



The Law Society

## **Payment by results**

Practice Advice Service

December 2011

supporting  
solicitors

# **Payment by results**

**Practice Advice Service**

**December 2011**

While every effort has been made to ensure the accuracy of the information in this booklet, it does not constitute legal advice and cannot be relied upon as such. The Law Society does not accept any responsibility for liabilities arising as a result of reliance upon the information given.

This booklet has been updated to take into account the SRA Code of Conduct 2011 and any changes in law with reference to case law and statute to the end of December 2011.

## Practice Advice Service

**Address:** The Law Society  
113 Chancery Lane  
London WC2A 1PL

**Document Exchange No:** DX 56 LONDON/CHANCERY LANE

Telephone Number: 0870 606 2522

**Fax Number:** 020 7316 5541

**Email:** [practiceadvice@lawsociety.org.uk](mailto:practiceadvice@lawsociety.org.uk)

**Website:** [www.lawsociety.org.uk/practiceadvice](http://www.lawsociety.org.uk/practiceadvice)

**Practice Advice Service Manager:** Nasrin Master LL.B Solicitor

The Practice Advice Service is staffed by solicitors who deal with enquiries using their own knowledge and a variety of information sources as well as the experience of colleagues in Legal Policy. It deals with enquiries on legal practice in many areas of law including solicitors' costs and Law Society policy.

This publication is available in large print (state size), on audio tape or in Braille Grade 2 on request.

**ISBN 978-1-85328-644-5**

## Contents

<b>Payment by results .....</b>	<b>2</b>
<b>Practice Advice Service .....</b>	<b>3</b>
<b>Contents .....</b>	<b>4</b>
<b>Introduction .....</b>	<b>6</b>
<b>Review of civil litigation funding and costs .....</b>	<b>7</b>
<b>Conditional Fee Agreements .....</b>	<b>9</b>
Primary legislation .....	10
The SRA Code of Conduct 2011 .....	10
The Law Society model CFA and 'What you need to know about a CFA' leaflet ..	12
CFA with Counsel .....	12
Solicitor interest in CFAs – financial services issues .....	12
Civil Procedure Rules 1998 and Costs Practice Direction .....	13
The Costs Practice Direction .....	14
Retrospective CFA's .....	16
Collective Conditional Fee Agreements .....	16
Contingency fees .....	17
Damage-Based Agreements .....	18
<b>Fixed costs – the new scheme .....</b>	<b>19</b>
Low Value Personal Injury Claims in Road Traffic Accidents ('the new scheme').	19
Fixed Costs under the scheme .....	22
Indemnity principle .....	23
Further reading .....	24
<b>Special interest groups .....</b>	<b>25</b>
<b>Appendix 1 – The History of CFAs and case law .....</b>	<b>27</b>
CFA developments .....	27
The 'costs war' .....	27
The new regime .....	28
Case law .....	29
Appendix 2 - The Law Society's Model Conditional Fee Agreement November 2005 .....	34

<b>Appendix 3 - Conditional Fee Agreements: what you need to know leaflet November 2005.....</b>	<b>36</b>
<b>Appendix 4 - The Litigation Funding Table .....</b>	<b>45</b>
<b>Appendix 5 - Road Traffic Accidents– Fixed recoverable costs .....</b>	<b>49</b>
<b>Appendix 6 – Frequently asked questions .....</b>	<b>51</b>
<b>Appendix 7 - Examples of Contentious and Non-Contentious Matters .....</b>	<b>54</b>

## Introduction

The purpose of this booklet is to provide solicitors with basic information on the ever changing and complex area of 'payment by results' which includes conditional fee agreements (CFAs), contingency fees, the indemnity principle and fixed costs.

Solicitors face an increasingly competitive market. The restricted availability of public funding for contentious matters and new legislation has encouraged solicitors to be innovative in the methods used to charge clients.

This booklet, prepared by the Practice Advice Service, is not intended to be a fully comprehensive guide but attempts to cover those areas that generate the most frequent enquiries from solicitors.

This booklet refers to various cases. Practitioners requiring copies of the relevant cases or information on case law may wish to contact the Law Society library which provides a photocopying service, please telephone 0870 606 2511 or email [library@lawsociety.org.uk](mailto:library@lawsociety.org.uk) for further details.

Throughout this booklet, reference is made to various procedures available under the **Civil Procedure Rules 1998 (CPR)**. The court fees applicable to each procedure may be accessed at [www.hmcourts-service.gov.uk](http://www.hmcourts-service.gov.uk). Details of the CPR may be accessed at [www.justice.gov.uk](http://www.justice.gov.uk).

It is intended to update this booklet from time to time. When this edition is revised, a note will be inserted on the Law Society website and copies may be downloaded from [www.lawsociety.org.uk/practiceadvice](http://www.lawsociety.org.uk/practiceadvice).

For queries or comments on this booklet contact either

- **Practice advice service:**

This Law Society telephone helpline provides support to solicitors on a wide range of areas of legal practice and procedure. The service is staffed by solicitors and can be contacted on 0870 606 2522 from 09.00 to 17.00 on weekdays. [www.lawsociety.org.uk/practiceadvice](http://www.lawsociety.org.uk/practiceadvice)

- **Lawyerline:**

This Law Society telephone helpline provides specific support to solicitors on client care and complaints handling. The service is staffed by solicitors and can be contacted on 0870 606 2588 from 09.00 to 17.00 on weekdays. [www.lawsociety.org.uk/lawyerline](http://www.lawsociety.org.uk/lawyerline)

Booklets on non-contentious costs (entitled 'Non-Contentious Costs') and contentious costs (entitled 'Contentious Costs') are also available. For advice on solicitors' costs generally, please contact the Practice Advice Service.

## Review of civil litigation funding and costs

In November 2008, Lord Justice Jackson was selected by the Master of the Rolls to conduct a fundamental review of the rules and principles governing the costs of civil litigation and to make recommendations which would promote access to justice at proportionate cost. A final report was published on 14 January 2010.

In March 2011, the Government published its response to the Jackson Report. *'Proposals for Reform of Civil Litigation and Funding and Costs in England and Wales - Implementation of Lord Justice Jackson's Recommendations'* which can be viewed at [www.justice.gov.uk](http://www.justice.gov.uk). Some of the key proposals that the Government intends to implement are:

1. Abolish the general recoverability of the Conditional Fee Agreement (CFA) success fee and after the event insurance (ATE) premium from the losing side.
2. Regulations to allow recoverability of the ATE insurance premium to cover the cost of expert reports only in clinical negligence cases.
3. An increase of 10 per cent in non-pecuniary general damages such as pain suffering and loss of amenity in Tort cases, for all claimants.
4. In personal injury cases, there will be a cap on the amount of damages that may be taken as a success fee. The cap will be set at 25 per cent of the damages other than those for future care and loss.
5. The maximum success fee under a CFA will remain at 100 per cent of base costs except for personal injury cases which would be subject to a 25 per cent cap on damages.
6. Recoverability of the self-insurance element by membership organisations, equivalent to the ATE insurance premium, will be also abolished.
7. Qualified One Way Costs Shifting (QOCS) will be introduced for personal injury cases, including clinical negligence.
8. Part 36 of the Civil Procedure Rules (offers to settle) will be amended to equalise the incentives between claimants and defendants to make and accept reasonable offers.
9. Damages-based agreements (DBAs) will be allowed to be used in civil litigation. Claimants will not be required to obtain independent legal advice before entering into a contingency fee agreement.
10. A new test of proportionality in costs assessment will be introduced.
11. Prescribed rates which successful litigants in person may recover from lay opponents will increase in line with inflation since they were set.

The Government is not currently persuaded that abolishing the indemnity principle is a necessity and is therefore not proposing any further work on it at this stage. There remain a number of recommendations including referral fees, fixed recoverable costs in the Fast Track, the Costs Council, costs and case management, before the event

insurance (BTE), third party funding, predictable damages, clinical negligence, intellectual property where further consultation is on-going.

