories of civil litigation? If so, which?

23. No, so far as commercial litigation is concerned. Again, it may be appropriate for some form of recoverability to operate in personal litigation, on which we would not be qualified to comment.

Q15 – If your answer to Q14 is yes, should recoverability of ATE insurance premiums be limited to non-legal representation costs such as expert reports?

24. N/A.

Q16 – If your answer to Q14 or Q15 is yes, should recoverability of ATE insurance premiums relation to disbursements be limited to circumstances where the successful party can show that no other form of funding is available?

25. N/A.

Q17 – How could disbursements be funded if the recoverability of ATE insurance premiums is abolished?

26. In commercial litigation, we would expect this to be done in the usual way. Litigation funding may also have a part to play.

Q18 – Do you agree that, if recoverability of ATE insurance premiums is abolished, the recoverability of the self-insurance element by membership organisations provided for under section 30 of the Access to Justice Act 1999 should similarly be abolished?

27. We do not have sufficient experience of work for membership organisations to be in a position to comment on this.

2.3 10% INCREASE IN GENERAL DAMAGES

The proposal: that there should be an increase in general damages of 10%.

Q19 – Do you agree that, in principle, successful claimants should secure an increase in general damages for civil wrongs of 10%?

28. As we understand it, the thrust of this proposal is that there should be a 10% increase in general damages for claimants in personal injury litigation, on which we are not qualified to comment.

29. We do not know whether a 10% increase in the general level of damages would lead to sufficient compensation for personal injury claimants. In any event, we do not believe that it would be appropriate for damages intended for future care to be used to meet legal costs

Q20 – Do you consider that any increase in general damages should be limited to CFA claimants and legal aid claimants subject to a SLAS?

30. Yes.

2.4 PART 36 OFFERS

The proposal: that Part 36 of the Civil Procedure Rules (offers to settle) should be reformed.

Q21 – Do you agree with the proposal to introduce an additional payment, equivalent to a 10% increase in damages, where a claimant obtains judgment at least as advantageous as his own Part 36 offer?

31. No. It would be wrong in principle. It would represent a departure from the compensatory principle in the law of damages. It would also lead to an imbalance in the respective positions of claimants and defendants under the Part 36 regime. Such an award would arguably not be enforceable if brought to the UK from another jurisdiction, under the Protection of Trading Interests Act 1980, so it is difficult to see why such an award should be enforceable if made by a court here.

Q22 – Do you agree that this proposal should apply to incentivise early offers? Please explain how this should operate.

32. No.

Q24 – Do you consider that the increase should be less than 10% where the amount of the award exceeds a certain level? If so, please explain how you think this should operate.

33. We do not think there should be any such "increase".

Q25 – Do you consider that there should be a staged reduction in the percentage uplift as damages increase?

34. We do not think there should be any such "percentage uplift".

Q26 – Do you agree that the effect of *Carver* should be reversed?

35. Yes.

Q27 – Do you agree that there is merit in the alternative scheme based on a margin for negotiations as proposed by FOIL? How do you think such a scheme should operate?

36. No.

2.5 QUALIFIED ONE WAY COSTS SHIFTING

The proposal: that there should be a regime of qualified one way costs shifting in certain cases.

Q28 – Do you agree with the approach set out in the proposed rule for qualified one way costs shifting (QOCS) (paragraph 135 – 137)? If not, please give reasons.

37. No.

38. England and Wales has had the cost shifting rule for many years and is highly regarded internationally for the quality of its civil judiciary and civil justice. Many commercial parties make a positive choice to litigate their business disputes here.

39. Many business disputes are also resolved by arbitration in London. Most arbitral rules and institutional rules (including the Arbitration Act 1996 itself) embody the presumption that the successful party should be awarded its costs. Moreover, the procedures for assessment of costs awarded in arbitrations are generally simpler than in English litigation.

40. If London is to continue to thrive as a centre for the resolution of business disputes, it should not introduce new cost shifting rules which would make other regimes (such as arbitration) a more attractive option.

41. In any event, there is already a partial cost shifting system in England and Wales because a successful party will very rarely recover 100% of its costs, however reasonably that party has conducted itself in the relevant proceedings.

42. In our experience, costs recoveries for successful parties in commercial litigation are between 50 and 75% of the costs actually expended in bringing or defending an action (depending upon whether the costs award is on the standard or indemnity basis). Such awards still leave a substantial irrecoverable element for the winning party.

43. Interim summary assessments and interim payments on account have also proved to be useful devices in moderating litigation behaviour and in ensuring that parties think twice before launching applications before the court. Greater judicial consistency is, however, required in the exercise of these powers.

44. The extension of partial cost shifting by, for example, awarding costs in favour of successful individuals or claimants only, would result in commercial parties and / or defendants being treated unequally before the courts even though they too are, of course, entitled to access to justice. It would also worsen litigation behaviour since claimants with bad cases would know that the costs risks against them had been alleviated or removed altogether.

45. That would be likely to encourage more frivolous litigation because of the pressure on the defendant to settle rather than incur irrecoverable costs in a case which it should nevertheless win. That is of particular concern to commercial entities which, in the litigation environment, are sought out as defendants with deep pockets.

