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BRIEFING PAPER

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No win, no fee funding arrangements

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Summary

The costs in civil litigation usually 'follow the event'. This means that the loser generally pays the winner's legal costs in addition to their own (although sometimes the loser will not be ordered to pay the full costs incurred by the winner). Where the winner's full costs are not recovered from the losing party, the winner may have to pay any shortfall to their own lawyers.

'No win, no fee' agreements are used to provide access to justice for those who cannot afford to pursue litigation and who are not eligible for legal aid. They may be used to fund all types of civil litigation except family cases. They cannot be used to fund representation in criminal proceedings. Whilst 'no win, no fee' agreements are usually used by those who would otherwise have no legal representation such a funding arrangement is open to any claimant, regardless of ability to pay lawyers' fees.

Should a claimant win, lawyers acting on the basis of a 'no win, no fee' agreement will claim a 'success fee' on top of the costs paid by the losing side. Should the claimant lose, the lawyers are not paid for their work on the case.

Key terms

- CFA: a form of 'no win, no fee' agreement under which success fees are calculated as a percentage of legal fees.
- Success fee: Fees that may be paid by successful parties to their lawyers acting on a CFA or speculative fee agreement, calculated as a percentage of legal fees and not on the amount recovered by the client.
- DBA: a different form of 'no win, no fee' agreement under which a lawyer's fee is calculated as a percentage of the client's damages if the case is won.
- ATE: after-the-event insurance which is purchased to protect against the costs and disbursements involved in litigation (primarily against having to pay the opponents costs in the event of losing a case).

England and Wales

In his 2009 review of the costs of civil litigation, Lord Justice Jackson found CFAs to be a major contributor to disproportionate costs. The last Government acted on his recommendations and the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* made major changes to funding arrangements in England and Wales made on or after 1 April 2013. The cost of lawyers' success fees and ATE insurance premiums can no longer be claimed by a successful claimant whose litigation was funded by a CFA; and the maximum that lawyers acting on a DBA can claim from a client's award of damages has been capped.

Scotland

In Scotland CFA arrangements are called speculative fee arrangements. Unlike their counterparts in England and Wales, solicitors in Scotland cannot enforce DBAs and advocates are forbidden from entering into them.

Northern Ireland

CFAs are not currently available to fund litigation in Northern Ireland, though the recent Access to Justice Review proposed their introduction.

1. No win, no fee agreements in England and Wales

1.1 Who pays in civil litigation?

The costs in civil litigation usually 'follow the event'. This means that the loser generally pays the winner's legal costs in addition to their own (although sometimes the loser will not be ordered to pay the full costs incurred by the winner). Where the winner's full costs are not recovered from the losing party, the winner may have to pay any shortfall to their own lawyers.

The costs of litigation usually 'follow the event' - if you lose you are liable to pay your opponent's costs

The expense of litigation and the withdrawal of legal aid means that many rely on 'no win, no fee' agreements to fund their claims. They may be used to fund all types of civil litigation except family cases. They cannot be used to fund representation in criminal proceedings. Whilst 'no win, no fee' agreements are usually relied on by those who would otherwise have no legal representation, such a funding arrangement is open to any claimant, regardless of ability to pay lawyers' fees.

1.2 Conditional fee agreements

The most common form of 'no win, no fee' agreement is the conditional fee agreement (CFA). Under a CFA the lawyers share with the client the risk of losing the case. If the case is lost, the lawyers will not charge the client for the work done. However if the case is won the lawyers will charge an additional success fee on top of the normal fees. This is intended to compensate the lawyers for the risk of not being paid and for the delays in getting paid. The level at which the success fee is set reflects the risk involved and can be up to 100% of the base cost.[1] A lower success fee may be payable if a case is settled at an earlier stage.

Success fees compensate lawyers for the risk of not being paid.

Lawyers are not obliged to accept a case on a CFA and when deciding whether or not to act on this basis they will take into account the merits of the case, its likely outcome and the level of the success fee.

To protect against having to pay the opponent's legal costs and both sides' disbursements (other expenses or charges, such as fees for expert witnesses if they are needed) claimants entering into CFAs may take out an after-the-event (ATE) insurance policy under which the insurer agrees to underwrite (sometimes subject to a maximum) the person's liability to pay the costs of another party to the litigation.

ATE insurance protects against having to pay the other side's costs

1.3 Legislative history

The *Courts and Legal Services Act 1990* permitted lawyers, for the first time, to enter into CFAs subject to satisfying prescribed

[1] In personal injury cases the success fee is capped at a percentage of the damages awarded - see paragraph 1.3.

conditions. The *Access to Justice Act 1999* permitted wider use of CFAs in civil litigation. Crucially the 1999 Act also made it possible for the successful party to recover the success fee and ATE insurance premium from the unsuccessful party. Until then, these costs were not recoverable and so were deducted from the client's damages.[2] In some personal injury cases the success fees were fixed, with the percentage varying depending on the type of claim and the stage at which it concluded. 100% success fees were available for those which concluded with a trial.

The 1999 Act also permitted the recoverability of a self-insurance element by membership organisations such as trade unions to cover their costs of indemnifying members against having to pay the costs of the winning party.

1.4 Human rights compatibility

In *Coventry and others v Lawrence and another* [2015] UKSC 50 the Supreme Court held, by a majority of 5-2, that the CFA regime prior to the Jackson reforms was compatible with the European Convention on Human Rights (ECHR).

Disproportionate figures were challenged on the basis that they contravened rights to a fair trial and to property

The case arose out of a nuisance dispute between neighbours, where damages should never have been substantial. However the appellants' base costs amounted to £398,000, the success fee was £319,000, and the ATE premium £350,000 - a total exceeding £1 million. The defendant respondents argued that such figures were so grossly disproportionate that their liability to pay them infringed their rights under article 6 ECHR (which protects the right to a fair trial), and/ or article 1 of the first protocol to the ECHR (which protects the right to peaceful enjoyment of ones possessions).

The majority identified the key aims of the regime as containing the rising cost of legal aid, improving access to the courts for members of the public with meritorious claims, and discouraging weak claims. The scheme's aims were held to be legitimate and its operation found to be a proportionate means of achieving those aims.

CFAs were held to be a rational and coherent means of achieving access to justice

The majority stated that there is no perfect solution to the problem of how best to enhance access to justice following the withdrawal of legal aid for most civil cases. It found the CFA scheme to be a 'rational and coherent' means of addressing this issue; success fees and ATE premiums would be recoverable as proportionate expenses if they had been necessarily incurred, even if the amount was large in comparison with the amount of damages reasonably claimed; and therefore not incompatible with the defendants' rights to a fair trial under Article 6 ECHR and property under Art 1 Protocol 1.

[2] The maximum uplift that could be claimed by solicitors in addition to their usual fee was set at 100% but the Law Society recommended a voluntary cap of 25% of the damages recovered.

1.5 The Jackson Review

In November 2008 Lord Justice Jackson was commissioned by the then Master of the Rolls to undertake a review of legal costs. The review was established on the basis that the costs of civil litigation were too high. The review considered the rules and principles governing the costs of civil litigation and made recommendations on how best to promote access to justice at proportionate cost.[3] Lord Justice Jackson published a Preliminary Report on 8 May 2009, and a Final Report in December 2009.[4]

Success fees and ATE insurance premiums were identified as leading to high costs

The report found that in some areas of civil litigation costs were disproportionate and impeding access to justice. 'No win, no fee' agreements were described by Lord Justice Jackson as "the major contributor to disproportionate costs in civil litigation in England and Wales". He identified the lawyer's success fee and ATE insurance premium as "two key drivers of cost under such agreements".[5]

In November 2010 the previous Government consulted on implementing a package of Lord Justice Jackson's recommendations.[6]

A number of the recommended measures required primary legislation, and some of the major reforms were taken forward in the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. This Act and regulations made under it had a significant effect in relation to funding arrangements made on or after 1 April 2013. General information is provided in the Ministry of Justice Policy Paper *2010 to 2015 Government policy: civil justice reform*, available on the GOV.UK website.

1.6 CFAs after Jackson

Lawyers' success fees and insurance premiums must now be met by the successful party

Following the Government's implementation of Lord Justice Jackson's recommendations, success fees payable under CFAs entered into after 1 April 2013 are no longer paid by the losing party[7] (except in limited classes of cases temporarily excluded from the reforms[8]). Nor can a costs order made in favour of a claimant using a CFA require the defendant to pay all or part of the ATE insurance premium.[9] The cost of an insurance policy is therefore now another factor that must be considered by any party contemplating litigation.

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3 The terms of reference for the review are set out in the *Review of Civil Litigation Costs: Final Report*, page 2

4 Courts and Tribunals Judiciary, *Review of Civil Litigation Costs: Reports*

5 *Review of Civil Litigation Costs: Final Report*, page xvi

6 *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales Implementation of Lord Justice Jackson's Recommendations*, Consultation Paper CP 13/10, November 2010, Cm 7947

7 Section 58A (6) of the *Courts and Legal Services Act 1990*, as amended by section 44 (4) of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*

8 See *Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013*, art 2

9 Section 58C of the *Courts and Legal Services Act 1990*, as inserted by section 46 (1) of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*

The *Conditional Fee Agreements Order 2013* provides that success fees may not exceed 100% of the basic damages.[10] In personal injury claims the Order capped success fees at 25% of the general damages for pain, suffering and loss of amenity and damages for past pecuniary loss in proceedings at first instance.[11] They are capped at 100% of those heads of damage on appeal.

Success fees are now capped

1.7 Damages-based agreements

A damages-based agreement (DBA) is a type of contingency fee agreement under which a lawyer can recover a percentage of the client's damages if the case is won. Previously DBAs could not be used to fund litigation or arbitration proceedings and could be used only in claims before tribunals. Since the entry into force on 1 April 2013 of the *Damages-Based Agreements Regulations 2013*, DBAs can be used to fund proceedings in all civil litigation cases (with limited exceptions[12]).

The *Damages-Based Agreements Regulations 2013* cap the maximum payment that a lawyer can recover from the client's damages at 25% of damages (excluding damages for future care and loss) in personal injury cases, 35% on employment tribunal cases (which has existed since 2010) and 50% in all other cases.[13]

Lawyers' payments from damages are capped

1.8 Proportionality and uncertainty of costs

A January 2016 decision of the High Court to award only a fraction of the costs claimed by a successful claimant in a privacy case is said to have ushered in an era of uncertainty in litigation.[14] A teacher settled a claim with the *Sunday People* for £20,000 plus costs. Her costs were originally assessed at £241,817 which included a 60% success fee for her solicitors, a 75% success fee for her barrister and an ATE insurance premium of £58,000. The figure was re-assessed to £167,389. The defendant challenged the amount, arguing that the reduced figure remained disproportionate. The costs judge agreed, finding that a sum of £83,964.80 represented the 'reasonable and proportionate costs' that should be allowed.

Speaking to the *New Law Journal*, costs lawyer Mark Carlisle said the decision heralded a whole new area of uncertainty:

> It is difficult to see how any privately funded litigant can make an informed decision about pursuing a case. It is now entirely possible that what appears to be a largely arbitrary reduction to a premium for ATE insurance (which the court accepts was necessary to protect the litigation from adverse costs and otherwise reasonable in amount) may result in a win turning into a significant and potentially ruinous net loss.[15]

Could awards of only 'proportionate' costs turn a win in court into a net loss?

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10 *Conditional Fee Agreements Order 2013*, art 3
11 Ibid, art 5
12 DBAs are not available for cases to which section 57 of the *Solicitor's Act 1974* applies.
13 *Damages-Based Agreements Regulations 2013*, reg 4
14 *BNM v Mirror Group Newspapers Ltd* [2016] EWHC B1 (Costs)
15 '"Reasonable" costs halved', *New Law Journal*, 10 June 2016

2. No win, no fee agreements in Scotland

2.1 Speculative fee arrangements

Solicitors in Scotland can currently enter into 'speculative fee arrangements' which are akin to CFAs in that a client is only required to pay his solicitor's legal fees if the litigation is successful. An enhanced fee is normally charged in the event of success. Success fees are calculated as a percentage of legal fees and not on the amount recovered by the client. In the event of the client's success, the fees element in the solicitor's account of expenses can be increased by a maximum of 100%.

Although entering into a speculative fee agreement means that a client will not have to pay his own solicitor anything if he loses the case, he still runs the risk of having to meet the other side's expenses. Currently, the only way of addressing this risk is through purchasing ATE insurance.

2.2 Damages-based agreements

In contrast to their availability in England and Wales, DBAs cannot currently be enforced by solicitors in Scotland and advocates are expressly forbidden by the Faculty of Advocates from entering into them. Some firms of solicitors have set up separate claims management companies, which are currently unregulated in Scotland, so that they can offer DBAs to their clients.[16]

DBAs cannot be enforced by solicitors and are forbidden for advocates

2.3 The Taylor review and Government consultation

The Scottish Government launched a consultation on the expenses and funding of civil litigation in January 2015.[17] The consultation drew heavily on Sheriff Principal James Taylor's *Review of the Expenses and Funding of Civil Litigation in Scotland*, published in September 2013. The remit of this review was:

> 'to review the costs and funding of civil litigation in the Court of Session and Sheriff Court in the context of the recommendations of the Scottish Civil Courts Review, and the response of the Scottish Government to that review [. . .]'.[18]

