"Improved Access to Justice –

Funding Options & Proportionate Costs"

The Future Funding of Litigation
- Alternative Funding Structures

APPENDICES

APPENDICES

APPENDIX 1

Recommendations from "Improved Access to Justice - Funding Options and Proportionate Costs

PART 1

RECOMMENDATIONS 1 – 20

Recommendation 1
Small Claims Limit for Personal Injury Cases

The starting point for recovery of costs in personal injury claims below £5,000 should remain at £1,000.

Recommendation 2
Fast Track Limit for Personal Injury Cases

The Fast Track Limit for personal injury cases should be increased to £25,000. There should be an opt-in option for cases up to £50,000 in value.

Recommendation 3
Personal Injury Cases in the Fast Track

The Predictable Costs Scheme (CPR Part 45 Section II), currently restricted to RTA cases below £10,000, should be extended to include all personal injury cases in the [increased level] fast track and should include fixed costs from the pre-action protocol stage through the post issue process & including trial with an escape route for exceptional cases. Fixed success fees, fixed/guideline ATE premiums and fixed/guideline disbursements should also be part of the scheme.

Recommendation 4

RTA Claims below £10,000

The vast majority of RTA claims fall below the £10,000 value threshold. The CJC recommends that in the vast majority of such claims where liability is not an issue speedy and prompt resolution would be assisted by a less resource intensive pre action protocol that would reduce unnecessary transactional costs. This should include:

(i) the presumption that the claimant's lawyer will obtain a medical report from an appropriate medical practitioner, at a fixed fee, to be paid promptly by the third party insurer.

(ii) the development of a "tariff" database for the valuation of general damages

(iii) in cases where a police report is necessary, the agreement of a national standardised format, fixed fee & target timescale for delivery.

(iv) a priority objective that all professionals involved in the claim should have regard to rehabilitation of the injured claimant in accordance with the APIL/ABI Rehabilitation Code.

Recommendation 5

In addition to personal injury cases, referred to in Recommendations 1 and 2 it would also be desirable to include housing cases within Recommendation 1, and non personal injury cases within Recommendation 2.

Recommendation 6

Section 6 of the Costs Practice Direction should be reviewed when the amendments to the Practice Direction, approved in July 2005, have come into effect, to ensure that the giving of an estimate carries a sanction if the estimate is departed from significantly.

Recommendation 7

In multi track cases where the value exceeds £1 million, in all group actions and in other complex proceedings there should be a rebuttable presumption requiring the parties to present budgets, supervised by the Court at appropriate stages to ensure compliance with the proportionality provisions of the overriding objective of the CPR.

Recommendation 8

Where the parties have agreed or the court has approved an estimate or budget and/or cap, both the receiving party and the paying party should be entitled to apply for detailed assessment but only at a costs risk if a significant increase/reduction in the amount claimed is not achieved.

Recommendation 9

Benchmark Costs

In all multi track cases benchmark costs should be provided for pre-action protocol work.

Recommendation 10

With a view to increasing access to justice and providing funding options in cases where ATE insurance is unavailable, the Legal Services Commission should give further consideration to the Conditional Legal Aid scheme (CLAS) previously proposed by the Law Society, the contingency Legal Aid Fund (CLAF) previously proposed by the Bar Council and JUSTICE, and the Supplementary Legal Aid System (SLAS) operating in Hong Kong.

Recommendation 11

In contentious business cases where contingency fees are currently disallowed, American style contingency fees requiring abolition of the fee shifting rule should not be introduced. However, consideration should be given to the introduction of contingency fees on a regulated basis along similar lines to those permitted in Ontario by the Solicitors' Act 2002 particularly to assist access to justice in group actions and other complex cases where no other method of funding is available.

Recommendation 12

Building on the Protective Costs Order as explained in R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192, to permit access to justice in public law cases, further consideration should be given to the wider import of the judgment.

Recommendation 13

Building on the judgment of the Court of Appeal in "*Arkin*" further consideration should be given to the use of third party funding as a last resort means of providing access to justice.

Recommendation 14

Encouragement should be given to the further expansion and public awareness of Before the Event Insurance to provide wider affordable access to justice funding complemented where necessary by a strong After the Event Insurance market.

Recommendation 15

The particular problems of funding group actions should be taken into account when considering Recommendations 10-13.

Recommendation 16

In addition to the presumption relating to the provision of medical reports in RTA cases below £10,000 (Recommendation 4) further work should be conducted by the CJC to develop an industry based agreement for fixed/guidelines fees for medical experts in all personal injury cases in a revised fast track of £25,000 (**Recommendation 2**).

Recommendation 17

Between the parties costs should be payable on the basis of costs and disbursements reasonably and proportionately incurred and should be assessed at hourly rates determined from time to time by the Costs Council (Recommendation 19) without prejudice to the ability of solicitors (and barristers) to agree other rates on a solicitor/client basis.

Recommendation 18

The CJC endorses the proposed legislation announced by the Government to regulate Claims Management Companies and urges that this be introduced with as much speed and rigour as possible so as to protect consumers and reduce if not remove opportunities for "technical" costs litigation that have bedevilled the Courts at all levels.

Recommendation 19

Successful litigants in person should be entitled to a simple flat rate (or fixed fee in a scale scheme) whether or not they have sustained financial loss.

Recommendation 20

A Costs Council should be established to oversee the introduction, implementation and monitoring of the reforms we recommend and in particular to establish and review annually the recoverable fixed fees in the fast track and guideline hourly rates

between the parties in the multi-track. Membership of the Costs Council should include representatives of the leading stakeholder organisations involved in the funding and payment of costs and should be chaired by a member of the judiciary.

Recommendation 21

That the DCA and the professional bodies (Law Society and Bar Council) should work together with the Attorney General's pro bono co-coordinating committee to introduce a pro bono CFA.

APPENDIX 2

Attendees at Costs Forum 2006

Organisation	
Abbey Legal Protect	Irwin Mitchell, Solicitors
Association of British Insurers	Judiciary
Allianz Cornhill	Law Society
Amelans, Solicitors	Legal Services Commission
Association of medical Reporting Agencies	Litigation Funding
Association of Personal Injury Lawyers	Litigation Protection
AXA	London solicitors Litigation Authority
Bar Council	Motor Accident Solicitors Society
Berrymans Lace Mawer, Solicitors	Medical Defence Union
British Medical Association	Motor Insurers Bureau
Carter Review Team	National Health Service Litigation Authority
Carter Ruck, Solicitors	Pattinson and Brewer, Solicitors
Citizens Advice Bureau	Royal Bank of Scotland
Commercial Litigators Forum	Royal sun Alliance
Consumers Association	Russell, Jones and Walker, Solicitors
DAS Legal Expenses	Shoosmiths, Solicitors
Department for Constitutional Affairs	Temple
Butterworths Costs Services	Thompsons, Solicitors
First Assist	Times Newspapers
Forum of Insurance Lawyers	Trade Union Congress
Girlings, Solicitors	Underwoods, Solicitors
Groupama	University of Oxford
Guise, Solicitors	Weightmans, Solicitors
Insolvency Management Services	Zurich Insurance

APPENDIX 3

Study meetings

- List of Attendees

Organisation	
Thompsons, Solicitors	Beachcrofts, Solicitors
Leigh Day & Co, solicitors	Davis Arnold Cooper, Solicitors
The Consumer Association	Department for Constitutional Affairs
Hugh James & Co, Solicitors	Law Society
University of Oxford	Legal Services Commission
Judiciary	Trade Union Congress
Legal Aid Board of Northern Ireland	Lovells, Solicitors
University of London, Queen Mary	
Irwin Mitchell, Solicitors	

APPENDIX 4

List of other research material

A non-exclusive list of material reviewed during the study

	Author
A pluralism of private courts	Dr A Cannon
A proposal by the Law society to link legal aid and conditional fees	Law Society
ABA Commission on billable hours report	American Bar Association
Achievable initiatives to improve civil law services in Queensland to the Attorney General	Queensland Public Interest Law Clearing House
Advocacy ad rhetoric vs scholarship and evidence in the debate over contingency fees: A reply to Professor Brickman	Professor HM Kritzer, Washington Law quarterly
An Australian perspective on class action settlements	V. Morabito, Monash University
Building a sustainable future – Civil legal aid fee proposals	Legal Services Commission
Civil Justice Council – Multi Party Actions	B Leigh
Civil Justice Reform: Some common problems, some possible solutions	GL Davies
Class Action Dilemmas-Pursuing Public Goals for Private Gain	
Class Action: Steps Rather Than Leaps	Rachael Mulheron
Comparing approaches to MTBI within Canada and in the UK, the USA, and Hong Kong	R Brian Webster QC
Compensation and blame culture – Reality or myth	AON
Competition: European Competition Network Launches a Model Leniency Programme	
Conditional versus contingent fees	W Emns, Bern University
Consultation paper on conditional fees	Law Reform Commission of Hong Kong
Contingency Fees As An Incentive to Excessive Litigation	Walter Olson US legal analyst
Contingent fees for contentious issues: A North American concept for British use	R Brian Webster QC
Costs in Public Interest Litigation	Queensland Queensland Public Interest Law Clearing House
Court adjudication of civil disputes	A Zuckerman, University College, Oxford
Damages actions for breaches of EU antitrust rules	European Union
Designing costs policies to provide sufficient access to lower courts	Dr A Cannon

	Author
DTI A Fair Deal for All – Extending Competitive Markets: Empowered Consumers, Successful Business	DTI
EU Consumer Policy: Making it Work!	David Byrne
European Commission Green Paper on damages action for breach of EC treaty anti-trust rules	EC
Expanding Private Causes of Action: Lessons from the U.S.Litigation Experience	John H.Beisner and Charles E.Borden
Improved Access to Justice-Funding –Hong Kong-Legal aid & SLAS	Hong Kong Law Refrom Commission
Fairness in Class Action	
Financing of Litigation by Third Party Investors: A share of Justice	Poonam Puri
Fonds d'aide aux recours collectifs Rapport Annuel 2003-04	
Funding Litigation: The challenge	Papers from the 3rd National Conference, Australian Institute of Judicial Administration
Damages actions for breach of the EC antitrust rules	European Commission
Group Actions in Germany	Conference papers
Group Action Recent Developments in France	Conference papers
Independent Lawyer	Various
Into the Future – The Agenda for Civil Justice Reform	Canadian Forum on Civil Justice
Is this the way we want to go	Lord Justice Kennedy
Legal Aid reform – The way ahead	Department for Constitutional Affairs and the Legal Services Commission. November 2006
Litigation Funding	Various
Litigation Funding & Legal Aid	Senior Costs Judge Peter Hurst Prepared for the CJC
Litigation Funding in Australia – Discussion Paper	The Officers Standing Committee of Attorneys-General
Litigation Funding in Australia	IMF submission to Standing Committee of Attorney's General
Litigation lending after Fostif. An advance in consumer protection, or a license to bottom feeders	Lee Aitken, University of Sydney
Lovell's Class Action Bulletin September 2006	Lovells Solicitors
Maintenance, litigation funding and representative actions	Peter Cashman, Law Commissioner, Victoria, Australia
Medial Class Actions in Australia & Canada: Pitfalls & Inconsistencies	Rachael Mulheron, Queen Mary College

	Author
Multi Party Actions for Consumer Redress	
National trends in personal injury litigation: Before and after Ipp	Professor EW Wright, Law Council of Australia
No fault compensation in New Zealand; Harmonizing injury compensation, provider accountability, and patient safety	Marie Bismark and Ron Paterson
Nought plus Nought plus Nought equals: Rhetoric and the Asbestos Wars	Dominic De Saulles
Organisation for Economic Co-operation & Development Recommendation for the Council concerning Effective Action Against Hard Core Cartels	OECD
Outcomes for legally represented and unrepresented claimants in personal injury compensation	Frontier Economics Ltd
Past and current efforts to ensure quality within the legal assistance community	AW Houseman, Center for Law and Social Policy
Proposals for a conditional legal aid fund	Bar Council
Protecting the consumer: Enforcing competition and consumer law	OFT
Reduce re-offending by ex prisoners	Social Exclusion Unit
Report of the legal costs working group	Department of justice, equality and law reform, Ireland
Representative in action in consumer protection legislation a consultation response	OFT
Restoration of a national legal aid scheme	Australian Legal Assistance Forum
Rise of Corporate Class Actions in Australia- An American Style Litigation Explosion	Commercial Litigation & Dispute Resolution: Bulletin: Speake Helmore Lawyers
Seven Dogged Myths concerning the contingency fee	Professor Herbert M Kritzer, University of Wisconsin Madison
Some Difficulties with Group Litigation Orders- and Why Class Action	Rachael Mulheron, Queen Mary College
Streamlined justice	Papers from the Advocate's Society and Law Society of Upper Canada conference
Study on the conditions of clams for damages in case of infringement of EC competition rues	Ashursts
Submission to the Standing Committee of Attorneys General on Litigation funding	Queensland Public Interest Law Clearing House
Suggested Changes to NWS Court Rules Relevant to Representative Proceedings	
Technical & Procedural Treatment of Class Actions in Different European Jurisdictions: A Bird's Eye View	Ioannis Alexopoulos – DLA Piper Rudnick Gray Cary LLP (UK)

Paper	Author
The Association of District Judges: Response to the Law Society paper: Compensation: Fast and Fair	Association of District Judges
The Canadian Bar Association v Province of British Columbia	Judgment
The compensation culture debate and tort "lore" lies damned lies and statistics	Annette Morris, Cardiff University
The Cost of compensation Culture	Institute of Actuaries Working Party
The Current state of Play in Europe: The Debate on Legislative Reform & Developments	Conference papers
The Dutch proposal for collective settlements: new trends in multi party actions. An evaluation	
The High Court has its say on Class Actions and Litigation Funding	Litigation update Blake Dawson Waldron - Lawyers
Toward a 21st century compensation system	ABI
US Class Actions: Lessons to be learnt and Fundamental Differences	Michael Hausfeld and Matthew Newick
Where are we heading with the funding of civil litigation	Denning Society, Lincoln's Inn
Will the revolution in the funding of civil litigation in England eventually lead to contingency fees	Professor M Zander, London School of Economics
YouGov – Cross Boarder Consumer Redress Research-Stage One Phrase one Interim Report	DTI
Law Reform Commission of Hong Kong Consultation paper on conditional fees	Law Reform Commission of Hong Kong
Guidance Notes to solicitors handling civil legal aid claims	Legal Aid Board of Hong Kong
Annual Report	Legal Aid Board of Hong Kong
Maintenance, Litigation Funding and Representative Actions	Dr P Cashman
Legal Costs in New South Wales	Legal Fees Review Panel
Competition Law Update	Freehills, solicitors
Review of Civil Law Legal Aid Scheme	Queensland Public Interest Law Clearing House
Past and current efforts to ensure quality in the civil legal assistance community	CLASP
Case management seminar report	Australian Institute of Judicial Administration
Court adjudication of civil disputes	A Zuckerman, University of Oxford
Canadian Tort Law	RB Webster QC
Into the Future: The agenda for civil justice reform (papers from Ontario, British Columbia, and Alberta)	Advocates Society

Paper	Author
Streamlining the Ontario civil justice system	Advocates Society
Civil procedure reform and costs system in Quebec	S Champagne, Barreau de Quebec
Support if growing for controversial contingent legal aid fund	J Robins article
Drug claims – The future or a lack of one	Lord Brennan article
CLAF – The Law Society and Bar proposals	DCA
Multi Party Actions	C Hodges, University of Oxford
Approaches to product liability in the EU and member states	C Hodges, University of Oxford
Conditional fees – A survival guide	Law Society (TM Napier)

APPENDIX 5

Attendees at Cost Forum 2007

Organisation	
Abbey Legal Protect	Irwin Mitchell, Solicitors
Association of British Insurers	Judiciary
Allianz Cornhill	Law Society
Amelans, Solicitors	Legal Services Commission
Association of Medical Reporting Agencies	Litigation Funding
Association of Personal Injury Lawyers	Litigation Protection
AXA	London Solicitors Litigation Authority
Bar Council	Motor Accident Solicitors Society
Beechcroft Wansborough	Medical Defence Union
Berrymans Lace Mawer, Solicitors	Motor Insurers Bureau
British Medical Association	National Health Service Litigation Authority
Carter Review Team	Norwich Union
Carter Ruck, Solicitors	Nottingham Law School
Citizens Advice Bureau	Royal sun Alliance
Commercial Litigators Forum	Russell, Jones and Walker, Solicitors
Consumers Association	Shoosmiths, Solicitors
DAS Legal Expenses	Temple
Department for Constitutional Affairs	Thompsons, Solicitors
Butterworths Costs Services	Times Newspapers
First Assist	Trade Union Congress
Forum of Insurance Lawyers	Underwoods, Solicitors
Girlings, Solicitors	University of Nottingham
Groupama	University of Oxford
Guise, Solicitors	Weightmans, Solicitors
Insolvency Management Services	Zurich Insurance

APPENDIX 6

Current methods of funding civil cases in England & Wales

1. There are five methods of funding civil litigation.

   i) Private funding
   ii) Legal Aid
   iii) Conditional Fee Agreements supported by After the Event Insurance
   iv) Legal Expenses Insurance
   v) Third Party Litigation Funding

(i) PRIVATE FUNDING

2. Private funding is the traditional method by which litigation is funded. The client enters into a retainer with the solicitor, who sets out the terms of business in a client care letter in accordance with the Solicitor's Costs Information and Client Care Code. The client may be required to pay the solicitor's (and counsel's) fees and disbursements during the progress of the case. At the end of the case, a final bill is delivered to the client for settlement. If the client has been successful and has been awarded costs against the opposing party those costs are ascertained by summary or detailed assessment carried out by the trial judge or a costs judge. The costs between the parties belong to the client and not to the lawyers, the purpose of the order of costs being to indemnify the client at least in part for the expense to which he or she has been put in conducting the litigation.

(ii) LEGAL AID

3. The Legal Aid scheme in England and Wales was introduced in 1948 to enable those who could not afford to litigate to do so, at little or no costs risks to themselves. Originally the eligibility limits were relatively generous. Those with no money were required to pay nothing towards their legal

assistance, others were required to make contributions depending on their capital and income. A significant proportion of the population was covered by the scheme.

4. Assuming that a client was financially eligible for legal aid, it was necessary to show that the case had a reasonable prospect of success. Latterly this requirement has been linked to another requirement ie that the end result would justify the amount of costs which would have to be spent in achieving that result. The LSC now applies a far more stringent test than merely a reasonable prospect of success and frequently requires counsel's opinion on merits before granting legal aid.

5. As the cost to the overall legal aid budget increased due to pressure on crime there was a constriction on civil legal aid. Eligibility limits were reduced in an effort to contain the cost. This has resulted in legal aid being available to only a small part of the population and not at all in most personal injury cases[1].

6. In the 1960s, 80% of households qualified for civil legal aid. Because of the ever growing, and largely uncontrolled demands of legal aid for crime[2], and in the face of exponential growth in areas of political societal concern such as family law and immigration, the amount available for civil has eroded over the years. Today, civil legal aid is only available only for those with a disposable income of less than £632 per month.

7. Between 1997 and 2004, the overall size of the legal aid budget rose from £1.5bn to £2.2bn. This has been estimated by Government to cost the taxpayer an estimated £100 per person per year each, said to make it the highest per capita in the world.

8. 2005/6 figures show that;

    - 1.6m received legal help or representation in connection with

[1] Legal Aid is still available for clinical negligence claims, and some multi party actions
[2] This is effectively available to any person facing a criminal charge, regardless of means

criminal offences

- Civil legal aid still exists, but it is almost exclusively limited to citizen versus state disputes

- Civil covers; mental health, immigration, housing, community care, actions against the police, and clinical negligence

- 700,000 people received some form of state funded legal advice in civil and family matters

- Of the 700,000, 130,000 family cases received legal aid certificates, and 25,000 in civil cases, excluding immigration work

- 93,000 people received advice or representation in immigration matters

- 6,700 law firms hold legal aid contracts for specific areas of civil legal work

- £831 m was spent on civil and family legal aid through the Community Legal Service

9. A legally-aided person whose case fails may be ordered to pay the costs, but the amount payable must not exceed the amount (if any) which is a reasonable one, having regard to the financial resources of all the parties to the proceedings and their conduct in connection with the dispute. The court has the power in certain circumstances to order that the LSC should bear the costs of the successful party. The legal representatives, although unsuccessful, are entitled to their costs out of the Fund, which are now payable at low prescribed rates, lower than ordinary commercial rates.

10. Where a legally-assisted person is successful, the costs belong to the legal

representatives, and not to the assisted party. The regulations provide that costs may be claimed against the paying party at normal commercial rates, rather than at the prescribed legal-aid rates (this is a departure from the normal indemnity principle). To the extent that the legal representatives are unable to recover costs from the paying party, those costs may be recoverable out of the CLS Fund, provided that those costs have been properly incurred and are reasonable. Such costs are paid only at the prescribed rates.

11. Legal Aid has been reviewed many times in recent years, attempting to address the ever increasing burden on the state.

12. In the 1980's the legal aid budget, previously ring fenced, was directly incorporated into the Lord Chancellor's Department budget. This meant that any overspend in legal aid would be have to be paid for from savings in administrative costs. More recent reforms have moved away from paying ex post facto hourly rates to lawyers, toward what are called "tailored rates" or "graduated rates" for the more complex cases.

13. The focus of the recent Government Review headed by Lord Carter of Coles was on criminal Legal Aid, an area where Lord Carter estimates that his recommendations could save 20% by 2010. The number of firms with criminal law contracts would be reduced.

14. Lord Carter made less expansive recommendations for civil. Reforms of a few years ago introduced what was called the Community Legal Service. It placed emphasis on greater specialism by lawyers providing services that were more geared to the legal needs of their respective communities.

15. Civil practitioners undertake either "controlled work", which is general legal advice and assistance, or "licensed work" which is representation based on eligibility and merits.

16. To provide some perspective, "controlled work accounts for nearly a million acts of advice, whether by telephone, through law centres, or law firms. These

are mainly in the areas of; debt, education, housing, employment, and welfare.

17. "Licensed work is the old fashioned legal aid certificate, of which there are about 130,000 per year in family, and 25,000 in civil.

18. The Community Legal Service was reviewed last year by a Parliamentary Select Committee after calls from consumer groups that it had created "advice deserts". They claimed that there were areas of the country where communities had no access at all to certain types of legal services.

19. The Civil Justice Council has expressed concern that the move to reducing the number of criminal contracts could have a serious effect on family and civil work[3]. 60% of criminal legal aid firms also do family work, and over 40% do civil. A reduction in the number of criminal firms, will inevitably lead to a reduction in the number of civil firms, and it is argued that the advice deserts debated by the Parliamentary Select Committee may only grow.

20. The Carter review exposes the vulnerability of the legal aid scheme. If costs are unsustainable politically, and the supplier base is being eroded[4], changes to the systems of procurement are unlikely to correct this long term trend in any significant way. Should the reforms accelerate the trend of supplier's leaving the market that in turn would accelerate the reduction in access to justice. **Against this scenario, with a perceived fragile ATE market (and thus CFAs) the alternative funding options of SLAS and contingency fees may ultimately provide the only way to maintain access to justice for the vulnerable and poor.**

[3] The Civil Justice Council response may be found at www.civiljusticecouncil.gov.uk
[4] Legal Services Commission figures show that the number of firms holding General Civil Certificates has fallen by 27% over the past five years (see Master of the Rolls' evidence to constitutional Affairs Select Committee, January 2007)

(iii) CONDITIONAL FEE AGREEMENTS (CFAS) SUPPORTED BY AFTER THE EVENT (ATE) INSURANCE

21. As Legal Aid eligibility limits were steadily reduced, a diminishing number of people were able to obtain legal aid in order to provide a means of access to justice. Section 58 of the Courts and Legal Services Act 1990 introduced the possibility of CFAs, commonly referred to as a "no win no fee agreements".

22. A CFA which complies with all the statutory requirements, makes it permissible for a legal representative to represent a client on the basis that if the case is lost, either no fee or a reduced fee, will be payable by the client. The client does, however, remain liable for the opposing party's costs. In recognition of the risk of non-payment or under-payment being taken by the legal representative, the legal representative is permitted to require payment of a percentage increase, known as a success fee, in the event of success. The success fee may be up to a maximum of 100% depending upon the level of risk being undertaken by the legal representative.

23. Originally, the success fee, was payable by the client out of the damages recovered from the opposing party[5]. The Law Society required solicitors to observe a voluntary cap on the level of success fee of 25% of the damages.

24. Following the change of government, and the introduction of the Access to Justice Act 1999, new sections 58 and 58A were inserted into the 1990 Act. This brought about a change in the law so that the party against whom an order for costs was made also had to pay the success fee, and in appropriate circumstances, any ATE insurance premium.

25. ATE insurance is a necessary part of access to justice provided by CFAs. As previously stated, a losing party represented under a CFA will have to pay the legal representatives either a reduced fee or no fee, but will still be liable for

[5] It is important to recognise that the policy that damages are sacrosanct is a new one, only dating back to the 1999 reforms. In both legal aid and earlier conditional fee schemes the individual would pay something from their award. Before that (dating back 750 years) lawyers would seek from their clients any shortfall in the costs that they cold not

the opposing party's costs. Since most litigants represented under CFAs do not have the means to meet such costs, it is necessary to have insurance which will meet those costs if the case is lost.

26. ATE insurance can be expensive and many litigants are unable to fund the premiums. In order to overcome this difficulty a number of different methods are used. In some increasingly rare cases the solicitors themselves will fund the premium, in other cases a loan is obtained from a bank to cover the cost of the premium.

27. Although the premium itself may be recovered from the paying party, the interest on the bank loan is not recoverable and will have to be paid by the client. Certain ATE policies have deferred premiums, ie nothing is payable until the litigation is completed, and still others are self-insuring, so that if the case is lost, no premium is payable.

28. The result of this change in the way litigation is funded was that losing parties usually backed by large liability insurers, found themselves liable to pay, not only the normal costs of the litigation, but also a success fee which could be up to 100% of the solicitor's profit costs and counsel's fees and also an ATE insurance premium. In consequence of this, the so-called "costs war" developed in which paying parties, backed by liability insurers, attacked the CFA in minute detail, since the 1990 Act provided that if the CFA, did not satisfy all of the conditions applicable to it by virtue of the Act, it would be unenforceable, and therefore no costs would be payable.

29. The Court of Appeal has been burdened with constant appeals relating to CFAs and has attempted to reduce the level of conflict. In addition, the Lord Chancellor, having consulted on the effectiveness of the CFA Regulations, revoked them, in the hope that this would remove the opportunity for many of the technical challenges which were being raised. Legal Representatives are now required to comply with the 1990 Act and with the Professional Rules

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recover An individual paying a contribution from their award is a recognised principle in all other common law jurisdictions (where the generally accepted figure is a near uniform 30%).

laid down by The Law Society and the Bar Council.

30. It remains to be seen how effective these measures will be, but it is already being argued that the Professional Rules have the force of statute, and that failure to comply with them would be a breach under the Act, which would render a CFA unenforceable. Given the amounts of money at stake, there is still room for satellite litigation attacking CFAs and ATE premiums.

31. The ATE market is immature and a number of potential providers, who entered the market early on, have left it again having suffered heavy losses.

32. There are currently five underwriters and twenty seven intermediaries providing ATE products[6]. There are unconfirmed reports that some underwriters are losing money on their ATE books.

33. From the start the ATE market has been vulnerable. Firstly it was established quickly from a minimal base of information to assess actuarial risks, which rendered the level of premiums not much more than an informed guess. Underwriters who also operated in the German market had a degree of experience, but the lack of certainty over legal costs meant that German principles[7] could not be exported to the English market.

34. The sustainability of the ATE market relies very heavily, like the rest of the insurance market, on a large breadbasket of cases, supported by accurate assumptions on risk and exposure.

35. Following the introduction of the new CFA regime, there was much uncertainty. The "costs war" broke out because a considerable extra financial burden had been passed to the liability insurance industry when success fees and ATE premiums had been made recoverable, and there was no

[6] Source: Litigation Funding
[7] At the time German operated the BRAGO system of scaled fixed fees

transparency as to the levels of success fee claimed or ATE premiums charged. The "Costs War" was assessed to have resulted in between 150,000 and 180,000 technical challenges being brought on CPR Part 8 grounds[8] . Insurers routinely brought technical challenges and the protracted caused serious delays in the victims of injuries from being paid and in their lawyers receiving costs (and sometimes no costs at all despite have won the case – see Myatt & Garner below).

36. To some extent the initial "Costs War" was suspended when the CJC mediated a series of predictable costs agreements, bringing certainty to all but the most serious settled road traffic claims, and to success fees for RTA and employers liability cases. This was because insurers knew what they were going to pay, and lawyers knew what they were going to receive, and when they were going to receive it. Research supporting these mediations also provided information on litigation risk.

37. The mediated and subsequent new rules in the CPR agreement on predictable costs managed to achieve some stability in the ATE market, but other factors affected the conditions necessary for a sustainable effective market.

38. Anecdotally, it is said that some solicitors are "speccing**"** or self-insuring their own cases. There have also been allegations of solicitors issuing **"ghost"** insurance policies.

39. The insurance industry has claimed that speccing or self insuring injury cases, may account for up to a quarter of low value, low complexity claims in certain types of injury.

40. Further uncertainty in the ATE market has been brought about by the emergence or greater use of Before the Event insurance policies, previously underused in supporting claims. Before the Event (BTE) insurance is widely available, as an add-on to house or car policies. It costs around £25, and affords legal cover from around £25-100,000, depending on policy. Although

[8] CPR Part 8 provides for a party to litigate on costs only, even where liability and quantum have been agreed.

widely used in other jurisdictions (such as Germany and Sweden) it was relatively underused in England until fairly recently. (It has been argued that it was underused, as it was deliberately not promoted, thus keeping the premium very low).

41. Professor Fenn's research suggests that now, an estimated 22% of RTA claims are run under BTE policies. This further erodes the breadbasket.

42. Although they are often the same companies as those that offer BTE cover and receive payment of substantial referral fees, the liability insurers are engaged in a further phase of the "Costs War" challenging the level and stages of ATE premiums, and the means by which the lawyer is tied into contracts with ATE providers. This has lead to greater uncertainty in the market although the CJC is currently attempting mediated solutions to all outstanding aspects of the costs war.

43. There is currently consultation as to whether there is a need to take out ATE insurance before the defendant to an action (or more precisely their insurer) has had an opportunity to admit liability. The simple argument is to question why insurance should be take out if there is no risk? If the answer to that question means "no risk therefore no ATE insurance", a considerable proportion of the breadbasket of cases would be removed affecting further the shape of the market.

44. The possible effects of further reform on the ATE market influences recommendation 4 in this report.

(iv) LEGAL EXPENSES INSURANCE

45. This is more popularly called Before the Event (BTE) insurance and is obtainable as a separate policy or more usually as an add-on to household and motor policies. This type of insurance is

    a) cheap (the many pay for the few);
    b) not recoverable from the paying party; and
    c) does not require the use of a CFA or ATE.

46. Liability insurers, who are also providing motor or household policies usually include BTE insurance cover. BTE is relatively economical to purchase, costing in the region of £25 as an add-on to an existing policy and typically provides cover up to £25,000 or £50,000 or even £100,000.

47. Changes to the Law Society's Introduction & Referral Code permitting referral fees has had the affect of encouraging the expansion of BTE insurance. BTE companies can refer claims often for a considerable fee (in excess of £500 per case) to firms who belong to panels, and deal with high volume cases. Insurers do not expect to pay costs if the case is lost. If won, the lawyer does not receive a success fee (there is no CFA) so the costs to the liability insurer is reduced. Most of these cases (85%) are within the predictable costs scheme.

48. Despite the mutually exclusive relationship between CFAs and BTE policies a strange by product of the technical challenges in the 'costs war' has been the argument (approved in Myatt) that if a legal representative has failed properly to investigate the existence of BTE insurance then a CFA is unenforceable and no costs are recoverable[9].

(v) THIRD PARTY LITIGATION FUNDING

49. Of the five methods of funding civil claims, the funding by parties who do not have a direct interest in the case (beyond their own investment and stake in the outcome) is the newest addition to the civil justice "funding menu".

50. For many years the laws of champerty, maintenance and barratry prohibited third parties from financing a claim, unless they were a party to the litigation. Over the years these doctrines have ceased to be criminal offences, and subsequently tortuous, although some argument still exists as to whether they are genuinely permissible under Rules of Court. A history of champerty and maintenance appears at **Appendix 11.**

51. In 2005 the Court of Appeal (Arkin) decided that third party funding was acceptable in terms of public policy, where the claimant had no other ways of funding their case. The court also laid down guidelines that if the claim is lost, the funder should be liable for adverse costs equal to the limit of their investment.

52. The development of third party funding is explored in more detail in Part 2 Section C of this report (Recommendation 3).

[9] Garrett v Halton Borough Council [2006] EWCA Civ 1017

APPENDIX 7

Caselaw – CFA's and ATE insurance

14. Four recent decisions of the Court of Appeal (*Garrett v Halton Borough Council; Myatt v National Coal Board* [2006] EWCA Civ 1017; *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134; and, *Gaynor v Central West London Buses Ltd* [2006] EWCA Civ 1120) have caused considerable disruption in the operation of the CFA/ATE market. There has been considerable reaction in the legal press, with forecasts of far reaching consequences.

15. The decisions in *Garrett* and *Myatt* will affect a diminishing number of cases because of the revocation of the CFA Regulations, although the Court of Appeal recognised that the decisions were of considerable importance since thousands of CFAs were entered into before 1 November 2005, in respect of claims whose costs consequences have not yet been resolved. The House of Lords has dismissed the petition seeking to appeal these decisions. The decisions in *Rogers* and *Gaynor* relate to the application of the statutory provisions in the Access to Justice Act 1999, and the Courts and Legal Services Act 1990.

GARRETT AND MYATT – OVERVIEW

16. In these appeals the court identified two questions which it felt had not been decided by *Hollins v Russell* [2003] EWCA Civ 718. The questions were:

    ii) whether the test of materiality referred to in paragraph 107 of *Hollins v Russell* requires the court to consider whether the client has suffered actual prejudice as a result of an alleged failure to satisfy the conditions referred to in Section 58(3) of the 1990 Act;

    iii) whether the enforceability of a CFA is to be judged by reference to the circumstances existing at the time when it is entered into, or by reference to the circumstances known to exist at the time when the question arises for decision.