46. Accordingly, the erosion of cost shifting may well exacerbate one of the vices to which it appears to be directed to counter, namely the moderation of unreasonable or uncommercial behaviour in litigation, and may, in fact, undermine one of its suggested aims, namely access to justice.

47. No legal system is, of course, perfect but if costs are having an inhibiting effect on certain parties bringing proceedings before the court or making it more difficult or expensive for parties when they are before the court, we suggest that the answer lies not in the removal of cost shifting but in the more effective and creative use of case management powers (which the judiciary already have), the more consistent and creative use of interim costs orders, more effective devices for encouraging settlement of cases and simpler mechanisms for the assessment of costs with more input from the judge who heard the case.

Q29 – Do you agree that QOCS would significantly reduce the claimant's need for ATE insurance?

48. We are not in a position to comment on this.

Q30 – Do you agree that QOCS should be extended beyond personal injury? Please list the categories of case to which it should apply, with reasons.

49. No.

Q31 – What are the underlying principles which should determine whether OOCS should apply to a particular type of case?

50. We do not think QOCS should apply and certainly not beyond personal injury litigation.

Q32 – Do you consider that QOCS should apply to (i) claimants on CFAs only or (ii) all claimants however funded?

51. See our response at 50 above. We are not in a position to comment on how QOCS should apply to personal injury litigation, if it is to do so.

Q33 – Do you agree that QOCS should cover only claimants who are individuals? If not, to which other types of claimant should QOCS apply? Please explain your reasons.

52. See our responses at 50 and 51 above.

Q34 – Do you agree that, if QOCS is adopted, there should be more certainty as to the financial circumstances of the parties in which QOCS should not apply?

53. See our responses at 50 and 51 above.

Q35 – If you agree with Q32, do you agree with the proposals for a fixed amount of recoverable costs (paragraph 143 – 146)? How else should this be done?

54. See our responses at 50 and 51 above.

2.7 ALTERNATIVE RECOMMENDATIONS ON RECOVERABILITY

Q36 – Do you agree that, if the primary recommendations on the abolition of recoverability etc are not implemented, (i) Alternative Package 1 or (ii) Alternative Package 2 should be implemented?

55. As indicated above, we support the primary proposal of abolishing recoverability. If that proposal were not be adopted, we would support Alternative Package 2 as being closer to full abolition than Alternative Package 1.

Q37 – To what categories of case should fixed recoverable success fees be extended? Please explain your reasons.

56. If the primary proposal is not adopted, we consider that there should be no extension of fixed recoverable success fees beyond personal injury litigation.

Q38 – Do you agree that, if recoverability of ATE insurance remains, the Alternative Packages of measures proposed by Sir Rupert should also apply to the recovery of the self-insurance element by membership organisations?

57. See our response at 27 above.

Q39 – Are there any elements of the alternative packages that you consider should not be implemented? If so, which any why?

58. As indicated above, we would not support Alternative Package 1 as it would be further from full abolition (the primary proposal).

2.8 PROPORTIONALITY

The proposal: that there should be a new test of proportionality of costs.

Q40 – Do you agree that, if Sir Rupert's primary recommendations for CFAs are implemented, a new test of proportionality along the lines suggested by Sir Rupert should be introduced?

59. No.

Q41 – If your answer to Q40 is no, please explain why not and what alternatives would you propose to achieve the objective of ensuring that costs are proportionate?

60. There should not be a new test of proportionality that would, because the aggregate level of costs was considered to be disproportionate, have the effect of rendering irrecoverable costs that were necessary for the pursuit of a claim and were reasonable in amount. A case which may have a relatively small sum in dispute can be complex and require extensive preparation and therefore costs. The introduction of the proposed new test of proportionality would render it uneconomic to pursue claims where, because of the relatively small sums in dispute, the claimants' recoveries would be likely to be wiped out by irrecoverable costs. As indicated at 47 above, the answer lies in the more effective and creative use of case management powers (which the judiciary already have), the more consistent and creative use of interim costs orders, more effective devices for encouraging settlement of cases and simpler mechanisms for the assessment of costs with more input from the judge who heard the case.

Q42 – How would your answer to Q40 change if (i) Sir Rupert's alternative recommendations were introduced instead, or (ii) no change is made to the present CFA regime? Please give reasons.

61. It would not.

Q42 – Do you agree that revisions to the Costs Practice Directions, along the lines suggested (at paragraph 219), would be helpful?

62. They might be if, contrary to our view, this proposal were to be entertained.

Q44 - What examples might be given of circumstances where it would be inappropriate to challenge costs assessed as reasonable on the basis of the proportionality principle?

63. Given our view of the proposal, we make no comment on this at this stage.

2.9 DAMAGES-BASED AGREEMENTS

The proposal: that Damages-Based Agreement ('contingency fees') should be allowed in litigation.

Q45 – Do you agree that lawyers should be permitted to enter into Damages-Bassed Agreements (DBAs) with their clients in civil litigation?

64. Whilst we have some concerns as to whether DBAs might incentivise claimants' lawyers to too great a degree, with the potential to cause conflicts of interest and reputational damage to the legal profession, it seems to us that the "conflict of interest" issue has existed for some time in relation to CFAs and therefore, assuming CFAs are to remain, it is difficult to see an in principle objection to DBAs. We are therefore cautiously in favour of the introduction of DBAs as defined in Chapter 20 (paragraph 1.1, page 189) of the Preliminary Report.

Q46 – Do you consider that DBAs should not be valid unless the claimant has received independent advice?

65. No. It is not required as things stand for CFAs and the independent advice is likely either to (a) be perfunctory or (b) require the independent advisor to get as deeply into the case as the existing advisor thereby unnecessarily duplicating costs.

Q47 – Do you consider that DBAs need specific regulation? If so, what should such regulation cover?

66. No. See further our responses at 71 – 72 below.

Q48 – Do you agree that, if DBAs are allowed in litigation, costs recovery for DBA cases should be on the conventional basis (that is the opponent's cost liability should not be by reference to the DBA)?

67. Yes. We consider that the Canadian model referred to in paragraph 2.5 of Chapter 20 at page 192 of the Preliminary Report should be introduced in this jurisdiction. 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).

Q49 – Do you consider that where QOCS is introduced for claims under CFAs, it should apply to claims funded under DBAs?

68. No.

Q50 – Do you consider that the maximum fee lawyers can recover from damages awarded under a DBA in personal injury cases should be limited to (i) 25% of damages excluding any damages referable to future care or losses as proposed, or (ii) some other figure? Please give reasons for your answer.

69. We are not qualified to comment on this.

Q51 – Do you consider that in personal injury claims where the solicitor accepts liability for paying the claimant's disbursements if the claim fails, the maximum fee should remain at 25%? If not, what should the maximum fee be? Should the limit be different in different categories of case?

70. See our response at 69 above.

Q52 – Do you consider that there should be a maximum fee that lawyers can recover from damages in non-personal injury claims? If so, what should be maximum fee be, and should the maximum fee be different in difference categories of case?

71. In principle we believe the size of contingency fee should be a matter of negotiation between the client and the lawyer, subject to the type of long-stop which currently exists where a client wishes to challenge solicitor and own client costs.

72. That said, the trial judge should have the power to review the success fee as to reasonableness, and to limit its recoverability as between solicitor and client. We understand that judicial scrutiny of contingency fees often occurs in jurisdictions where they already operate, such as the United States and Canada.

Q52 – How should disbursements be financed by claimants operating under DBAs?

73. This would be a matter for discussion and agreement between solicitor and client. Litigation funding might have a role to play.

2.10 LITIGANTS IN PERSON

The proposal: that the prescribed rate of £9.25 an hour recoverable by litigants in person who cannot prove financial loss should be increased to £20 an hour.

Q54 – Do you agree that the prescribed rate of £9.25 per hour recoverable by litigants in person should be increased? If not, why not?

74. We believe that the policy considerations mentioned in paragraphs 3.2 to 3.4 of Chapter 17 (page 175) of the Preliminary Report should continue to restrain the extent to which litigants in person should be able to recover their own costs.

Q55 – Do you agree that the rate should be increased to (i) £16.50 per hour, (ii) £20 per hour or (iii) some other rate (please specify)?

75. See our response at 74 above. Subject to that, and whilst we do not generally act for litigants in person and so are not in a position to comment on the detail of such a proposal, if there is to be an increase we can see the logic of an inflation-based increase.

Q56 – Do you agree that the prescribed rate of £50 per day for small claims be increased? If so, to what figure?

76. We do not generally act in small claims and are therefore not in a position to comment on the detail of such a proposal. That said, we can see the logic of an inflation-based increase.

FURTHER ASSISTANCE

77. Should officials from the Ministry of Justice wish to discuss any aspect of this response or seek clarification of any of the points contained in it, we would be pleased to offer further assistance. In this regard, the principal contacts on our Committee will be Simon James (email: simon.james@cliffordchance.com, tel: +44 (0) 20 7006 8405) and Hardeep Nahal (email: hardeep.nahal@herbertsmith.com, tel: +44 (0) 20 7466 2184), who would be pleased to assist.

11 February 2011

THE CITY OF LONDON LAW SOCIETY
LITIGATION COMMITTEE

Individuals and firms represented on this Committee are as follows:

Simon James (Chairman)	Clifford Chance LLP
Duncan Black	Field Fisher Waterhouse LLP
Richard Clark	Slaughter & May LLP
Tom Coates	Lewis Silkin LLP
Angela Dimsdale Gill	Hogan Lovells International LLP
Geraldine Elliott	Reynolds Porter Chamberlain LLP
Gavin Foggo	Fox Williams LLP
Richard Foss	Kingsley Napley LLP
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Stefan Paciorek	Pinsent Masons LLP
Joanna Page	Allen & Overy LLP
Kevin Perry	Edwards Angell Palmer & Dodge UK LLP
Patrick Swain	Freshfields Bruckhaus Deringer LLP
Philip Vaughan	Simmons & Simmons