In summary, the main recommendations of the Taylor Review were as follows:

- Speculative fee arrangements offer access to justice but caps to the level of success fees should be introduced: a cap of 20% (inclusive of VAT) for the first £100,000 of damages; 10%

16 Scottish Government, Consultation on Expenses and Funding of Civil Litigation Bill, January 2015, para 43
17 Ibid
18 *Review of Expenses and Funding of Civil Litigation in Scotland*, September 2013, page 1

(inclusive of VAT) on damages between £100,001 and £500,000; and 2.5% (inclusive of VAT) on all damages over £500,000.[19]

- Solicitors in Scotland should be able to enter into DBAs (also referred to as 'contingency fees') on the basis that no fee would be charged should the case be lost.
- 'One way costs shifting' should operate in most circumstances in personal injury cases (including clinical negligence), meaning that the pursuer (usually an individual) would not be responsible for paying the defender's legal costs should the pursuer lose but that the defender would remain liable for the pursuer's legal costs should the defender lose.

In its consultation the Scottish Government announced its intention to bring forward legislation broadly along the lines recommended by Sheriff Principal Taylor: to introduce caps on success fees and to introduce DBAs (with the same caps). The legislation will likely provide that the only outlay which will remain the responsibility of a client under such agreements is any premium to obtain ATE insurance cover, should the client deem that necessary.

The Scottish Government published its analysis of the consultation responses in August 2015.[20] However reform in this area was not included in the Scottish Government's legislative programme for 2015/16.

19 Ibid, page 158
20 *Expenses and Funding of Civil Litigation Bill: Analysis of Consultation*, August 2015

3. In Northern Ireland

'No win, no fee' agreements are not available to fund civil litigation in Northern Ireland. Personal injury claims not reliant on legal aid are funded in a variety of ways, including commercial arrangements between lawyers and insurers, trade union support, and informal practices adopted by smaller firms.[21]

Solicitors' informal arrangements with clients mirror CFAs

Many personal injury cases in Northern Ireland operate under what are in practice CFAs, although they are not recognised as such. A successful claimant can only claim costs from a defendant to the extent that the claimant has incurred a liability to pay costs to his or her own solicitor. Lord Justice Jackson recommended the abolition of this "indemnity principle" in England and Wales because of its capacity to generate satellite litigation.[22] Solicitors overcome the problem of the prohibition on CFAs in civil litigation by notionally agreeing with their clients at the outset that the client is liable to pay their fees, but then waiving those fees if the case fails.[23]

In September 2010 the Minister of Justice in the NI Executive announced a review to examine how people could best be helped to secure access to justice in a cost effective manner. A consultation in 2013 shortlisted two options, both involving a conditional fee agreement with the success fee payable by the successful plaintiff or by the losing defendant. Both options were rejected, following further consideration, due to the significant additional costs incurred arising from the success fees and insurance premiums for ATE insurance.

A second report published following the Access to Justice Review Part II, *A strategy for access to justice*,[24] made further recommendations for how to maintain access to justice while minimising the cost to legal aid. It proposed the introduction of CFAs in Northern Ireland in line with the Jackson reforms:

Access to Justice Reviews proposed the introduction of CFAs in Northern Ireland

> Conditional fee agreements ("CFAs") have the potential to maintain and enhance access to justice for the whole population of Northern Ireland. In order to be effective and affordable in this jurisdiction CFAs should be introduced without any additional liabilities being imposed on defendants and with success fees payable from damages recovered. Claimants must be protected from adverse costs orders by one-way cost shifting. These recommendations are all in line with the Jackson reforms in England and Wales, the Taylor report in Scotland and the recommendations of the first Access to Justice Review.[25]

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21 '*A strategy for access to justice*', The Report of Access to Justice (2), September 2015, para 22.23

22 *Review of Civil Litigation Costs: Final Report*, pages 53-59

23 See '*A strategy for access to justice*', The Report of Access to Justice (2), September 2015, para 22.24

24 '*A strategy for access to justice*', The Report of Access to Justice (2), September 2015

25 Ibid, page 16

The report recommended that success fees should not be permitted in road traffic claims and success fees should be limited in all other cases to 20% of damages recovered.[26]

A second consultation[27] was opened on 30 November 2015 inviting comment on the recommendations made in *A strategy for access to justice*. It closed on 19 February 2016. The NI Executive has not yet published its response.

26 Ibid, page 17
27 Department of Justice, *Alternative Method for Funding Money Damages Claims consultation*, November 2015

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