17. The court noted that the approach of the court in *Hollins* was based on the proposition that the words "satisfied all the conditions applicable to it" in Section 58(1) of the 1990 Act should be construed in a realistic way to reflect the purposes of the legislation. Having quoted paragraphs 105 to 109 of *Hollins*, the court expressed the view that there was no hint in the judgment that, in considering whether the conditions had been sufficiently complied with it was necessary or relevant to take into account any detriment actually suffered by the claimant as a result of the departure from the Regulation in question. In each case the court

considered whether there had been a substantial compliance with, or a material departure from what was required by looking at what the solicitor did without regard to the consequences for the client.

18. The language used in *Hollins* did not invite Judges to consider whether the departure from the Regulation had caused the client to suffer any detriment, it merely reflected the fact that Costs Judges would be looking back to an earlier point in time when considering whether there had been a material departure, nor was it intended that there should be a consideration of the actual consequences of the material departure. The focus on the adverse effect was on the protection afforded to the client, not whether, as a matter of fact, the client had actually suffered any prejudice. If there has been a failure of substantial compliance, or a material departure from what is required by the Regulations, that failure or departure of itself, has a material adverse effect on the protection afforded to the client, or upon the proper administration of justice. The court concluded that if there has been a departure from a Regulation which has had a materially adverse effect on client protection, the client "would have just cause for complaint" even if he chooses not to complain because he has not in fact suffered any detriment, or is aware of any.

19. The court then turned to consider the question whether materiality requires a consideration of actual detriment. The court held that the language of Section 51(3) of the 1990 Act is clear and uncompromising. If one or more of the applicable conditions is not satisfied, then the CFA is unenforceable. The court acknowledged that the scheme can yield harsh results, especially if the client has not suffered any actual loss as a result of the breach, but it is designed to protect clients and to encourage solicitors to comply with detailed statutory requirements which are clearly intended to achieve that purpose.[10] In relation to Section 58(1) and (3) of the 1990 Act, Parliament must be taken to have decided deliberately not to distinguish between cases of innocent non compliance and those which are negligent or committed in bad faith, nor between those which cause prejudice (in the sense of actual loss) and those which do not. Parliament's approach was tough but not irrational. The only mitigation of this strict approach is that the breach must be material, in the sense described at paragraph 107 of *Hollins*, so that literal but trivial material departures from the statutory requirements do not amount to a failure to satisfy the statutory conditions. In the view of the court it is fallacious to say that a breach is trivial or not material because it does not in fact cause loss to the client in the particular case.

20. The enforceability of a CFA (like any other contract) should, as a matter of principle, be capable of being determined as at the date that it is made. Otherwise, its enforceability may change during the lifetime of the contract, thus making the contractual position between

[10] The court held that the approach laid down by the House of Lords in *Wilson v First County Trust Ltd (No.2)* [2003] UKHL 40; [2004] 1 AC 816 and *Smith (Administrator of Cosslett) Contractors Ltd v Bridgend County Borough Council* [2001] UKHL 68; [2002] 1 AC 336 should be adopted.

solicitor and client uncertain from day to day, according to whether, at the point of time when the issue is being considered, it can be shown that the client has or has not suffered detriment as a result of the breach. The statutory scheme is straightforward, its language refers only to breach and not to causation or loss. Subject to the principle that the law is not concerned with very small things, a breach of contract is a breach even if it causes no loss.

21. *Hollins* dealt a fatal blow to challenges to the enforceability of CFAs on the grounds of minor technical breaches of the statutory requirements. Following *Hollins* 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.

22. The court acknowledged that it might, in some cases, be helpful to have regard to what actually happened, since that might shed light on the *potential* consequences of a breach (if the matter is judged at the date of the CFA) and therefore on the extent to which the breach had a material adverse effect on the protection afforded to the client. In most cases, however, the Judge is urged to focus his/her 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 to make a judgment as to whether, in the light of that material, the departure from the requirements in question had a material adverse effect on the protection afforded to the client.

23. The principal question for the court to decide in *Garrett* and *Myatt* was whether there was substantial compliance with (or no material departure from) a requirement if a breach did not in fact cause the client to suffer detriment.

GARRETT V HALTON BOROUGH COUNCIL – ANALYSIS

24. Ms Garrett suffered a personal injury and entered into a CFA with her solicitors who had had the claim referred to them by a claims management company (AA). The solicitors advised the claimant that they believed that a contract of insurance with NIG (the insurer required by AA) was appropriate. The solicitors confirmed that "we do not have an interest in recommending this particular insurance agreement". An attendance note of a telephone conversation recorded that it was explained to the claimant that the solicitors "had no interest in the [insurance] premium and it is between the client and AA although we are on the AA panel". The Judge at first instance found that there was a declarable interest (failure to recommend the NIG policy would lead to termination of the panel membership) although not a direct financial interest.

25. The Court of Appeal rejected a submission that the Regulations should be construed narrowly because of their potentially draconian effect on solicitors. The purpose of the Regulations is to protect clients, not the financial interest of solicitors. The court found that the word "interest" was not ambiguous and clearly included membership of a panel of a claims management company. The obligation in Regulation 4(2)(e)(ii) is to inform the client, if the solicitor recommends a particular insurance contract, "whether he has an interest in doing so". The obligation is not to inform the client whether *he believes* that he has an interest in doing so; it is to inform the client whether he has such an interest *in fact*. The Regulation is concerned with client protection.

26. The court accepted the submission that the profit generated by cases referred by a claims management company was likely to be of greater significance to solicitors than commissions paid for ATE insurance premiums in connection with CFAs. The indirect financial interest in maintaining a flow of work through membership of a panel of solicitors is greater than the direct financial interest in commissions paid for insurance premiums. The court found that the solicitors did have a financial interest in recommending the NIG policy to the claimant and that the Judge at first instance was correct in concluding that there was insufficient disclosure of that interest.

27. Finally, the court pointed out that the Solicitors Financial Services (Conduct of Business) Rules 2001 were amended, with effect from 14 January 2005, to comply with the European Directive on Insurance Mediation 2002/92/EC. From that date a solicitor who proposes that his client should enter into an ATE insurance policy, and who recommends a particular policy because it is the only policy which, consistently with his firm's membership of a panel, he is allowed to recommend, must tell the client that he is contractually obliged to recommend a policy with that insurer. This obligation continues after the revocation of the CFA Regulations on 1 November 2005, and the court pointed out that, if the obligation has been observed since 14 January 2005 the problem which arose in the *Garrett* case should not have arisen again since that date.

MYATT & ORS V NATIONAL COAL BOARD - ANALYSIS

28. The claimants in *Myatt* were all former miners suffering from noise induced hearing loss. Each case was settled for less than £5,000. Each claimant entered into a CFA with his solicitors and the costs were dealt with as costs only proceedings under CPR 44.12A. On assessment the CFA in each case was held to be unenforceable by reason of a breach of Regulation 4(2)(c) because the solicitors had failed to inform any of the claimants whether they considered that they had relevant BTE cover.

29. The court found that it was implicit in the Regulation that the solicitor must take steps to ascertain what the insurance position is, in order to be in a position to say whether he considers that the client's risk of costs is already insured. To some extent the solicitor must rely on the client for this purpose and is required to do no more than take reasonable steps. This will depend on all the circumstances of the case.

30. On the particular facts, the court agreed with the Costs Judge that the solicitors had asked the wrong question. They should not have asked the claimants to decide whether they had before the event insurance, which would cover their risk as to costs in respect of their claims. Since the solicitors had asked the wrong question they did not take reasonable steps to ascertain the true insurance position so as to enable them to inform the clients whether they considered that the risk was already insured.

31. Although *Myatt* was decided on its own facts, the court was persuaded to give further guidance. Regulation 4(2)(b) does not require the solicitors slavishly to follow the detailed guidance given by the Court of Appeal in *Sarwar v Alam* [2001] EWCA Civ 1401; recognising that *Sarwar* had no application in high volume low value litigation conducted by solicitors on referral by claims management companies. The guidance of the Court of Appeal is set out below. It is not intended to be exhaustive. The court emphasised that what was reasonably required of a solicitor depends on all the circumstances of the case.

> "72. 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. … 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.
>
> 73. 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. … At para 138, [of Hollins] 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.

74. 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.

75. Fourthly, the cost of the ATE premium may be a relevant factor. … 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.

76. 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."

32. The court concluded that it was not possible to give rigid guidance as to the questions the solicitor should ask in every case, but 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 trade union, to send him the policy or trade union membership document. In certain circumstances it will be 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 may be reasonable to ask the client whether he has any legal expenses insurance which will cover costs in respect of the proposed claim.

33. The court concluded by emphasising that their guidance was not intended to give encouragement to defendants to embark on fishing expeditions in the hope that they might be able to show that the claimant's solicitor did not discharge his Regulation 4(2)(c) duty. The court should not require further disclosure unless there is a genuine issue as to whether there has been compliance with Regulation 4.

34. In respect of a case where a solicitor fails to inform the client whether he considers that his risk of incurring liability for costs is covered by a BTE policy, but the client does not in fact have a relevant BTE policy, the question arises whether the court is entitled to have regard to the fact that there is no BTE policy when it decides whether the solicitors failure is a material breach. The court found that the fact that a client had no relevant BTE insurance when the solicitor infringed Regulation 4(2)(c) was irrelevant to the materiality of the breach.

ROGERS V MERTHYR TYDFIL COUNTY BOROUGH COUNCIL – ANALYSIS

35. This was the Court of Appeal's first opportunity to deal with staged ATE premiums. The claimant, a child, was injured when he fell over in a play area in a local park, damages were agreed in the sum of £3,105 and the claimant succeeded at trial. The ATE policy had a three stage premium: £450 payable at the outset, a further £900 payable when proceedings were issued, and a further £3,510 sixty days before the trial. On appeal to the Circuit Judge the ATE premium was reduced to £900.

36. On appeal to the Court of Appeal three main issues arose for decision:

    iv) What is the proper approach to proportionality in a small personal injury case where the ATE premium may appear large in comparison with the amount of the damages reasonably claimed?;

    v) What is the proper approach to evidence of reasonableness of the choice and of the amount of the ATE premium in such cases?;

    vi) Are both staged (or stepped) premiums and single premiums for ATE insurance legitimate for the purposes of the recoverability of an ATE premium by a successful claimant, and is it reasonable that such premium should be wholly or partially block rated?

37. In relation to proportionality the court referred to CPR rule 1.1, the overriding objective, and to the decision in *Lownds v Home Office* [2002] EWCA Civ 3654. Following that decision, if the court concludes that it was *necessary* to incur the staged premium, then that should be adjudged a *proportionate* expense. Once it is concluded that the ATE staged premium was necessarily incurred, principle and pragmatism together compel the conclusion that it was a proportionate expense. The question for the court to decide was whether the ATE staged premium was necessarily incurred.

38. Nobody suggested that a staged premium model was not, of itself, a legitimate way of rating the risk. The circumstances which must be taken into account by the court, under CPR 44.5(1), include the financial risk faced by the insurer. The fact that the ATE premium was large compared with the agreed damages did not necessarily mean that it was disproportionate.

39. On the facts of the case, including an analysis of the actual figures, the court found it impossible to say that the total premium was unreasonable.

40. The court endorsed what the Senior Costs Judge had said about the material published in Litigation Funding in *Re: RSA Pursuit Test Cases*:

41. "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."

42. The court rejected the submission that the solicitor, in tying himself to the particular insurer (DAS) was in breach of Section 4(1) of the Solicitors Introduction and Referral Code 1990. The court stated that the success of ATE insurance had been dependent, from the outset, on such arrangements, which are designed to prevent "cherry picking" and to ensure that very many low risk cases are available as a counterweight to the few high risk cases. Counsel for the Law Society confirmed that solicitors had been advised that they would not act in beach of the Code if they made reasonable contractual arrangements of this kind with ATE insurers. On the facts of the case the court found that the solicitor had acted reasonably. The defendants had been unable to identify any cheaper alternative provider and the average premium of the DAS policy compared favourably with the average premium charged by their competitors.

43. The Court of Appeal gave guidance as to the procedure to be adopted in future in respect of ATE policies incorporating two or more staged premiums. The party whose policy it is should inform the opponent that the policy is staged, and should set out, accurately, the trigger moments at which the second or later stages will be reached. This obligation is intended to be in addition to the obligations set out in CPR 44.15(1) and in paragraphs 19.1(1) and 19.4 of the Costs Practice Direction. If this information is given the opponent will have been given fair notice of the staging and, unless there are features of the case that out of the ordinary, his liability to pay, at the second or third stage a higher premium than would otherwise have been the case, should not prove to be a contentious issue. Information as to staged premiums, should in the light of this judgment, be given to an opponent in respect of policies already in existence, even if the appropriate notice for funding has already been given.

44. If an issue arises about the size of the staged premiums, the Court suggested that it would 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 the client, and the basis on which the premium is rated, whether block rated or individually rated. District Judges and Costs Judges do not have the expertise to judge the reasonableness of a premium, except in very broad brush terms, and the viability of the ATE market would be imperilled if they were to regard themselves (without the assistance of expert evidence) as

better qualified that the underwriter to rate the financial risk which the insurer faces. The Court pointed out that it was not in an insurers' interest to fix a premium at a level which would attract frequent challenges.

45. Finally, the Court confirmed that it is permissible and reasonable for the premium itself to be insured by the policy. This issue had been decided by the Court in *Callery v Gray* (No. 2) [2001] EWCA Civ 1246 at 63.

46. The Court, specifically, did not decide the extent of recoverability of an ATE premium, which buys certain benefits which are not directly linked with the financial risks faced by the client who takes out the policy. Whether that element of the premium, if identifiable, should properly be chargeable to the unsuccessful defendant must await the outcome of a future inquiry.

GAYNOR V CENTRAL WEST LONDON BUSES LIMITED – ANALYSIS

47. Miss Gaynor was injured while travelling as a passenger on one of the Defendant's buses which was involved in a collision. She consulted solicitors who sent her a retainer letter. Proceedings were commenced and damages were eventually. The compromise was embodied in a consent order, which also provided that the defendant should pay the Claimant's costs if not agreed on the standard basis.

48. On the detailed assessment, the defendant argued that the retainer letter was in fact a CFA, and that it was unenforceable because it failed to comply with certain of the CFA Regulations. As the judgment makes clear, the appeal turns on the true construction of the retainer letter.

49. The letter gave the firm's hourly rates and estimated that, if the case went to a full hearing, the fee was likely to be £6,000 plus VAT and disbursements. It points out that if the Claimant were to win she would recover the majority of her costs from the Defendant, and, if she were to lose she would probably be ordered to pay the Defendant's costs. The letter states that the solicitors will not seek a payment on account of costs, except possibly for experts' reports. The Court found nothing exceptional in the terms of the letter to that point.

50. The letter then continued, stating that, although it is the usual practice of solicitors to obtain a payment on account, they would not be doing so. If the opponent admitted liability the insurers would pay the legal costs. The letter continued:

> (b) "However, and where liability is not admitted and you decide to pursue your case further, you may be liable to pay for the costs of medical reports, police

> reports and other expert reports as are required. If you succeed under a cover of compensation from your opponent you will be reimbursed for your outlay.
>
> If your claim is disputed by your opponent and you wished to pursue your claim through litigation, then we will require a payment on account of costs and disbursements. Before requesting any payment we will discuss the alternative methods of funding your case with you. You may have the funds to pay for the costs of litigation. You may wish to enter into a conditional fee agreement with us and apply for after the event legal expenses insurance to cover your opponent's cost in litigation ...."

51. The letter continued by asking appropriate questions in respect of pre-existing legal expenses insurance, and the client was informed that, if she were to meet the costs of litigation from her own funds, she would be billed at regular intervals as the matter progressed. The letter concluded:

> "If your claim is disputed by your opponents and you decide not to pursue your claim then we will not make a charge for the work which we have done to date".

52. The Costs Judge at first instance rejected the suggestion that the letter amounted to a CFA, largely on the basis that it was plain from the language of the retainer letter that there was no intention to make a CFA. The defendant appealed to the Circuit Judge, who allowed the appeal, agreeing that the parties never intended to enter into a CFA (there was no other evidence), but accepting the defendant's submission that the Costs Judge had asked himself the wrong question. The Judge found that, as a result of Section 58(2)(a) of the 1990 Act, there are only two kinds of fee agreement, those that fall within the section and those that fall outside it. He found that there was no scope for a third species of agreement, namely one which, although it appeared to fall within the section, in fact fell outside it by reason of lack of intention. The Court of Appeal found that the basis for the Circuit Judge's conclusion must have been the last paragraph of the retainer letter quoted above.

53. In the Court of Appeal, the defendant argued that the retainer letter was an agreement for the provision of advocacy and litigation services, which provided for the claimant's solicitor's fees and expenses to be payable only in certain specified circumstances namely, in all circumstances, save where she decided not to pursue the claim. This submission was rejected by the Court, which stated that the object of Section 58 of the 1990 Act and the Regulations is to provide protection to the client. (See *Hollins v Russell* [2003] EWCA Civ 718 paragraph 100, 105 and 107). This is predicated on the assumption that the solicitor will in fact provide litigation or advocacy services. If such services are not provided, the client has no need of protection.

54. The Court continued:

> (c) "13 ... 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 *for those services*, or any of them, to be payable only in specified circumstances. The words that I have emphasised are critical to this appeal. A provision in an agreement as to the costs payable in respect of services which are not advocacy or litigation services as defined by Section 119(1) is irrelevant to whether an agreement is a CFA".[11]

55. The Court found that the central question to be answered was whether the words "the work we have done to date" came within the definition of "litigation services". It was purely a question of construction and did not involve considering what work was in fact done by the solicitor. It involved a consideration of whether work done by the solicitor before the claimant decided not to pursue her claim should properly be characterised as the provision of litigation services.

56. The Court found that the last paragraph of the retainer letter was an offer to waive fees for modest pre-litigation services. The Court continued:

> "17. Approaching it as a matter of construction, I would hold that the work done before a decision is made not to pursue the claim, pursuant to the last paragraph on the page, is not the provision of litigation services. In my judgment "contemplated proceedings" are proceedings on which it can be said that there is at least a real likelihood that they will be issued. Until the potential defendant disputes her claim, it is not possible to say that the proceedings are contemplated. Advising a client as to whether he or she had a good prima facie case and writing a letter of claim are not enough to amount to litigation services.
>
> 18. This approach to the "litigation services" is consistent with the statutory purpose of protecting clients to which I have referred at paragraph 13 above. A client who, having received limited pre-litigation services, decides not to pursue a claim by litigation has no need for the panoply of protection afforded by the conditions stated in Section 58(3) of the 1990 Act. In my view it was not intended by Parliament that this statutory regime should apply to agreements to provide such limited services. This agreement is a far cry from the most obvious application of Section 58(2)(a), namely a "no win, [no fee] agreement."

57. This decision, more than any other, has triggered considerable commentary in the legal press. In general, the commentaries are fundamentally flawed in that they base their conclusions on the incorrect assumption that the Court was construing the 1990 Act, whereas the whole decision focuses on the meaning of the retainer letter. On the facts, the retainer letter was found to be valid and not a CFA, and, to the extent that similar retainer letters are in use, the Court of Appeal decision will be followed. There is nothing, either the judgment or the Act, which prevents a party entering into a CFA at the outset.

58. One writer suggests: "the judgment deals with the statutory definition of a CFA ..."; it does not. Another assumes that the Court interpreted "contemplated proceedings" in a way which somehow impinges on the meaning of the Act; it does not.

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[11] Section 119(1) defines "litigation services" as "any services which it would be reasonably to expect a person who is exercising or contemplating exercising, a right to conduct litigation in relation to any proceedings, or any contemplated proceedings, to provide" Regulation 1(3) of the CFA Regulations defines "client" as including, a person who has instructed the legal representative to provide advocacy or litigation services to which the conditional fee agreement relates.

59. Section 58(2) CLSA 1990 states "(a) A conditional fee agreement is an agreement with a person *providing advocacy or litigation services* ...", i.e. it describes the sort of person *with whom* it is possible to enter into a CFA. There is no requirement that proceedings should be contemplated at that stage and indeed, as the writer states, many CFAs are brought to a successful conclusion without proceedings being commenced. Had the claimant, in this case, entered into a CFA from the outset, there would have been no problem (provided that the CFA Regulations had been complied with).

60. The decision in *Gaynor* should be seen as no more than a decision on its own facts, and, to the extent that there are retainer letters in operation which use the same or similar wording, the decision of the Court of Appeal will apply.

APPENDIX 8

Summary of CLAF and SLAS Schemes in Australia[12], Hong Kong, and Canada

South Australia	Legal Assistance Fund
Operating since	1992
Types of Case	Personal injury, public liability, professional negligence, commercial, insurance, inheritance
Merits Test	YES - Prospects, Likelihood of recovery, public interest
Means Test	YES - Unable to afford from own means. Income >$70,000 (£30,000) plus reasonable assets
Cost Protection	No
Contribution	At the Panel's discretion
Application Fee	$100 ($250 for emergency applications)
Assistance Provided	Reasonable legal costs on a scale basis, and disbursements
Recovery	15% award, plus recovery of advanced legal costs and disbursements
Annual Volume	13 applications approved.
Annual turnover	
Profit/Loss	
Notes	Solicitor provides a cost estimate

South Australia	Disbursement Only Fund
Operating since	1992
Types of Case	Civil and commercial cases
Merits Test	YES - Prospects, Likelihood of recovery, public interest, if defence counterclaim exceed claim
Means Test	YES - Unable to afford from own means. Not eligible for legal aid
Cost Protection	No
Contribution	At the Panel's discretion
Application Fee	$100 ($250 for emergency applications)
Assistance Provided	Disbursements
Recovery	Disbursements plus 25-100% uplift on value of disbursements
Annual Volume	
Annual turnover	
Profit/Loss	
Notes	Solicitor acts on a no win no fee basis

[12] The CJC is grateful to the Queensland Public Interest Clearing House for the information on Australian State SLAS Schemes

South Australia	Legal Assistance Fund
Operating since	1992
Types of Case	Personal injury, public liability, professional negligence, commercial, insurance, inheritance
Merits Test	YES - Prospects, Likelihood of recovery, public interest
Means Test	YES - Unable to afford from own means. Income >$70,000 (£30,000) plus reasonable assets
Cost Protection	No
Contribution	At the Panel's discretion
Application Fee	$100 ($250 for emergency applications)
Assistance Provided	Reasonable legal costs on a scale basis, and disbursements
Recovery	15% award, plus recovery of advanced legal costs and disbursements
Annual Volume	
Annual turnover	
Profit/Loss	
Notes	Solicitor provides a cost estimate

Queensland	Civil Law Legal Aid Scheme
Operating since	1993. Funded by Public Trustee. Operated by Legal Aid Board
Types of Case	All civil litigation. PI cases take priority.
Merits Test	YES - Prospects, Extent of benefit or detriment, Public Interest.
Means Test	YES - Standard Legal Aid Queensland test.
Cost Protection	No
Contribution	If just above means test, a contribution may be required.
Application Fee	None
Assistance Provided	Fixed legal fees and Disbursements. ($2,000 District and Supreme Courts, %500 Magistrates Court)
Recovery	Repayment of amount lent.
Annual Volume	300 applications granted in 13 years (from 500 applications)
Annual turnover	Paid out $3m in total over past 13 years.
Profit/Loss	Loss, £1m in 13 years. Recovered $2m.
Notes	Applicant must have been refused legal aid. Solicitors must be approved by LAQ. Solicitors and Counsel must act on a no win no fee basis. $30,000 threshold for PI claims to use court system.