The Government has indicated that changes to the CFA regime will require primary legislation and will follow as soon as Parliamentary time allows. Other changes will require changes to the Civil Procedure Rules and other secondary legislation. Therefore, it remains to be seen when the proposed changes will be implemented.



## Conditional Fee Agreements

CFAs are used in matters where the level of fee depends upon a particular event, usually winning the case.

A CFA is a type of contingency fee which is permitted for contentious business providing it meets the requirements contained in section **58 of the Courts and Legal Services Act (CLSA) 1990 (as amended by section 27 of the Access to Justice Act (AJA) 1999)**.

In making CFAs, solicitors must comply with the **SRA Code of Conduct 2011 ('the Code')**.

Solicitors anticipating entering into a CFA should familiarise themselves in more detail with: -

- **s58 CLSA 1990 (as amended by s27 AJA 1999);**
- **The CPR 1998 parts 43 to 48;**
- **The Practice Direction supplementing parts 43 to 48 of the Civil Procedure Rules 1998;**
- **The Code.**

There are various types of CFAs including:

- CFA without success fee

The client must pay ordinary costs if he wins and either no costs or reduced costs if he loses.

- CFA with success fee

The maximum success fee that can be charged is 100 per cent (often referred to as the amount of 'uplift'). The success fee is intended to cover two elements: the risk element and the deferred fee element. The client may be able to recover some or all of the risk element from an opposing party. However, the **CPR** provide that the deferment element cannot be recovered from the opposing party (**CPR 44.3B(1)(a)**).

- Collective CFA

A Collective CFA does not refer to specific proceedings but, as and when instructions are given to the solicitor, they can be brought within the agreement. Trade unions or other bulk purchasers of legal services (such as legal insurers) commonly use these types of agreements.

CFAs were originally introduced in the 1990s to fill the gap between the few clients who qualify for legal aid and the few clients who can afford to access justice without it. For the vast majority of people, exposure to own solicitor costs and also potentially to those of the other side if the case is lost are a very real barrier to making claims for damages. The CFA regime was the government's response to this fundamental problem. For further information on the history of CFAs see **Appendix 1**.

## Primary legislation

To have a valid CFA solicitors must comply with the primary legislation, namely the requirements of **s58 CLSA (as amended by s27 AJA 1999)** and also with **the Code** as set out by the Solicitors Regulation Authority (SRA) at [www.sra.org.uk](http://www.sra.org.uk) and the CPR ([www.justice.gov.uk](http://www.justice.gov.uk)). If **s58** requirements are not met then the agreement is unenforceable, and, by virtue of the indemnity principle, the losing party is not liable to pay the winning party's costs.

Section **58** requires CFAs to:-

- be in writing
- not relate to criminal or family proceedings,
- [and in the case of a] success fee, must specify the percentage increase, which must not exceed that specified by the Lord Chancellor (currently set at 100 per cent).

For further information on proposals for CFAs, please see the section on the Review of Civil Litigation Costs by Lord Justice Jackson above.

## The SRA Code of Conduct 2011

The SRA Handbook sets out all the SRA's regulatory requirements, including the ten overarching Principles and Code. The Code sets out mandatory outcomes and these are supported by indicative behaviours (IBs), which serve to assist in determining how you might achieve compliance. Although the IBs are not mandatory, solicitors who do not follow them may be required to demonstrate how they have nevertheless achieved the outcomes and therefore complied with the Principles.

The emphasis on the Code reflects the fact that the SRA has the role of primary regulator in the area of CFAs.

In particular, the Chapter 1 on Client care requires that solicitors give information about:

- Client care
- Costs
- Complaints handling procedure
- Commission

Particular attention is drawn to **Outcome 1.6**, which holds that solicitors only enter into fee agreements that are legal, suitable for the client's needs, and take account of the client's best interests. To achieve compliance with this outcome, IBs set out that where the fee arrangement is governed by statute, such as a conditional fee agreement, the client is given all relevant information relating to it (**IB 1.17**), and the agreement is not an unlawful fee arrangement such as an unlawful contingency fee (**IB 1.27**).

Solicitors have obligations in respect of their client's ability to pay and must provide the best possible costs information as set out in **Outcome 1.13 of the Code**.

Solicitors' attention is drawn to:

**IB 1.16** "discussing how the client will pay, including whether public funding may be available, whether the client has insurance that might cover the fees, and whether the fees may be paid by someone else such as a trade union;"

**IB 1.13** "discussing whether the potential outcomes of the client's matter are likely to justify the expense or risk involved, including any risk of having to pay someone else's legal fees;"

**IB 1.14** "clearly explaining your fees and if and when they are likely to change;"

**IB 1.5** "explaining any limitations or conditions on what you can do for the client, for example, because of the way the client's matter is funded;"

**IB 1.4** "explaining any arrangements, such as fee sharing or referral arrangements, which are relevant to the client's instructions;"

Solicitors' attention is also drawn to Chapter 9 on Fee sharing and referrals.

Further, solicitors must achieve outcomes with respect to complaints handling and information:

**Outcome 1.9** "clients are informed in writing at the outset of their matter of their right to complain and how complaints can be made;"

**Outcome 1.10** "clients are informed in writing, both at the time of engagement and at the conclusion of your complaints procedure, of their right to complain to the Legal Ombudsman, the time frame for doing so and full details of how to contact the Legal Ombudsman;"

**Outcome 1.11** "clients' complaints are dealt with promptly, fairly, openly and effectively;"

**Outcome 1.14** "clients are informed of their right to challenge and complain about your bill and the circumstances in which they may be liable to pay interest on an unpaid bill."

Non-compliance with a Principle in the SRA Handbook or failure to achieve an outcome in **the Code** is a matter that the Solicitors Regulation Authority takes seriously and solicitors may be subject to disciplinary action by the SRA if they do not comply with **the Code**.

Further information about the Legal Ombudsman can be obtained from their website at: [www.legalombudsman.org.uk](http://www.legalombudsman.org.uk)

The Law Society has produced practice notes on "Initial interviews" "Client care letters" and "Complaints management" which are intended to assist solicitors amongst other things with client care letters and terms and conditions. Practitioners should also consider the practice note "Provision of Service Regulations 2009". The practice notes are available on the website at [www.lawsociety.org.uk/productsandservices/practicenotes.page](http://www.lawsociety.org.uk/productsandservices/practicenotes.page)

The Code in its entirety may be viewed at [www.sra.org.uk/](http://www.sra.org.uk/).

## The Law Society model CFA and ‘What you need to know about a CFA’ leaflet

The Law Society prepared a model CFA for use from 1 November 2005. It is included in **Appendix 2**. The model CFA consists of a one page agreement and an attached leaflet entitled ‘What you need to know about a CFA’ see **Appendix 3**. The agreement contains the statutory and basic requirements and the purpose of the leaflet is to explain the agreement. This format is designed to be clearer for the client and therefore, easier for the solicitor to use. The agreement and leaflet may need to be amended to reflect changes made in the law since 1 November 2005. If amendments are made to the documents then they should no longer be referred to as the Law Society models.

While the ‘What you need to know about a CFA’ leaflet addresses most of the information a solicitor is required to provide when using a CFA, a client care letter is still necessary.

## CFA with Counsel

It is possible for solicitors to enter into CFAs with counsel and again the agreement must comply with **s58 CLSA 1990** as amended by **s27 AJA 1999**. Separate notification of the CFA does not need to be given in order to recover the additional liability as long as notification has been given in respect of the solicitor/client CFA see **CPR 44.3B(1)** below. Such an agreement is provided for in the ‘What you need to know about a CFA’ leaflet which contemplates both situations where barristers are or are not instructed under a CFA. Two model CFA agreements are available to solicitors for use when instructing counsel. One has been prepared jointly by the Association of Personal Injury Lawyers and the Personal Injuries Bar Association and is for use in personal injury/clinical negligence cases. This model can be found at [www.barcouncil.org.uk](http://www.barcouncil.org.uk). The other has been produced by the Chancery Bar Association is available at [www.chba.org.uk](http://www.chba.org.uk) and can be used in a variety of situations, see Appendix 6 for further information. Solicitors and counsel are of course able to prepare their own model agreement for use in such circumstances.

## Solicitor interest in CFAs – financial services issues

Solicitors should be aware that the Financial Services Authority (‘the FSA’) regulates contracts of insurance such as after the event insurance.

Under **Chapter 6 on Your client and introductions to third parties** of the **Code**, solicitors are able to enter into arrangements with third parties in connection with general insurance contracts. This means that solicitors can have an arrangement with a provider whereby they recommend one ATE insurance policy only. Solicitors’ attention is drawn to **Outcome 6.2, ‘Clients are fully informed of any financial or other interest which you have in referring the client to another person or business’, and IBs 6.1 to 6.4.**

In making such a recommendation, and in circumstances where the firm is not authorised by the FSA and relies instead on the exemption granted to professional firms under the **Financial Services and Markets Act 2000**, the firm must ensure it complies with the **Solicitors’ Financial Services (Scope) Rules 2001 (‘Scope Rules’)**. For example, the firm must ensure that they account to the client for any pecuniary reward or other advantage which they receive from a third party (**Rule 4(c)**)

**of the Scope Rules**) and it must be on the FSA's Exempt Professional Firms Register and appoint a compliance officer (**Rule 5(6) of the Scope Rules**).

Solicitors must also comply with the **Solicitors' Financial Services (Conduct of Business) Rules 2001** ('COB Rules') and, in respect of insurance mediation activities such as arranging and recommending an ATE insurance policy, must provide the information required at **Rule 3(3) and in Appendix 1 of the COB Rules**.

The **Scope Rules and the COB Rules** are available on the [SRA website](#).

**Appendix 4** of this booklet lists a table of some of the after-the-event insurance products that are available on the market for use with conditional fees.

The Jackson Report proposes that before-the-event (BTE) insurance should be actively promoted to encourage wider use and the abolition of referral fees paid by lawyers in personal injury cases see [www.judiciary.gov.uk/](http://www.judiciary.gov.uk/)

## **The Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008 (Cancellation of Contracts Regulations)**

CFAs entered into away from the solicitor's own place of business (eg at the client's home), or following discussions that take place away from their own place of business may be caught by the **Cancellation of Contracts Regulations**. The **Cancellation of Contracts Regulations** came into force on 1 October 2008. Where the **Cancellation of Contracts Regulations** apply the client has a right to cancel the CFA within a seven day period. The solicitor must give the client written notice of this right, setting out various prescribed information. Failure to do so is a criminal offence. If you have entered into a CFA without advising your client of the right to cancel under the **Cancellation of Contracts Regulations** and all fees remain outstanding, you should consider advising the client of the right to cancel the agreement, you may consider entering into a retrospective CFA (see below) which includes notification of the clients right to cancel as prescribed by the **Cancellation of Contracts Regulations**. For further information on the **Cancellation of Contracts Regulations** please see the Law Society's Practice Note on Cancellation of Contracts at [www.lawsociety.org.uk/practicenotes](http://www.lawsociety.org.uk/practicenotes).

## **Civil Procedure Rules 1998 and Costs Practice Direction**

The **CPR** apply to the CFA regime and solicitors should be mindful of these when entering into a CFA.

**Parts 43-48 of the CPR** and the accompanying Costs Practice Direction (PD) contain a number of important matters for those intending to use under CFAs. The following is only a summary and practitioners should read the Rules in detail:-

**CPR part 43.2 (3)** where advocacy or litigation services are provided to a client under a CFA, costs are recoverable under **Parts 44 to 48** notwithstanding that the client is liable to pay his legal representatives fees and expenses only to the extent that sums are recovered in respect of the proceedings, whether by way of costs or otherwise. Some commentators have argued that this does not alter the law but

merely clarifies that you can have 'CFA lites', ie the clients liability for fees and expenses is limited to costs recovered from an opponent – see **Appendix 1**.

**CPR part 44.3A (1)** states that the court will not assess the success fee and insurance premium until the conclusion of proceedings. This is to ensure that the level of success fee does not become apparent to the other side before resolution of the case.

**CPR part 44.3B (1)** disallows recovery of the additional liability in a number of situations, including that part of the success fee which relates to the solicitor's costs of funding the action through the postponement of his fees. It is important to note that the percentage of success fee which relates to the postponement of fees must be separately stated in the agreement and is not recoverable from an opponent. Another situation where recovery of the additional liability is disallowed is when the party instructed under the CFA has failed to give notice of the arrangement in accordance with a rule, practice direction or court order. Solicitors instructed under a CFA prior to the start of proceedings who wish to claim an additional liability should inform the other side of the funding arrangement as soon as possible – see **paragraph 9.3 of the Practice Direction (Pre-Action Conduct)**.

**CPR part 44.12A** makes provision for costs to be assessed where the parties have settled the substantive dispute without proceedings but are unable to agree costs. The claim should be brought under Part 8 but the court must dismiss the claim if it is opposed and effectively can only act as arbiter if both sides agree. Practitioners may want to consider securing the opponent's consent to this procedure before concluding the settlement of the substantive claim.

**CPR part 44.15** deals with the duty on practitioners who are seeking to recover an additional liability to notify the existence of CFAs both to the court and to the other parties involved and the fact that additional liabilities are going to be claimed from the other side. Notification is required in respect of the original agreement and any subsequent changes. Failure to comply with this duty could lead to an additional liability not being recovered under **part 43.3B (1)** – see above.

## The Costs Practice Direction

The **PD which supplements parts 43 to 48 of the CPR** can be found on the Ministry of Justice website [www.justice.gov.uk](http://www.justice.gov.uk). Below is a basic overview of relevant sections of the **PD** in the context of CFAs. Solicitors should study the **PD** themselves in detail to ensure that they are in compliance.

**Section 3.1** states that where there is an additional liability the court can on summary assessment assess either the base costs alone or together with any additional liability. Generally it is unlikely the court will assess an additional liability before the end of a case, as to do so would divulge that party's view of the risk involved to the other side.

**Section 4.17(1)** states that the percentage of the success fee needs to be shown separately from base costs.

**Section 6 (1) and (2)** states that 'estimates of costs' which are to be recovered from the other side are to be limited to an estimate of base costs and should not include additional liabilities.

**Section 11** states that proportionality is applicable to base costs but not to additional liabilities which must be viewed on what was reasonable at the time they were agreed.

This section also sets out factors to be considered when deciding whether a success fee is reasonable, including the availability of other methods of funding.

It continues in addressing the relevant factors that the courts will consider when determining whether or not insurance premiums are reasonable, these include:-

- i. where the insurance cover is not purchased in support of a CFA with a success fee, how its cost compares with the likely cost of funding the case with a CFA with a success fee and insurance cover;
- ii. the level and extent of cover provided;
- iii. the availability of any pre-existing insurance cover;
- iv. whether any part of the premium would be rebated in the event of early settlement;
- v. the amount of commission payable to the receiving party or his legal representatives or other agents.

**Section 17** deals with the costs only procedure under rule **44.12A** (see above).

**Section 19** deals with notification of funding arrangement. If a solicitor is claiming an additional liability he must inform the other parties or potential parties to the claim that he is doing so.

A party will risk not recovering any additional liabilities for any period during which he failed to provide such information. **Section 19 (2)** states that notification to every party and to the court should be given:-

- by a claimant on issuing proceedings; or
- if defending an action or in **Part 20** proceedings, in the solicitor's first act in the action e.g. when filing an acknowledgement of service, a defence or any other document; or
- within seven days of the client entering into the CFA after proceedings have been commenced; or
- **Practice Direction (Pre-Action Conduct)** provides that a party should inform any other party as soon as possible about a funding arrangement entered into prior to the start of proceedings.

This section also sets out the extent of information to be provided and says that when supplying information about an after-the-event insurance policy the party must –

- a) state the name and address of the insurer, the policy number and the date of the policy and identify the claim or claims to which it relates (including Part 20 claims if any);
- b) state the level of cover provided by the insurance; and
- c) state whether the insurance premiums are staged and, if so, the points at which an increased premium is payable.

**CPR Form N251** can be used to provide notice of the funding arrangements.

On the subject of CFAs, the Jackson Report proposes that in civil litigation the successful party can no longer recover from the unsuccessful opponent after-the-event (ATE) insurance premiums and success fees. The Report further proposes that success fees should be capped at 25 per cent of damages. To compensate the claimant for this, the Report recommends that general damages for pain, suffering and loss of amenity should be increased by 10 per cent. The Jackson Report also proposes the introduction of qualified one way costs shifting ie unsuccessful

claimants will not be required to pay the defendants costs but, unsuccessful defendants will continue to pay the claimants costs. The Report proposes that qualified one way costs shifting should apply for personal injury litigation and possibly clinical negligence, judicial review, defamation claims and others see [www.judiciary.gov.uk/](http://www.judiciary.gov.uk/)

## Retrospective CFA's

A CFA is a contractual agreement and therefore it is arguable that, with consent of both parties, it is possible for the agreement to have retrospective effect. This could be a way for solicitors to recover their costs for pre CFA work or a means by which to resolve a failure to comply with legislative requirements for example the **Cancellation of Contracts Regulations** (see above). The court has considered the issue of retrospective CFAs in the case of **Birmingham City Council v Forde** [2009] EWHC 12 (QBE); [2009] 1 WLR 2732 where it said 'that it is clear from **Holmes v Alfred McAlpine Homes (Yorkshire) Ltd** [2006] EWHC 110 that such an agreement can be valid.' At paragraph 23 Stanley Burton J said this:

"If it is agreed that a written agreement should apply to work done before it is entered into, it should be correctly dated with the date on which it is signed and expressed to have retrospective effect, i.e to apply to work done before its date..."

Whether or not a success fee can be recovered retrospectively is more difficult.'

In **Birmingham City Council v Forde** [2009] EWHC 12 (QBE); [2009] 1 WLR 2732 on appeal, the retrospective success fee was deemed to be recoverable – see details of the case in **Appendix 1**.

## Assignment of a CFA

Assignment of a CFA may become necessary when for instance a solicitor moves firms and some of his clients wish to follow him, the firm merges with another or becomes an LLP. In **Jenkins v Young Brothers Transport Ltd** [2006] EWHC 151 (QB); [2006] 1 WLR 3189 the court held 'that the general rule that a benefit could be assigned but that a burden could not was subject to a limited exception where the exercise of a right was expressly or impliedly conditional on the performance of a covenant and the performance of the covenant was related to the right; that the benefit of being paid was conditional upon and inextricably linked to the meeting by the original firm of solicitors of its burden of ensuring to the best of its ability that the claimant succeeded in his claim; and that, accordingly, both the benefit and the burden of the conditional fee agreement could be assigned as within an exception to the general rule'.

## Collective Conditional Fee Agreements

Collective conditional fee agreements (CCFAs) are intended for bulk purchasers of legal services using CFAs such as trade unions and commercial organisations. They enable bulk purchasers to enter into a single agreement with solicitors to allow them to run their members' cases. The agreement does not have to refer to specific



proceedings, but will provide for fees to be payable on a common basis in relation to a class of proceedings.

CCFAs are 'funding arrangements' for the purposes of recovery of additional liabilities, such as the cost of membership (**CPR r.43.2(1)**).

The authority for the validity for CCFAs comes from the **s58 CLSA 1990** as amended by the **s27 AJA 1999**. CCFAs are just another form of CFAs and are subject to the SRAs rules in the Code (see above).

New and simplified client care provisions between membership organisations and their members were introduced for arrangements entered into after November 2005 – see **Access to Justice (Membership Organisation) Regulations 2005**.

## Contingency fees

The difference between a conditional fee under a CFA and a contingency fee is:

A 'contingency fee' is the generic term used to describe any fee arrangements between solicitors and clients where payment of the solicitor's fees is dependent upon the result of litigation or arbitration. A conditional fee is one type of statutory species of contingency fee and is governed by **s58 CLSA 1990** (as amended by **s27 AJA 1999**). A further form of statutory species are the recently created Damage-Based Agreements introduced by **s154 Coroners and Justice Act 2009 (inserting s58AA CLSA 1990)**, see below.

Contingency fee agreements are traditionally known to be agreements where the solicitor's fee is calculated as a percentage of the money's recovered. A conditional fee agreement differs in that the solicitor's fee is based on the amount of work done to secure that money.

**O(1.6)** of the Code, which replaced the Solicitors' Code of Conduct 2007, Rule 2.04, permits solicitors to use contingency fees for all non-contentious cases and in those contentious cases which are permitted by common law or statute. Generally, contingency fees are unenforceable in England and Wales in litigation because they are considered to be champertous arrangements, which are contrary to public policy and the common law.

Although contingency fees are mostly restricted to work which is defined as non-contentious, the definition of non-contentious is fairly broad and includes work before many tribunals. See Appendix 7 for examples of contentious and non-contentious business and information on the recent case of **Tel-ka Talk Limited v HMRC** (in which The Law Society intervened) which reconfirmed the position that proceedings before tribunals are non-contentious. To be a valid contingency fee agreement the agreement must be contained in a non-contentious business agreement as defined by **s57 Solicitors Act 1974**. (See also **s58 CLSA**, as amended by **s27(5) AJA 1999**). **Section 27 of AJA 1999** specifically states "if a conditional fee agreement is an agreement to which **s57 of the Solicitors Act 1974** (non-contentious business agreements between solicitor and client) applies, then subsection (1) shall not make it unenforceable."

There is an argument that it is also feasible to use contingency fees in a matter up to the stage of issuing court proceedings. However, it should be noted that if proceedings are subsequently issued, it is a moot point as to whether all the work on the case retrospectively becomes contentious. This could potentially mean that the agreement is unenforceable against the client and recovery of any costs from the other side would be a breach of the indemnity principle.

## Damage-Based Agreements

As of 9 April 2010 contingency fee agreements used in Employment Tribunal work must comply with the **Damage-Based Agreement Regulations 2010** ("DBA Regulations") in order to be valid. The **DBA Regulations** were made under **s154 Coroners and Justice Act 2009** which inserted **s58AA CLSA 1990**. The DBA Regulations apply to any person providing advocacy services, litigation services or claims management services in Employment Tribunal work and to all damage-based agreements signed on or after 9 April 2010 whether proceedings are issued or not.

A CFA could still be used for an employment matter and as such would fall outside the DBA Regulations provided that the amount of costs and/or any success fee is not determined by reference to the amount of the financial award achieved. For further information on damage-based agreements please see the Law Society's Practice Note on Damage-Based Agreement Regulations 2010 at [www.lawsociety.org.uk/practicenotes](http://www.lawsociety.org.uk/practicenotes).

On the subject of contingency fees the Jackson Report proposes that contingency fees be permissible in contentious proceedings subject to regulations including a cap of a maximum percentage of damages that can be recovered in fees. The Report proposes an additional safeguard, namely that the agreement will be invalid unless it is countersigned by an independent solicitor. The unsuccessful party will remain responsible for the successful party's costs on the conventional basis only see [www.judiciary.gov.uk/](http://www.judiciary.gov.uk/).

## Fixed costs – the new scheme

### Low Value Personal Injury Claims in Road Traffic Accidents ('the new scheme')

Changes to the fixed fee scheme for low value personal injury road traffic accidents came into force on 30 April 2010. For accidents which occurred between 6 October 2003 to 29 April 2010 and those which exit the new scheme, the fixed recoverable costs scheme as set out in **CPR Part 45** and the accompanying **Practice Direction about costs (PD43-48)** at s25A still applies see **Appendix 5**.

The new scheme is set out in the **Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents** (the Pre-Action Protocol) supported by **Practice Direction 8B – Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents – Stage 3 Procedure (PD 8B)** and amendments have been made to the **CPR** and other **Practice Directions including Part 45 Fixed Costs, Part 36 Offers to Settle, Part 44 General Rules about Costs, Parts 14, 21, 27, 48, and Practice Directions 2B, 4, 8, 14, Costs PD, PD52** and the **Pre-Action Protocol for Personal Injury Claims**.

The new process applies to claims for accidents occurring on or after 30th April 2010.

The **Pre-Action Protocol** deals with Stage 1 and 2 of the new scheme. The **Pre-Action Protocol** applies where;

#### (4.1)

1. a claim arises from a road traffic accident occurring on or after 30 April 2010
2. the claim includes damages in respect of personal injury
3. the claimant values the claim at not more than £10,000 on a full liability basis including pecuniary losses but excluding interest
4. if proceedings were started the small claims track would not be the normal track for that claim

The aim of the **Pre-Action Protocol** is to ensure that;

#### (3.1)

1. the defendant pays damages and costs using the process set out in the Protocol without the need for the claimant to start proceedings
2. damages are paid within a reasonable time and
3. the claimant's legal representative receive the fixed costs at the end of each stage in this Protocol

It does not apply to a claim;

#### (4.4)

1. in respect of a breach of duty owed to a road user by a person who is not a road user
2. made to the MIB pursuant to the Untraced Drivers' Agreement 2003 or any subsequent or supplementary Untraced Drivers' Agreement
3. Where the claimant or defendant is
  - a) deceased or
  - b) a protected party as defined in rule 21.1(2)(d)
4. where the claimant is bankrupt or
5. where the defendant's vehicle is registered outside the United Kingdom

## Stage 1

Stage 1 of the scheme deals with notification of the claim being sent electronically on new prescribed forms via a new claims portal at [www.rtapiclaimsprocess.org.uk](http://www.rtapiclaimsprocess.org.uk). Solicitors need to register with Insurance Database Services Limited (ISDN), which is the company responsible for managing the portal, to obtain user-id and passwords to allow them initial access the portal. Registration packs are available at [www.rtapiclaimsprocess.org.uk](http://www.rtapiclaimsprocess.org.uk).

Once registered the;

- Claim Notification Form ("CNF") (Form RTA 1) should be sent electronically via the portal to the defendant's insurer;
- the Defendant Only CNF (Form RTA 2) should be sent to the defendant by first class post;
- the defendant insurer must complete the Insurers response section of the CNF and send it to the claimant within 15 days (30 days for MIB claims);

Where liability is admitted or the only contributory negligence that is alleged is in relation to the claimant admitted failure to wear a seat belt the Stage 1 fixed costs of £400 as set out in rule **45.29 of the CPR** should be paid within 10 days after the defendant has sent his CNF response (**6.18**) to the claimant and the claim will process to Stage 2 of the scheme.

Where the defendant;

- makes an admission of liability but alleges contributory negligence (other than the claimant's admitted failure to wear a seat belt); or
- does not complete the CNF response; or
- does not admit liability; or
- notifies the claimant that there is inadequate mandatory information in CNF; or
- that the claim would be valued for less than £1,000

Then the claim would exit the scheme (**6.15**) and be dealt with under the Pre-Action Protocol for Personal Injury Claims (**6.17**).

## Stage 2

Liability already been admitted at Stage 1 the claimant can request an interim payment under Stage 2 of the scheme (**7.9**). The claimant should obtain a medical report and send the defendant the Stage 2 Settlement Pack (Form RTA 5) comprising the;

- Stage 2 Settlement Pack Form;
- medical report;
- evidence of pecuniary losses; and
- evidence of disbursements (**7.26**).

There is a 35 day 'total consideration period' which allows the defendant to consider the Stage 2 Settlement Pack and make an offer (within 15 days) the remainder of the time is for further negotiation between the parties (**7.28**). This period can be extended by agreement.

The defendant must either accept the offer or make a counter-offer (**7.31**). Any offer to settle will automatically include the Stage 2 fixed costs of £800 in **rule 45.29 of the CPR** an agreement to pay disbursements and, in conditional fee agreement cases a 12.5 per cent success fee on Stage 1 and 2 base costs see **rule 45.31(1) of the CPR. (7.37)**. The payment should be made within 10 days of the end of the 'total consideration period' (**7.40**).

If the amount of damages have not been agreed between the parties at the end of Stage 2 the claim will be determined by the court under the **Part 8** procedure and in conjunction with the new **PD 8B**.

### Stage 3

Under Stage 3 the application to the court must be started by the claimant filing a claim form accompanied by the Court Proceedings Pack (Part A) Form (Form RTA 6) and the Court Proceedings Pack (Part B) Form (Form RTA 7) consisting of the;

- claimant and defendant's final offers in a sealed envelope;
- copies of medical reports;
- evidence of special damages and disbursements; and
- any notice of funding (**6.1 PD 8B**).

No further information can be included which has not already been raised in the Stage 2 Settlement Pack Form (RTA 5) (**7.57**). The Forms are to be sent to the defendant prior to issue, the defendant then has 5 days to check them before the claimant issues the claim (**7.58**).

Once the claim has been issued and served the defendant must file and serve an acknowledgment of service using Form N210B within 14 days indicating whether he contests the making of the order or the amount of damages claimed, objects to the use of the Stage 3 procedure or disputes the courts jurisdiction (**8.1 and 8.3 PD 8B**).

The defendant must also indicate whether he wants the claim to be determined;

- on the papers; or
- at a hearing.

The court will then order how the damages will be assessed and give both parties at least 21 days notice of the date (**11.1 and 11.2 PD 8B**). Fixed costs for this stage of the scheme are £250 for a paper hearing and £500 for a oral hearing.

**PD8B** also deals with settlement where the claimant is a child and the procedure when the expiry of the limitation period prevents compliance with Stage 1 and 2 of the RTA Protocol.

## Fixed Costs under the scheme

**CPR 45.27 to 45.40** sets out the amount of costs applicable to claims determined under the scheme. Costs allowed when the claimant is a child and costs consequences for non-compliance with the RTA Protocol are also set out in this section of the CPR. **CPR 45.30** sets out the disbursements that can be added and **CPR 45.31** the success fee applicable in conditional fee cases.

The fixed costs are;

- £400 for Stage 1
- £800 for Stage 2,
- £250 for Stage 3 (plus a further £250 advocate's costs for an oral hearing and £150 if giving advice of the amount of damages for a child).

So total fixed recoverable base costs under the scheme will be either £1,450 or £1,700 when acting for an adult.

An additional 12.5 per cent of Stage 1,2 and 3 (excluding advocate's costs and advice of the amount of damages for a child) is applicable where the claimant or his legal representative lives or works in an area set out in **PD 43-48 para. 25A.6** see **CPR 45.29(5)**

For conditional fee agreement cases a success fee of;

- 12.5 per cent of the Stage 1 and 2 fixed costs and
- 100 per cent for Stage 3 is applicable see **CPR 45.31**.

Cost penalties apply for failing to comply with the RTA regime (**CPR 45.36**).

## Claims that exit the scheme

It is important to note that once a claim leave the scheme, it can not re-enter it. Claims will leave the scheme for a number of reasons including;

- failure to comply with certain time limits
- failure to comply with the timetable
- providing inadequate information
- if causation is questioned or denied
- allegations made of contributory negligence (other than failure to wear a seat belt)
- allegations of fraud

Once a claim leaves the scheme it will fall into the appropriate track for cases over £1,000 this is likely to be the Fixed Recoverable Costs scheme – see **Appendix 5**

The Jackson Report proposes fixed costs in all personal injury fast track litigation, and for other types of cases a dual system eventually leading to fixed costs for all types of claims in the fast track; see [www.judiciary.gov.uk/](http://www.judiciary.gov.uk/).

## Indemnity principle

The indemnity principle is an entrenched principle of law. **Harold v Smith** [1860] 5 H&N 381 provided that costs between party and party are given by the law as an indemnity to the person entitled to them. They are not imposed as a punishment on the party who pays them, or given as a bonus to the party who receives them. The amount which the paying party has to pay cannot exceed the amount which the successful party has to pay to his own solicitor. This was reaffirmed in **Gundry v Sainsbury** [1910] 1 KB 645.

Therefore, if the solicitors representing the successful party have intimated that their client 'need not worry' about paying their fees, there is a possibility that the court will hold that the loser has no liability in costs. (See the House of Lords decision in **British Waterways Board v Norman** (1993) 26 HLR 232 (this case was subsequently overruled by **Thai Trading Co (a firm) v Taylor** [1998] QB 781 (CA) but not in regard to this aspect of the judgment.)

There are a number of important **exceptions** to the indemnity principle including:

1. Costs payable under conditional fee agreements (**s58 CLSA 1990** as amended by the **s27 AJA 1999**);
2. Costs funded by the **Legal Services Commission (s22 AJA 1999)** and **CLS (Costs) Regulations 2000 reg 15**;
3. Sums payable to litigants in person (**Litigants in Person (Costs and Expenses) Act 1975**);
4. Fixed costs payable under **CPR Part 45 (Butt v Nizami [2006] EWHC 159 (QB); [2006] 2 All ER 140)**;
5. Fixed sums in respect of fast track trial costs (**CPR Part 46**);
6. The allowance of costs in respect of an in-house solicitor or employed solicitor (**Re Eastwood (deceased) [1975] Ch 112**).
7. Costs payable under **s194 of the Legal Services Act 2007** to the Access to Justice Foundation. When a successful party has been represented, either fully or partly pro-bono in a civil matter it is possible under **s194** for the court to make a costs order against the opponent in favour of the Access to Justice Foundation who are a national charity. There is a useful article in the *Law Society's Gazette* of 13 November 2008 LSG 105/43 p.14-15 entitled: Laying the Foundation by Jeremy Morgan QC which discusses the procedure and points out a practical issue which should be considered when facing a number of costs orders going either way in such a case.

There have been many calls to abolish the indemnity principle. Including that in the Jackson Report where Lord Justice Jackson at paragraph 3.4 lists seven reasons for reaching his conclusion that the indemnity principle should be abolished see [www.judiciary.gov.uk/](http://www.judiciary.gov.uk/).

The Law Society has long argued for abolition of the principle but to date, these recommendations have not been implemented and the indemnity principle remains in operation.

## Further reading

**SRA Code of Conduct 2011** available online at [www.sra.org.uk](http://www.sra.org.uk).

**SRA Handbook** published by the Law Society. Available from the Law Society bookshop (telephone 0870 850 1422).

**Outcomes-Focused Regulation, A Practical Guide** by Andrew Hopper QC and Gregory Treverton-Jones QC, published by the Law Society. Available from the Law Society bookshop (telephone 0870 850 1422).

**Cook on Costs 2011** by Michael J Cook published by Butterworths.

**Conditional Fees, A Guide to CFAs and Litigation Funding** by Gordon Wignall published by The Law Society. Available from The Law Society bookshop (telephone 0870 850 1422).

**Litigation Funding** which is a bi-monthly magazine published by the Law Society. For subscription details please call 020 7841 5523.

**Guide to Good Practice** published by the Law Society. Available from the Law Society Bookshop (telephone 0870 850 1422).

The **Practice Advice Service** Frequently Asked Questions published on the Law Society's website at [www.lawsociety.org.uk/practiceadvice](http://www.lawsociety.org.uk/practiceadvice).

**Practice Notes** are provided by the Law Society as appropriate. Solicitors should regularly refer to the Law Society's website [www.lawsociety.org.uk](http://www.lawsociety.org.uk).

The Law Society's full **summary of the Jackson Report**.



## **Special interest groups**

### **International**

For law firms, solicitors, and foreign lawyers seeking to develop their international business and build global relationships and profile, our innovative International Division provides the contacts, tools and information your firm needs and opportunities to progress your international career.

[www.lawsociety.org.uk/international](http://www.lawsociety.org.uk/international)

### **Junior lawyers**

The Junior Lawyers Division provides a clear voice for student members of the Law Society enrolled through the SRA, trainees, and solicitors with up to five years' active PQE.

[www.lawsociety.org.uk/juniorlawyers](http://www.lawsociety.org.uk/juniorlawyers)

### **Law management**

The Law Management Section focuses on the full range of practice management disciplines, including HR, finance, marketing, IT, business development, client care, quality and risk.

[www.lawsociety.org.uk/lawmanagement](http://www.lawsociety.org.uk/lawmanagement)

### **Probate**

The Probate Section focuses on wills, financial planning, trusts, tax planning, Court of Protection, care planning and estate administration.

[www.lawsociety.org.uk/probate](http://www.lawsociety.org.uk/probate)

### **Property**

The Property Section focuses on areas including e-conveyancing, housing, land registration, money laundering, planning and environment, as well as tax and revenue.

[www.lawsociety.org.uk/property](http://www.lawsociety.org.uk/property)

### **Civil Justice**

The Civil Justice Section focuses on all areas of dispute resolution including arbitration, litigation and mediation.

[www.lawsociety.org.uk/civiljustice](http://www.lawsociety.org.uk/civiljustice)

### **Competition**

The Competition Section focuses on UK and EU competition law policy, practice and procedure, providing practitioners with opportunities to engage in dialogue and debate and encouraging candid engagement between the profession and officials in the relevant institutions.

[www.lawsociety.org.uk/competition](http://www.lawsociety.org.uk/competition)

### **Other groups**

We also maintain a list of useful practitioner associations and groups at [www.lawsociety.org.uk/groupssections.law](http://www.lawsociety.org.uk/groupssections.law).

## Appendix 1 – The History of CFAs and case law

### CFA developments

CFAs were first introduced in 1995 for personal injury, some insolvency work and cases before the European Commission of Human Rights and the European Court of Human Rights. In 1998, CFAs were extended to all types of proceedings except family and criminal. Under these types of agreements, both the success fee and any after-the-event (ATE) insurance policy premium (which was purchased to protect the client against an adverse costs order) were payable by the solicitor's own client and were not recoverable from the other side. Inevitably, this meant that the client had to pay these out of any damages received.

In 2000, the regime changed when **s58 CLSA 1990** (as amended by **s27 AJA 1999**) sanctioned the **Conditional Fee Agreements Regulations 2000 (S.I. 2000/692) (the 2000 Regulations)**. These Regulations, along with the **Conditional Fee Agreements Order 2000 (S.I. 2000/823)**, came into effect on 1 April 2000, they set out the requirements of an enforceable CFA.

The 2000 regime introduced recoverability of the success fee and ATE insurance premium which meant that as the losing party in the matter was liable to pay these 'additional liabilities', they now had an interest in how much was being charged for them.

The government attempted to simplify the CFA regime by introducing further regulations. The **Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003 (S.I. 2003/1240)** were brought in to effect on 2 June 2003. An agreement under these regulations is often referred to as a 'CFA simple' or 'CFA lite'. For various reasons, the CFA lite was not widely adopted.

Further regulations were introduced in 2003 following discussions between the Law Society and the Department of Constitutional Affairs (DCA), covering outstanding issues such as the death or bankruptcy of a client. The **Conditional Fee Agreements (Miscellaneous Amendments) (No 2) Regulations 2003 (S.I. 2003 / 3344)**, came into force on 2 February 2004. In practice, the **2003 Regulations** were unworkable, and added to the confusion of the 2000 regime.

### The 'costs war'

The **2000 Regulations** (and subsequent **2003 Regulations**) were detailed and technical, and because of the link to **s58(1) CLSA 1990** (as amended by **s27 AJA 1999**) solicitors were constantly faced with a very real threat that a breach would lead to unrecoverability of all costs. Conversely, for the paying party, the prospect of being relieved of the burden to pay the winning party's costs created an incentive to challenge the CFA on a technicality.

The 2003 Court of Appeal decision in **Hollins v Russell [2003] EWCA Civ 718** (in which the Law Society intervened) stemmed the flow of technical challenges by determining that validity of a CFA was not affected unless the breach was 'material' and 'adversely affected the client or the administration of justice'.

However, case law continued to develop and after pressure from the Law Society, the DCA agreed to try to simplify matters.

## The new regime

In June 2003, the DCA produced a consultation paper called 'Simplifying CFAs'. The focus was on the problems caused by the secondary legislation (in effect the **2000 Regulations**). Various stakeholders were involved, including the Judiciary, the Law Society, Consumers Association and Association of British Insurers.

In June 2004, the DCA produced a document 'Making simple CFAs a reality – A summary of responses to the consultation paper simplifying conditional fee agreements and proposals for reform'. As a result of further feedback from stakeholders, a new 2005 regime was outlined in the DCA's final paper 'New Regulation for Conditional Fee Agreements'.

The Law Society strongly believed that it would be more sensible for regulatory requirements on solicitors to be in Law Society's rules, rather than regulations. The DCA, with the support of the Judiciary and other stakeholders agreed. On 1 November 2005 the **Conditional Fee and Collective Conditional Fee Regulations 2000** were revoked by the **Conditional Fee Agreements (Revocation) Regulations (2005/2305)**. Separate rules for CCFAs were no longer required under the new regime, and so the **Collective Conditional Fee Agreements Regulations 2000 (S.I. 2000/2988)** were also revoked. Responsibility for compliance with the statutory requirements was effectively handed over to the Law Society.

The new regime applies to all conditional fee agreements, collective or otherwise, entered into on or after 1 November 2005. The old regulations continue to have effect in relation to agreements entered into before 1 November 2005.

As mentioned above solicitors still have to comply with the primary legislation, namely the mandatory requirements in **s58 CLSA 1990** (as amended by **s27 AJA 1999**) and with the Code. The CPR also remain in force. Solicitors should consider these provisions carefully when entering into a CFA.

Before 1 November 2005, the **CFA Regulations** fell under **s58** and if these were breached in a material way, the agreement could have been deemed to be unenforceable in accordance with **s58(1)**.

The intention behind the 1 November 2005 changes was to strip away unnecessary regulation and bring balance to the CFA regime. In transferring CFA requirements from statutory regulation to the Law Society's Solicitors' Costs Information and Client Care Code and now **Chapter 1 on Client care of the Code**, it reduces the possibility of draconian sanctions for minor breaches.

A positive indication of how the regime was to be received is the Court of Appeal decision in **Garbutt v Edwards (2005)** EWCA Civ 1206 which was decided under the old CFA Regulations where the court held that a failure to provide clients with costs estimates did not mean the solicitors could not recover their costs. The Court found that the Law Society client care rules are not in place 'to relieve paying parties of their obligations to pay costs which have been reasonably incurred'. The court went on to say that a failure to provide costs estimates should not render a retainer unenforceable. This was an encouraging signal from the courts that breaches of the Code should not be used to launch technical challenges and the Law Society was recognised by the court as providing disciplinary sanction for breach of its rules.

The wider funding issues remain relevant. The **CPR** which govern the court's discretion in respect of recoverable costs are unchanged under the new regime. Existing guidance in this area continues to be applicable, including the Court of Appeal decision in **Sawar v Alam [2001]** EWCA Civ 1401. It is well documented that the

Law Society was disappointed that the court did not accept the Society's contention that there is a strong public interest in maintaining the client's freedom of choice – see case law below.

## Case law

**The following cases are a sample of those available in this area. There are many other relevant cases; those mentioned below are just a selection which attracted interest. The Law Society has intervened in a number of influential cost cases.**

**Success Fee - Callery v Gray – [2001] EWCA Civ 1117** (affirmed by House of Lords [2002] UKHL 28)

The first major case under the 2000 Regulations was that of *Callery v Gray* in 2001 where the Court of Appeal upheld the legality of CFAs and set out some guidelines regarding success fees and ATE premiums. Although this matter went to the House of Lords, it declined to interfere with the Court of Appeal decision.

**Before the event insurance - *Sawar v Alam* [2001] EWCA Civ 1401.**

*Sawar v Alam* dealt with the situation where despite there being before-the-event insurance (BTE) covering the claimant, he chose to use a CFA and after-the-event insurance (ATE) instead. This was an unusual case in that the BTE policy was that of the driver who was the other party in the proceedings. The court decided that a solicitor needs to check whether the client, his spouse or partner has a BTE policy before recommending a CFA and ATE. This follows the 2000 Regulations in that Regulation 3 states that a solicitor has to cover in preliminary discussions whether the client is already covered for the costs of taking a claim by the terms of a pre-existing insurance policy or by membership of a scheme run by an organisation of which he is a member, such as a trade union.

The question, however, has to be how far does the solicitor have to go to make these checks. In *Sawar v Alam* the court suggested that any enquiries did not have to be extensive in a small case. It is well documented that the Law Society was disappointed that the court did not accept the Society's contention that there is a strong public interest in preserving the client's freedom of choice. This case was the subject of a lengthy article in the Law Society Gazette on 15 November 2001.

**Funding - *Bowen v Bridgend County Borough Council* [2004] SCCO 25 March**

This issue that a solicitor also has to discuss with the client the most appropriate means of funding his claim, and any financial liabilities he may face in entering a CFA became a significant point in this case. Costs Judge O'Hare concluded that the client had not been advised about the availability of public funding for housing disrepair cases. As a result, he decided that the solicitors had not complied with the 2000 Regulations and therefore the CFA was unenforceable.

**Unenforceability - *Hollins v Russell* [2003] EWCA Civ 718**

A major decision on the CFA scheme was *Hollins v Russell* in 2003 when the Court of Appeal held that breaches of the 2000 Regulations had to be divided into those that were material and those that were not. Material breaches are those that affect the administration of justice or consumer protection. Only breaches that were both material and adversely affected the client or the administration of justice will cause

the CFA to be unenforceable. The court also stated that 'technical challenges' to CFAs should stop.

**Enforceability of the Law Society's CFA - Ghannouchi v Houni [2004] SCCO 4 March**

In *Ghannouchi v Houni* in 2004, Costs Judge Seager Berry held that the wording of the Law Society's model CFA was in breach of the 2000 Regulations in respect of the parts relating to the inability of the solicitor to recover money from the client where the costs had been agreed or assessed at a lower level than claimed. However, he concluded that the breach was not material and the CFA was still enforceable.

**Regulation 4(2)(c) of Conditional Fee Agreements Regulations 2000 – BTE – Myatt v National Coal Board [2006] EWCA Civ 1017**

The court found that the clients had been asked the wrong question in respect of the availability of BTE cover. The question asked was too restrictive to comply with the Regulation as it placed too much of a burden of understanding of complex terms of insurance policies on the clients. Some general guidance on the scope of a solicitor's duty under Regulation 4(2)(c) was given. The court also looked at the meaning of the *Hollins v Russell* 2003 judgement and found that the language of s.58 CLSA 1990 was clear and uncompromising. They therefore found that as a statutory condition had been breached the CFA was unenforceable and the solicitor was not entitled to any costs despite the fact that the clients had suffered no detriment.

**Regulation 4(2)(e)(ii) of Conditional Fee Agreements Regulations 2000 – Interest in recommending a contract of insurance – Garrett v Halton BC [2006] EWCA Civ 1017**

The solicitors, who had failed to tell their clients that it was a term of their claims management panel membership that they should recommend a particular insurance policy, were in breach of Regulation 4(2)(e)(ii). Continued panel membership was an indirect financial interest and needed to be declared in order to comply with the Regulations. Again the court looked at the meaning of the *Hollins v Russell* 2003 judgement and found that the language of s.58 CLSA 1990 was clear and uncompromising. They therefore found that as a statutory condition had been breached the CFA was unenforceable and the solicitor was not entitled to any costs despite the fact that the clients had suffered no detriment.

**Birmingham City Council v Rose Forde [2009] EWHC 12 (QBE); [2009] 1 WLR 2732**

The Claimant entered into a CFA in respect of a housing disrepair case without a success fee. The local authority challenged the validity of similar CFAs so the Claimant solicitors sent a letter asking her to sign another CFA with a success fee that extended the work covered by the retainer. The Defendants appealed against the decision but the appeal was dismissed. Held the letter formed part of the second CFA, the letter formed part of the retainer, the second CFA was enforceable. A retrospective success fee in a retrospective conditional fee agreement was not contrary to public policy.

**Dunn v Crescenzo Mici [2008] EWHC 90115 (Costs)**

Challenge to validity of CFA for want of compliance with Regulation 4(2)(c) Conditional Fee Agreements Regulations (2000). The CFA was signed by a "litigation friend" who did not receive advice under regulation 4. The son was the client, not his mother so there was no obligation to give her advice under regulation 4. The son had

attained 18 years by the time the action was brought “litigation friend” in the CFA had no significance under CPR 21 thus the CFA was held to be valid.

**Kilby v Gawith [2008] EWCA Civ 812**

The appellant (G) appealed against a costs decision made in favour of the respondent (K). G and K had been involved in a road traffic accident. G admitted liability and K, who had the benefit of BTE insurance, entered into a CFA with her solicitor. Quantum was agreed and G agreed to pay costs but disputed the success fee fixed at 12.5 per cent of the fixed recoverable costs by virtue of rule 45.11(2) of the Civil Procedure Rules. K issued costs proceedings and G contended that the court had a discretion whether or not to allow a success fee and at what level. The costs judge ruled that rule 45.11(2) was not discretionary. A district judge dismissed G’s appeal.

The Court of Appeal held that the costs judge and district judge had reached the correct conclusion. Rule 45.11 had to be construed by reference to its ordinary natural meaning in the context of the rules as a whole. While rule 45.11(1) provided that a claimant ‘may recover a success fee’ the natural meaning was that a claimant was entitled to claim a success fee. Rule 45.11(2) provided that the amount of the success fee ‘shall be’ 12.5 per cent, which meant that where a success fee was recovered it had to be 12.5 per cent. If the draftsman had meant for there to be a discretion to grant a success fee he would not have fettered that discretion by specifying the amount. The purpose of the rules was to provide fixed levels of remuneration, *Nizami v Butt* [2006] EWHC 159 QB, (2006) 1 WLR 3307 and *Lamont v Burton* [2007] EWCA Civ 429, (2007) 1 WLR 2814 applied. The approach to BTE insurance in *Sarwar v Alam* [2001] EWCA Civ 1401, (2002) 1 WLR 125 did not lead to the conclusion that rule 45.11(2) should be construed any differently, *Sarwar* applied.

**Arkin v Borchard Lines and Others [2005] EWCA Civ 655; [2005] 1 WLR 3055**

In this decision the Court of Appeal treated as non-champertous a clear contingency fee arrangement where the funder had not sought to control the litigation and where the percentage share did not exceed what would have been fair remuneration for services and served to act as a cap on the fees payable.

**King v Telegraph [2004] EWCA Civ 613; [2005] 1 WLR 2282**

In a case where a success fee of 100 per cent was claimed on the basis that the case had a prospect of no better than 50 per cent, the defendant sought security for costs because no after the event insurance had been notified. The court declined and Eady J. said there was nothing inconsistent with the intention of the legislature in lawyers agreeing to support a claim by means of a CFA even where a cold dispassionate assessment of the likely outcome would lead them to the conclusion that the claim is unlikely to succeed. *‘it is not this court to thwart the wish of Parliament that litigants should be able to bring actions to vindicate their reputations under a CFA, and that they should not be obliged to obtain ATE cover before they do so.’*

**R (on the application of Factortame) v Secretary of State for Transport (No.2) [2002] EWCA Civ 932; [2002] All ER (D) 41**

This judgment concerned fees paid by the successful claimants to a firm of accountants, Grant Thornton. The claimants had agreed to pay Grant Thornton 8 per cent ‘of the final settlement received’. This was to constitute payment for Grant Thornton’s accountancy and back-up services in relation to the assessment of quantum and for the retention and payment by Grant Thornton of independent expert

witnesses. The defendant challenged the claimants' right to recover this payment as costs on the ground that the agreement in question was champertous and unenforceable. The court rejected this argument. Relevant to its decision was that Grant Thornton did not attempt to exert any influence upon the conduct of this phase of the litigation, the fact that the 8 per cent recovery did not exceed what would have been fair remuneration for Grant Thornton's services, indeed it acted as a cap on their fees, and the fact that the agreement to remunerate Grant Thornton had been necessary in order to procure for the claimants access to justice.

The court observed that the introduction of CFAs evidenced a radical shift in the attitude of public policy to the practice of conducting litigation on terms that the obligation to pay fees would be contingent on success.

**Epoq Group Ltd v (1) Healys Solicitors and (2) Streetwise Publications, SCCO, 25 June 2009 (unreported)**

Master Haworth held that the solicitors were not entitled to any remuneration under a CFA (even though the firm believed that it had achieved a success by way of reaching a settlement,) because they did not complete all the work to be done, which included matters related to the assessment of costs. The firm's wrongful termination of the retainer, prior to it fulfilling its duties under the CFA, caused them not to be entitled to any payment. Although an agreement can contain terms to the effect that solicitors are entitled to payment before the work is completed, the CFA in this case (which followed the Law Society form) did not contain any applicable ones. Therefore the firm's entitlement to payment only arose on completion of all the work to be done under the CFA, which included the matters related to the assessment of costs.

**Thomas v Butler (t/a Worthingtons Solicitors) [2009] EWHC 9015**

The court found that the solicitors had failed to discuss funding options adequately with the client, who was under the mistaken belief that they were being represented under a CFA. The Master relied on CPR 44.4(1) in making his order that none of the solicitors' £20,651 costs were payable. The rule allows the court to 'disallow costs which have been unreasonably incurred or are unreasonable in amount'. The court thought costs in this case were unreasonable because of the breach of the costs code.

**Sibthorpe v Southwark London Borough Council (Law Society intervening) [2011] EWCA Civ 25**

In a housing disrepair claim, the solicitors entered into a CFA which provided for a success fee of 10%, limited the solicitors' costs to costs recovered, and provided that the solicitors would indemnify the claimant against any adverse costs. The indemnity clause read: 'If you lose, you pay your opponent's charges and disbursements. You may be able to take out an insurance policy against this risk. If you are unable to obtain an insurance policy against this risk, we indemnify you against payment of your opponent's charges at the end of the case if you lose. This means that we will pay those charges.' The court held that these arrangements were not covered by CLSA 1990 s58, but the indemnity was not champertous, nor did it amount to a contract of insurance. In no case cited to the court had it been held to be champertous for a person to run the risk of a loss should the action fail, without enjoying any gain should the action succeed.



**Sousa v Waltham Forest London Borough Council [2011] EWCA Civ 194**

The court held that an insurer was entitled to benefit from the same rights as the insured. Therefore an insurer with a subrogated claim could take advantage of a CFA just as much as could an insurer with an assigned cause of action. Any person, whether rich or poor and whether human or corporate, is entitled to enter into a CFA and take out ATE insurance.

## Appendix 2 - The Law Society's Model Conditional Fee Agreement November 2005

For use in personal injury and clinical negligence cases only.

This agreement is a binding legal contract between you and your solicitor/s. Before you sign, please read everything carefully. This agreement must be read in conjunction with the Law Society document 'What you need to know about a CFA'.

### Agreement date

[.....]

### I/We, the solicitor/s

[.....]

You, the client [.....]

### What is covered by this agreement

- Your claim against [.....] for damages for personal injury suffered on [.....]. *(if either the name of the opponent or the date of the incident are unclear then set out here in as much detail as possible to give sufficient information for the client and solicitor to understand the basis of the claim being pursued)*
- Any appeal by your opponent.
- Any appeal you make against an interim order.
- Any proceedings you take to enforce a judgment, order or agreement.
- Negotiations about and/or a court assessment of the costs of this claim.

### What is not covered by this agreement

- Any counterclaim against you.
- