Contingency Fees – How they might work with Inter Partes Costs

This paper came out of the discussion on Wednesday in which it became clear that we did not have a shared understanding of how claimant lawyers would be paid in CF cases and consequently how any cap on the CF would operate.

I think there are two rival models for this – I don't know whether as a Working Party we might decide that only one approach should be permitted (if so query how any prohibition on the other approach would be enforced?). Either way I hope this clarifies where we are on the issue; perhaps some of the paper could feature as a worked example in our final paper

1   If we assume for these purposes that all cases are run by lawyers on a CF fixed at 25% of all damages, our shared starting point is that this means the lawyers cannot take more than 25% and the client is prima facie guaranteed to receive at least 75% of all his damages. The uncertainty is over the circumstances in which the 25% can be claimed by the lawyer.

2   Unfortunately all we can guarantee is that the 75% will not be taken by the lawyer – there may be other claims to a share of the damages. If ATE has been taken out to cover other side costs (likely in many non PI cases) the premium may well come from the damages; if Third Party Funding is in place to cover own disbursements, the funder will also be seeking a share. Neither of these elements would be subject to any prescribed cap – they seem to fall outside the statutory regime in section 58AA of CLSA1990 (as amended) which governs providers of legal services (litigation, advocacy and claims management)

3   There might be further issues as to what would happen if the combined claims of the lawyers, ATE provider and Third Party Funder were large enough to wipe out the client's damages entirely – can this be prevented and if it happens who bears the shortfall? Presumably this would be governed by relevant model agreements.

4   Returning to look just at the Claimant lawyers, there are two main models for calculating the CF.

Option A: The "Ontario" model

On this approach costs recovered from the other side are taken into account within the overall CF. The basic approach is that the total remuneration for the claimant lawyer, other side costs plus anything taken from client damages, cannot exceed 25% of damages recovered.

Unfortunately it cannot be as simple as that because it is always envisaged that the claimant lawyer will be able to retain full inter partes costs recovered which might well be greater than 25% of damages [if it were otherwise the client might end up with a costs windfall and indemnity principle arguments might ensue].

I think remuneration under the Ontario model could be summarised as:

•   If costs recovered are less than 25% of damages recovered, the lawyer retains the costs recovered and then takes a share of the client's damages to take his total remuneration up to 25% of damages recovered

•   If costs recovered in full and these are more than 25% of damages recovered, the lawyer retains the costs recovered and the client keeps 100% of his damages

- If there is a shortfall in recovery of costs (e.g. because of failure to beat a Part 36) but the costs recovered are still more than 25% of damages, the lawyer retains the costs recovered but can also recover the costs shortfall from the client's damages, subject always to limit of 25% of damages.

Option B: The "Success Fee" Model

This model takes as its starting point the fact that the successful claimant lawyer will always retain any inter partes costs recovered. The whole nature of the CF is as an additional payment by way of a success fee, compensating for the risk of not being paid if the case was lost.

Therefore in all cases the lawyer retains the inter partes costs and the CF, though of course has no additional right to claim anything further e.g. in the event of not securing full cost recovery.

5   In the following hypothetical examples, I'm assuming 25% CF throughout (even though in reality different % would be expected depending on the model). Also assuming no other constraints or caps on the CF

Example 1: Low Damages, full cost recovery

C recovers £100,000 damages

Full inter partes costs recovery totalling £80,000

Ontario Model: C lawyer simply retains the £80,000; client keeps 100% of damages (£100K)

Success Fee Model: C retains the £80,000 costs; then gets the £25,000 CF, bringing total fees to £105,000; client is left with 75% (i.e. £75,000 damages)

Example 2: Low Damages, limited cost recovery

C recovers £100,000 damages

Full inter partes costs would have been £80,000 but because of failing to beat a Part 36 offer, only £30,000 has been recovered in costs

Ontario Model: C lawyer retains the £30,000; claims the cost shortfall from the client, but since the shortfall is £50,000 C lawyer can only claim up to 25% of damages i.e., £25,000. C lawyer therefore gets total of £55,000 (30 + 25); client retains 75% of damages (£75K)

Success Fee Model: C retains the £30,000 costs; then gets the £25,000 CF, bringing total fees to £55,000; client is left with 75% (i.e. £75,000 damages)

Example 3: High Damages, full cost recovery

C recovers £1,000,000 damages

Full inter partes costs recovery totalling £80,000

Ontario Model: C lawyer retains the £80,000; his total remuneration is capped at £250,000. Having received £80,000 in costs he claims the balance of £170,000 from the client. So lawyer ends up with £250,000; client ends up with £830,000.

Success Fee Model: C retains the £80,000 costs; then gets the £250,000 CF, bringing total fees to £330,000; client is left with 75% (i.e. £750,000 damages)

Example 4: High Damages, limited cost recovery

C recovers £1,000,000 damages

Full inter partes costs recovery would have been £80,000 but because of a Part 36 only £30,000 has been recovered

Ontario Model: C lawyer retains the £30,000; his total remuneration is capped at £250,000. Having received £30,000 in costs he claims the balance of £220,000 from the client. So lawyer ends up with £250,000; client ends up with £780,000.

Success Fee Model: C retains the £30,000 costs; then gets the £250,000 CF, bringing total fees to £280,000; client is left with 75% (i.e. £750,000 damages)

Comparing the two models

• The Success fee model is simpler and more transparent
• Because of its close similarity with CFAs, the Success Fee model potentially enables clients to make better informed choices between different funding models
• Ontario has the advantage that it caps overall remuneration thereby ensuring proportionality of overall remuneration to damages recovered
• In the absence of other safeguards, both models have the potential to allow lawyers to claim remuneration which is massively higher than would be payable under other funding arrangements but the risk of this is greater under the Success Fee model
• The reasonableness of a % CF depends in all cases on the merits of the case, but the Success Fee model is more sensitive to this than Ontario, making it particularly hard to prescribe an overall maximum % cap
• For any given % CF, the Success Fee model is always more generous to the claimant lawyer than the Ontario model, suggesting it would be the model of choice if both models are permitted under the regulatory framework

6 Personally I suspect that the Success Fee model will be preferred by practitioners and we should concentrate on regulating that form of agreement – the nature of the safeguards and level of the cap being subject to a separate discussion and paper

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