New South Wales	Pro Bono Disbursement Trust Fund
Operating since	
Types of Case	Only for matters conducted pro bono or at a significantly reduced cost and the matter must have been referred through the Law Society's Pro Bono Scheme or the Bar Association's Legal Assistance Scheme or the Public Interest
Merits Test	YES - prospects
Means Test	No
Cost Protection	No
Contribution	Yes - Based on assessment
Application Fee	
Assistance Provided	Reasonable legal costs and disbursement
Recovery	Total reimbursement not to exceed: $7,500 (supreme court, district court), $3,750 (local courts), $5500 (other jurisdictions)
Annual Volume	
Annual turnover	
Profit/Loss	
Notes	Legal Aid must have been refused.

Western Australia	Legal Assistance Fund
Operating since	1991. $1m start up funding from Law Society and Lottery funding
Types of Case	Only for matters conducted pro bono or at a significantly reduced cost and the matter must have been referred through the Law Society's Pro Bono Scheme or the Bar Association's Legal Assistance Scheme or the Public Interest
Merits Test	n/k, presumed yes
Means Test	YES - Unable to afford from own means.
Cost Protection	Yes
Contribution	n/k
Application Fee	n/k
Assistance Provided	Legal costs and disbursement. Lawyer works on a flat fee (below market rates)
Recovery	15% of damages
Annual Volume	
Annual turnover	
Profit/Loss	
Notes	The Fund was closed to new application in 2003.

Victoria	Law Aid
Operating since	1995. $1.6m grant in 1998 from State Government.
Types of Case	All civil
Merits Test	YES - prospects, likelihood of recovery, public interest.
Means Test	Yes - On a case by case basis.
Cost Protection	No
Contribution	Yes - Repay all disbursements
Application Fee	No
Assistance Provided	Reasonable legal costs and disbursements.
Recovery	5.5% of damages (initially 10%)
Annual Volume	
Annual turnover	
Profit/Loss	
Notes	

Northern Teeritories	Contingency Legal Aid Fund
Operating since	1993. $200,000 start up from Law Society. Attorney General's Department, Law Society and Legal Aid Commission.
Types of Case	Only for matters conducted pro bono or at a significantly reduced cost and the matter must have been referred through the Law Society's Pro Bono Scheme or the Bar Association's Legal Assistance Scheme or the Public Interest
Merits Test	YES - prospects
Means Test	No
Cost Protection	No
Contribution	Yes - Based on assessment
Application Fee	
Assistance Provided	Reasonable legal costs and disbursement
Recovery	Total reimbursement not to exceed: $7,500 (supreme court, district court), $3,750 (local courts), $5500 (other jurisdictions)
Annual Volume	
Annual turnover	
Profit/Loss	
Notes	Legal Aid must have been refused.

Tasmania	Civil Disbursement Fund
Operating since	2004. $250,000 allocated by State Government. Operated by LA Commission
Types of Case	Preference for serious personal injury, employer's liability, professional negligence.
Merits Test	Yes - Prospects, Quantum, Likelihood of recovery
Means Test	Yes - Applicant unable to cover disbursements.
Cost Protection	No
Contribution	Yes - Depending on means
Application Fee	
Assistance Provided	Disbursements and sundries
Recovery	Full recovery of disbursements plus uplift of 20-100% of disbursements.
Annual Volume	100 in history (35 average pa)
Annual turnover	
Profit/Loss	Solicitor must act on a no win no fee basis, reduced fee, or pro bono.

Hong Kong	Supplemental Legal Aid Scheme
Operating since	1984. Initial line of credit of HK $1m (£80,000), repaid. Extended in 1989.
Types of Case	Initially PI and fatal accidents only. Extended to: Personal Injury, Professional Negligence, Employer's Liability,
Merits Test	YES - Reasonableness of claim. Same as for mainstream legal aid
Means Test	Yes - Legal Aid limit at HK$158,300, SLAS limit at HK$439,800
Cost Protection	Yes
Contribution	Yes - HK$ 39,575
Application Fee	HK$1,000,plus interim contribution of HK$39,575
Assistance Provided	Reasonable legal costs and disbursement
Recovery	Outlay, interest, plus 6% if settled, 10% on delivery of brief to counsel (reduced from 7.5 and 15%)
Annual Volume	01: 159. 02:124. 03:79. 04: 85. **05: 85**
Annual turnover	From HK$37m (02) to HK$21.7m (04)
Profit/Loss	+ HK$90m. From HK$35m (01) to HK$4.7m (04). Ran into deficit in 2005
Notes	Above the legal aid threshold . Ran at a profit until 2005, when it reported an annual deficit due to; the impact of claims managers taking away the low risk low value RTA cases, a reduced levy on damages, and extension into more risk bearing areas of litigation. The HK Law Reform Commission recommends the development of a hybrid CLAF, with conditional fees for a third tier of coverage.

Ontario Canada	Class Proceedings Fund
Operating since	1992. CD$500,000 grant from Law Society of Upper Canada
Types of Case	Civil class actions
Merits Test	Yes - Merits, funds raised by class, public interest, disadvantage
Means Test	
Cost Protection	Yes
Contribution	
Application Fee	
Assistance Provided	Disbursements only. Lawyers to act on contingency basis
Recovery	Outlay plus 10% of damages
Annual Volume	50 in 14 year history. Less than 12 from 01-03
Annual turnover	CD$300,000 paid out 92-04.
Profit/Loss	CD $3,300,000 to 2003
Notes	

Quebec Canada	Fonds d'aide aux recours collectifs
Operating since	1978. Capital guaranteed by Provincial Government
Types of Case	Civil Class Actions
Merits Test	Yes
Means Test	
Cost Protection	Yes
Contribution	
Application Fee	
Assistance Provided	Legal fees (CD$100 per hour) plus expert fees
Recovery	Outlay plus 10% of damages (2-10% levy on all class settlements even if not funded by le Fonds. 50-90% of uncollected money, 50-70% of unclaimed cy pres awards.
Annual Volume	55 in 2003
Annual turnover	84% of applications granted.
Profit/Loss	
Notes	If the claimant is only likely to recover a small amount, then small claims scale costs only would be recoverable.

APPENDIX 9

CASE LAW - THIRD PARTY FUNDING

Third party funding is becoming more prevalent. The approach of the court has developed since *MacFarlane v EE Caledonian Ltd (No.2)*[13] where a claims consultant who had maintained the action of an unsuccessful claimant was ordered to pay the costs of the successful defendant. The fact that the maintainer had not accepted liability for the successful adverse party's costs tainted the contract with the claimant with illegality, quite apart from the additional illegality which arose from the champertous nature of the agreement.

The court has recently examined the question of third party litigation funding in more detail, in *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655. In that case the claimant, Mr Arkin, was a man without means. His lawyers were acting for him under CFAs. He was, however, only able to pursue his claim to judgment because of the financial support provided by a professional funder, MPC. The claim failed. Mr Arkin's lawyers recovered nothing. MPC's support for him cost them in excess of £1.3 million for no return. Very substantial costs had been incurred by the defendants and by the Part 20 defendants which together amounted to nearly £6 million. The court explained (at paragraph 23) that "cost shifting" under which costs usually follow the event is not a universal rule in common law jurisdictions. The main principle that underlies the rule is that if one party *causes* another unreasonably to incur legal costs he ought, as a matter of justice, to indemnify that party for the costs incurred. The defendant, who has wrongfully injured a claimant and who has refused to pay the compensation due, should pay the costs that *he has caused* the claimant to incur so that the claimant receives a full indemnity. A claimant who brings an unjustified claim against a defendant, so that the defendant is forced to incur legal costs in resisting that claim, should indemnify the defendant in respect of the costs that *he has caused* the defendant to incur. The court concluded:

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[13] 1995 1 WLR 366 Longmore J

> "23. … Causation is usually a vital factor when considering whether to make an award of costs against a party.
>
> 24. Causation is usually a vital factor in leading a court to make a costs order against a non party. If the non party is wholly or party responsible for the fact that litigation has taken place, justice may demand that he indemnify the successful party for the costs that he has incurred .."

The court confined its attention to cases where application for an order for costs against a non party has been made on the ground that the non party has supported the unsuccessful claimant.

The court examined a number of authorities including *Hamilton v Al-Fayed (No.2)* [2002] EWCA Civ 665 in which Simon Brown LJ, after extensive consideration of the authorities, identified that there was a conflict between two principles: on the one hand the desirability of the funded party obtaining access to justice; on the other, the desirability that the successful party should recover his costs. He considered that where the funders were "pure funders" the former principle should prevail. There were indications that this result accorded with public policy. Simon Brown LJ recognised that one benefit of the principle that costs follow the event was that this deterred the bringing of actions that were likely to be lost. The fact that lawyers would assess the merits carefully before appearing under a CFA, and that the Legal Services Commission required a similar exercise before approving the grant of legal aid were likely to achieve the same benefit. Pure funders were less likely to exercise the same careful judgment. Nonetheless the desirability of access to justice prevailed.

The Court of Appeal then considered a recent Privy Council decision *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UK PC 39. In that case Lord Brown of Eaton-Under-Heywood set out the principles to be derived from the English and Commonwealth authorities.

> "36. 1) Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or

defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.

2) Generally speaking the discretion will not be exercised against "pure funders", described in paragraph 40 of *Hamilton v Al Fayed* as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.

3) 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 non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence - see, for example, the judgments of the High Court of Australia in *Knight* and Millett LJ's judgment in *Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [1997] 1 WLR 1613. Consistently with this approach, Phillips LJ described the non-party underwriters in *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12 as "the defendants in all but name". Nor, indeed, is it necessary that the non-party be "the only real party" to the litigation in the sense explained in *Knight*, provided that he is "a real party in ... very important and critical respects" - see *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* (2001) 179 ALR 406, referred to in *Kebaro* at pp 32-3, 35 and 37. Some reflection of this concept of "the real party" is to be found in CPR 25.13 (2) (f) which allows a security for costs order to be made where "the claimant is acting as a nominal claimant".

4) Perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder's own financial interests."

The Court of Appeal, having considered these principles, did not dispute the importance of helping to ensure access to justice but considered that appropriate weight should be given to the rule that costs should normally follow the event:

> "38. … In our judgment the existence of this rule, and the reasons given to justify its existence, render it unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action. Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed."

The court pointed out that a funder who entered into an agreement which is champertous would be likely to render himself liable for the opposing party's costs without limit should the claim fail. The solution put forward by the Court of Appeal was as follows:

> "41. We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party *to the extent of the funding provided.* The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit."

7. In giving its decision in "Arkin" the Court of Appeal said:

> "42. If the course which we have proposed becomes generally accepted, it is likely to have the following consequences. Professional funders are likely to cap the funds that they provide in order to limit their exposure to a reasonable amount. This should have a salutary effect in keeping costs proportionate."

Maintenance and champerty

4–026.1 One of the recurring themes which the courts have had to deal with over the years is that of actions being supported by non-parties and the extent to which such parties can and should be made liable to pay the opposing party's costs in the event of failure.

Lord Mustill succinctly described the history of maintenance and champerty in a judgment in 1993[9]:

> " . . . the crimes of maintenance and champerty are so old that their origins can no longer be traced, but their importance in medieval times is quite clear. The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious since the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims which the defendant lacked the resources and influence to withstand. The fact that such conduct was treated as both criminal and tortious provided an invaluable external discipline to which, as the records show, recourse was often required. As the centuries passed the courts became stronger, their mechanisms more consistent and their participants more self reliant. Abuses could be more easily determined in accordance with the demands of justice, without recourse to separate proceedings against those who trafficked in litigation. In the most recent decades of the present century maintenance and champerty have become almost invisible in both their criminal and tortious manifestations. In practice, they have maintained a living presence in only two respects. First, as the source of the rule, now in the course of attenuation,[10] which forbids a solicitor from accepting payment for professional services on behalf of a plaintiff calculated as a proportion of the sum recovered from the defendant. Secondly, as the ground for denying recognition to the assignment of a "bare right of action". The former survives nowadays, so far as it survives at all (that is, champerty), largely as a rule of professional conduct, and the latter (that is, assignment), is in my opinion best

[8] *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] 1 W.L.R. 1649; [2002] 1 All E.R. 737, Ferris J.
[9] *Giles v Thompson* [1994] 1 A.C. 142 at 153.
[10] *i.e.* by the introduction of conditional fees.

> treated as having achieved an independent life of its own. It therefore came as no surprise when Parliament, acting on the recommendation of the Law Commission,[11] abolished the crimes and torts of maintenance and champerty."[12]

The abolition of the crimes and torts does not affect any rule of that law where a contract is to be treated as contrary to public policy or otherwise illegal.[13]

Maintenance

The Law Commission defined maintenance as "the procurement, by direct or indirect financial assistance, of another person to institute, or carry on or defend civil proceedings without lawful justification".[14] The Commission went on to discuss what might constitute "lawful justification" and noted that the trend of judicial authorities was towards an increase in the number of interests which the courts are prepared to accept.[15] 4–026.2

Lord Denning M.R. commented on the developing law on a number of occasions, first in 1968:

> "A person is still guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse. But the bounds of 'legitimate concern' have been widened: and 'just cause or excuse' has readily been found. . . .
>
> Much maintenance is considered justifiable today which would in 1914[16] have been considered obnoxious. Most of the actions in our courts are supported by some association or other, or by the State itself. Comparatively few litigants bring suits, or defend them, at their own expense. Most claims by workmen against their employers are paid for by a trade union. Most defences of motorists are paid for by insurance companies. This is perfectly justifiable and is accepted by everyone as lawful, provided always that the one who supports the litigation, if it fails, pays the costs of the other side."[17]

Lord Justice Scarman confirmed the continuing erosion of illegality in 1975:

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[11] Proposals for the Reform of the Law relating to Maintenance and Champerty, 1966, Law Com. No. 7.
[12] s.14 of the Criminal Law Act 1967.
[13] s.14(2) the Criminal Law Act 1967.
[14] Para.9, Proposals for the Reform of the Law relating to Maintenance and Champerty, 1966, Law Com. No.7.
[15] Report, para.10.
[16] *i.e.* at the time of the judgment in *Oram v Hutt* [1914] 1 Ch. 98, CA.
[17] *Hill v Archbold* [1968] 1 Q.B. 686, CA.

> "The maintenance of other people's litigation is no longer regarded as a mischief: trade unions, trade protection societies, insurance companies and the State do it regularly and frequently. The law has always recognised that there can be lawful justification for maintaining somebody else's litigation; today, with the emergence of legal aid, trade unions and insurance companies, a great volume of litigation is maintained by persons who are not parties to it . . . the law, therefore, may recognise exceptions to its illegality."[18]

Lord Denning expressed the view in a later judgment that although the abolition of the crimes and torts of maintenance and champerty struck down earlier authorities based on outdated public policy:

> "it did not strike down our modern cases in so far as they carry out the public policy of today."[19]

He concluded:

> "It is perfectly legitimate today for one person to support another in bringing or resisting an action—as by paying the costs of it—provided that he has a legitimate and genuine interest in the result of it and the circumstances are such as reasonably to warrant his giving his support."[20]

In *Trendtex Trading Corporation v Credit Suisse*,[21] the case which the court had to consider was the assignment of a bare right to litigate.[22] Both the House of Lords and the Court of Appeal were unanimous in holding that if no parties had been involved in the assignment other than Trendtex and Credit Suisse then the assignment would have been valid. The only point of difference was the effect of the onward sale to any anonymous third party.[23] The House of Lords considered the onward assignment to be objectionable on the ground of champerty. Lord Justice Lloyd went on to summarise the principles established by the House of Lords.[24]

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[18] *Wallersteiner v Moir (No.2)* [1975] 1 All E.R. 849, CA. See also *Norglen Ltd (in liquidation) v Reeds Rains Prudential Ltd*; *Circuit Systems Ltd (in liquidation) v Zukeh-Redac (U.K.) Ltd* [1998] 1 All E.R. 218, HL.

[19] *Trendtex Trading Corp. v Credit Suisse* [1980] Q.B. 629, CA.

[20] [1980] Q.B. 629 at 653.

[21] [1980] Q.B. 629, CA; [1982] A.C. 692, HL.

[22] "The question was whether the subject matter of the assignment was in the view of the court property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity." *Glegg v Bromley* [1912] K.B. 474, Parker J.

[23] See *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All E.R. 499 at 507, Lloyd L.J., CA.

[24] [1985] 3 All E.R. 499 at 509.

"i. Maintenance is justified, *inter alia*, if the maintainer has a genuine commercial interest in the result of the litigation.
ii. There is no difference between the interest required to justify maintenance of an action and the interest required to justify the taking of a share in the proceeds or the interest required to support an out and out assignment.
iii. A bare right to litigate, the assignment of which is still prohibited, is a cause of action, whether in tort or contract, in the outcome of which the assignee has no genuine commercial interest.
iv. In judging whether the assignee has a genuine commercial interest for the purpose of (i) to (iii) above one must look at the transaction as a whole.
v. If an assignee has a genuine commercial interest in enforcing the cause of action it is not fatal that the assignee may make a profit out of the assignment.
vi. It is an open question whether if the assignee does make such a profit, he is answerable to the assignor for the difference."

On the facts of *Trendtex* the House of Lords held that the contemplated assignment to the anonymous third party was objectionable, not because the third party was likely to make a profit out of the assignment, but because he had no genuine pre-existing commercial interest in the outcome of the cause of action. In the language of Fletcher Moulton L.J. in *British Cash and Parcels Conveyors Ltd v Lamson Store Service Co. Ltd* [1908] 1 K.B. 1006 at 1014 it was a case of "wanton and vicious inter-meddling with the disputes of others in which the defendant has no interest whatever"[25]

There is no doubt that the court may order a non-party to pay the costs of an unsuccessful plaintiff, whom he has supported, if the circumstances warrant it, by virtue of the power conferred by section 51 of the Supreme Court Act 1981.[26] There does not ever seem to have been a time when the court has regarded the support of a near relative of comparatively modest means as being contrary to public policy,[27] but the situation is otherwise in relation to commercial organisations:

"It may well be that it is not necessary to every case of lawful maintenance that the maintainer should accept a liability for a successful adverse party's costs; for example, a member of a family or a religious fraternity may well have a sufficient interest in maintaining an action to save such maintenance from contractual illegality, even

[25] *per* Lloyd L.J. at 509.
[26] *Aiden Shipping Co. Ltd v Inter Bulk Ltd* [1986] A.C. 965.
[27] See *Condliffe v Hislop* [1996] 1 W.L.R. 753, CA. In *Thistleton v Hendricks*, 32 Con. L.R. 123, the court held that a mother who had funded her son's unsuccessful litigation, knowing that he was unlikely to be able to pay his opponent's costs, should pay costs (limited to £7000) to the defendant.

without any acceptance of liability for such costs. But, in what one may call a business context (*e.g.* insurance, trade union activity or commercial litigation support for remuneration) the acceptance of such liability will always, in my view, be a highly relevant consideration."[28]

Where a claims consultant maintained the action of an unsuccessful claimant, the court was able to order the maintainer to pay the costs of the successful defendant. The fact that the maintainer had not accepted liability for the successful adverse party's costs tainted the contract with the claimant with illegality, quite apart from the additional illegality which arose from the champertous nature of the agreement.[28a]

Champerty

4–027 The Law Commission commented in 1966 that there was a substantial body of case law to the effect that champertous agreements (including contingency fee agreements), were unlawful as contrary to public policy. The Report continued:

"This rule of public policy has many implications for solicitors. The following are important:

i) Contingency fee agreements are unlawful . . .
ii) A solicitor cannot recover from professional indemnity insurers loss arising from his having entered into an agreement in fact champertous . . .
iii) A solicitor who has made, or knowingly participates in the furtherance of, a champertous agreement is not entitled to enforce a claim for costs . . .
iv) A solicitor who is conducting his client's litigation on a champertous basis may find himself ordered by the court to pay the other side's costs."[29]

Lord Denning M.R. explained in 1962:

"The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the

[28] *McFarlane v E.E. Caledonia Ltd (No.2)* [1995] 1 W.L.R. 366, Longmore J. and see *Nordstern Allgemeine Versicherungs AG v Internav Ltd* [1999] 2 Lloyd's Rep. 139, CA.
[28a] *McFarlane v E.E. Caledonia Ltd* (1995) 1 W.L.R. 366.
[29] Proposals for Reform of the Law relating to Maintenance and Champerty (Law Com. No.7 (1966)) paras 16 and 17.

law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law . . . "[30]

By section 58 of the Courts and Legal Services Act 1990 legal representatives are permitted to enter into conditional fee agreements in certain circumstances entitling the solicitor, in the event of a successful outcome, to a percentage uplift or success fee. Lord Justice Steyn was of the view that this:

"represents at least a concession to the view that the abuses associated with champerty are not the inevitable result of all variants of contingency fee agreements. And there is of course, no more cogent evidence of a change of public policy than the expression of the will of Parliament."[31]

Funding by non-parties

The Master of the Rolls has explained the up-to-date position with regard to maintenance and champerty: 4–028

"31. Champerty is a variety of maintenance. Maintenance and champerty used to be both crimes and torts. A champertous agreement was illegal and void, involving as it did criminal conduct. *Sections 13(1)* and *14(1)* of the Criminal Law Act 1967 abolished both the crimes and the torts of maintenance and champerty. Section 14(2) provided, however:

'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'

Thus, champerty survives as a rule of public policy capable of rendering a contract unenforceable.

32. A person is guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse': see *Chitty on Contracts*, 28th ed (1999), vol 1, para 17–050. Champerty 'occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit': *Chitty*, para 17–054. Because the question of whether maintenance and champerty can be justified is one of public policy, the law must be kept under review as public policy changes. As Danckwerts LJ observed in *Hill v Archbold*[32]:

[30] *Re Trepca Mines Ltd* [1963] Ch. 199 at 219.
[31] *Giles v Thompson* [1994] 1 A.C. 142 [1993] 3 All E.R. 321 at 331, CA.
[32] [1968] 1 Q.B. 686, 697.

> 'the law of maintenance depends upon the question of public policy, and public policy . . . is not a fixed and immutable matter. It is a conception which, if it has any sense at all, must be alterable by the passage of time.'

33. In *Trendtex Trading Corpn v Credit Suisse*[33] Oliver LJ remarked:

> 'There is, I think, a clear requirement of public policy that officers of the court should be inhibited from putting themselves in a position where their own interests may conflict with their duties to the court by agreement, for instance, of so-called "contingency fees" . . . '

34. The introduction of conditional fees shows that even this requirement of public policy is no longer absolute . . .

35. In *In re Trepca Mines Ltd (No 2)*[34] Lord Denning M.R. observed:

> 'The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law; and I may observe that it has received statutory support, in the case of solicitors, in section 65 of the Solicitors Act 1957.'

36. Where the law expressly restricts the circumstances in which agreements in support of litigation are lawful, this provides a powerful indication of the limits of public policy in analogous situations. Where this is not the case, then we believe one must today look at the facts of the particular case and consider whether those facts suggest that the agreement in question might tempt the allegedly champertous maintainer for his personal gain to inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice.

37. In reaching this conclusion we have been particularly influenced by the approach of the Court of Appeal and the House of Lords in *Giles v Thompson*.[35] The issue in that case was whether the plaintiffs in two conjoined appeals could recover as damages the costs of hiring cars to replace those put out of commission by the defendants' negligence. The cars had been provided by hire companies under agreements which gave the hire companies the right to pursue actions against the

[33] [1980] Q.B. 629, 663.
[34] [1963] Ch. 199, 219–220.
[35] [1994] 1 A.C. 142; [1993] 3 All E.R. 321.

defendants in the plaintiffs' names to recover those damages. In one case the hire agreement gave the plaintiff credit in respect of payment of the hire charges until 'such time as the claim for damages has been concluded'. In the other case the credit was given 'until such time as damages, and statutory interest, have been recovered'. Thus, in the latter case, the hire company's right to payment of the hire was conditional upon the success of the action. The defendants objected to paying the hire charges in each case on the ground, among others, that the hire agreements were unenforceable as constituting maintenance or champerty.

38. In the leading judgment in the Court of Appeal[36] Steyn L.J.,[37] identified the public policy which renders champertous agreements illegal as resting on the perceived need to protect the integrity of public justice. Later,[38] he added that the policy focused on the protection of the party confronted with the maintained litigation, it did not exist to protect the plaintiff. He gave a valuable exposition,[39] of the history of this area of the law, culminating in the enactment of *section 58* of the Courts and Legal Services Act 1990, which we shall have to consider in more detail in due course. As to this, he remarked.[40]

> 'The relevance of section 58 is that Parliament has, subject to the requirements of the section, empowered the Lord Chancellor to validate by order agreements for a percentage uplift in the costs in the event of success. The ability to recover fees beyond what was otherwise reasonable was intended to be "an incentive to lawyers to undertake speculative actions". Such agreements were, and in the absence of an order still are, unlawful as being contrary to public policy. The rationale of the common law rule is that such agreements allowed the duty and interest of solicitors to conflict with a resultant risk of abuse of legal procedure. Section 58 evidences a proposed modification in relation to an important species of champerty. It represents at least a concession to the view that the abuses associated with champerty are not the inevitable result of all variants of contingency fee agreements. And there is, of course, no more cogent evidence of a change of public policy than the expression of the will of Parliament.'

Subsequently, he observed[41]:

[36] [1993] 3 All E.R. 321.
[37] At p.328.
[38] At p.336.
[39] At pp.328–329.
[40] At p.331.
[41] At p.332.

> 'Contingency fee agreements are nowadays perhaps the most important species of champerty. Such agreements are still unlawful. Yet an English solicitor may share in a contingency fee earned in foreign litigation: see rule 8 (contingency fees) of the Solicitors' Practice Rules 1990. This reinforces the point that the doctrine of champerty serves to protect only the integrity of English public justice. It is based not on grounds of morality but on a concern to protect the administration of civil justice in this country.'

He continued[42]:

> 'Ultimately, it is necessary to consider the questions posed in this case in the light of contemporary public policy. The correct approach is not to ask whether, in accordance with contemporary public policy, the agreement has in fact caused the corruption of public justice. The court must consider the tendency of the agreement. The question is whether the agreement has the tendency to corrupt public justice. And this question requires the closest attention to the nature and surrounding circumstances of a particular agreement. That is illustrated by the well known decision of the House of Lords in *Trendtex Trading Corpn v Credit Suisse* [1982] AC 679.'

39. Applying that approach, he held that neither agreement was contrary to public policy. The other members of the court concurred.
40. In the House of Lords[43] Lord Mustill gave the leading speech, in which the other members of the House concurred. After a brief reference to their history, he observed[44]:

> 'In the most recent decades of the present century maintenance and champerty have become almost invisible in both their criminal and their tortious manifestations. In practice, they have maintained a living presence in only two respects. First, as the source of the rule, now in the course of attenuation, which forbids a solicitor from accepting payment for professional services on behalf of a plaintiff calculated as a proportion of the sum recovered from the defendant. Secondly, as the ground for denying recognition to the assignment of a "bare right of action". The former survives nowadays, so far as it survives at all, largely as a rule of professional conduct, and the latter is in my opinion best treated as having achieved an independent life of its own.'

41. Lord Mustill then proceeded to analyse the facts of each case . . .

[42] At p.333.
[43] [1994] 1 A.C. 142.
[44] At p.153.

42. On these facts Lord Mustill held that it was appropriate to consider whether the mischief was established against which the public policy was directed. As to this, he observed[45]:

> 'It is sufficient to adopt the description of the policy underlying the former criminal and civil sanctions expressed by Fletcher Moulton LJ in *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006, 1014: "It is directed against wanton and officious intermeddling with the disputes of others in which the [maintainer] has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse." This was a description of maintenance. For champerty there must be added the notion of a division of the spoils.'

43. Lord Mustill held that in neither case was this mischief established. Summarising the position, he said[46]:

> 'Returning to the company, is it wantonly or officiously interfering in the litigation; is it doing so in order to share in the profits? I think not. The company makes its profits from the hiring, not from the litigation. It does not divide the spoils, but relies upon the fruits of the litigation as a source from which the motorist can satisfy his or her liability for the provision of a genuine service, external to the litigation. I can see no convincing reason for saying that, as between the parties to the hiring agreement, the whole transaction is so unbalanced, or so fraught with risk, that it ought to be stamped out. The agreement is one which in my opinion the law should recognise and enforce . . . '[47]

44. This decision abundantly supports the proposition that, in any individual case, it is necessary to look at the agreement under attack in order to see whether it tends to conflict with existing public policy that is directed to protecting the due administration of justice with particular regard to the interests of the defendant. This is a question that we have to address. In so doing we revert to the statement of Lord Mustill that 'the rule, now in the course of attenuation, which forbids a solicitor from accepting payment for professional services calculated as a proportion of the sum recovered from the defendant . . . survives nowadays, so far as it survives at all, largely as a rule of professional conduct'. With respect, this statement is not correct. The basis of the rule is statutory . . . "

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[45] At p.161.
[46] At p.165.
[47] *R (Factortame Ltd) v Secretary of State for Transport* [2002] EWCA Civ 932; [2002] 2 W.L.R. 1104; [2002] 4 All E.R. 97, CA.

It is not an abuse of process for an impecunious claimant to bring proceedings for a proper purpose and in good faith while being unable to pay the defendant's costs if the proceedings fail. It may be unjust to a successful defendant to be left with unrecovered costs but the claimant's freedom of access to the courts has priority.[48] Even where maintenance was tortious and criminal (pre-1967) it was not an abuse of process for a claimant without means to bring proceedings with financial assistance provided by a third party and the court would not stay proceedings on this ground.[49] Similarly even today the presence of unlawful maintenance is not by itself an abuse.[50]

In 1993,[51] the Court of Appeal took the opportunity to review the decisions since 1986:

> "These decisions may be conveniently summarised under the following heads.
>
> (1) Where a person had some management of the action, *e.g.* a director of an insolvent company who causes the company improperly to prosecute or defend proceedings . . . [52]
> (2) Where a person has maintained or financed the action. This was undoubtedly considered to be a proper case for the exercise of the discretion by Macpherson J. in *Singh v Observer Ltd.*[53]
> (3) In *Gupta v Comer*[54] this court approached the power of the court to order a solicitor to pay costs under RSC, Order 62, r.11 (now revoked) as an example of the exercise of the discretion under section 51 of the 1981 Act.
> (4) Where the person has caused the action. In *Pritchard v J.H. Cobden Ltd*[55] the [claimant] had suffered brain damage

[48] *per* Millett L.J. *Abraham v Thompson* [1997] 4 All E.R. 363, CA.
[49] See *Martell v Consett Iron Co. Ltd* [1995] Ch. 363.
[50] *Abraham v Thompson* above.
[51] *Symphony Group plc v Hodgson* [1993] 4 All E.R. 143, CA.
[52] "See *Re Land and Property Trust Co. plc* [1991] 1 W.L.R. 601, *Re Land and Property Trust Co. plc (No.2), The Times*, February 16, 1999; *Re Land and Property Trust Co. plc (No.3)*, [1991] B.C.L.C. 856, *Taylor v Pace Developments Ltd* [1991] B.C.C. 406, *Re A Company (No.004055 of 1991), Ex p. Doe Sport Ltd* [1991] B.C.L.C. 865 and *Framework Exhibitions Ltd v Matchroom Boxing Ltd* (1992) CA, Transcript 873. It is of interest to note that, while it was not suggested in any of these cases that it would never be a proper exercise of the jurisdiction to order the director to pay the costs, in none of them was it the ultimate result that the director was so ordered."
[53] [1989] 2 All E.R. 777. An arrangement by a wife in divorce proceedings to pay her solicitors out of the money she expected to receive under the order of the court was not necessarily champertous or invalid. In the particular case it was held to be a valid contract for valuable consideration to assign a future chose in action. *Sears Tooth v Payne Hicks Beach, The Times*, January 24, 1997, Wilson J.
[54] [1991] 1 Q.B. 629.
[55] [1988] Fam. 22.

through the defendant's negligence. That resulted in a personality change which precipitated a divorce. This court held that the defendant's agreement to pay the costs of the divorce proceedings could be justified as an application of the Aiden Shipping principle.[56]

(5) Where the person is a party to a closely related action which has been heard at the same time but not consolidated—as was the case in Aiden Shipping itself.

(6) Group litigation where one or two actions are selected as test actions.[57]

In proceedings where there were related actions, the claimant was being funded by a third party in relation to the litigation and the defendant in separate winding-up proceedings was also being funded by a third party, the Court of Appeal held that there were two questions for decision:

(1) whether the agreements were unlawful and contrary to public policy on the ground of champerty;

(2) if so whether further proceedings should be stayed on that ground.

If the court decided that the proceedings should not be stayed, even if the agreements were champertous, it was unnecessary to resolve the first question. The question of whether the court's process was affected or threatened by an agreement for the division of spoils was one to be considered in the light of the facts of each case. In coming to its conclusion the court stressed that where a subsidiary company involved in litigation is funded by its parent company, the nature of the parent company's interest in the proceedings is the key to the question whether the company may be made liable in costs as a non-party.[58]

Orders for costs against non-parties—summary of principles

In November 1996, Lord Justice Phillips sitting with Sir John Balcombe, who had given the leading judgment in *Symphony Group Plc v Hodgson*,[59] reviewed the decisions relating to payment of costs by a non-party and formulated a number of principles in the light of those decisions[60]: 4–029

[56] See [1988] Fam. 22 at 51.
[57] See *Davies (Joseph Owen) v Eli Lilly & Co.* [1987] 1 W.L.R. 1136.
[58] *Stocznia Gdanska SA v Latreefers Inc*, unreported, February 9, 2000, CA. The court confirmed that *Globe Equities Ltd v Globe Legal Services Ltd* [1999] B.L.R. 232, CA, was the leading authority on non-party costs.
[59] (1994) Q.B. 179, CA.
[60] *Murphy v Young & Co.'s Brewery Plc* [1997] 1 W.L.R. 159 [1997] 1 All E.R. 518 at 528, CA.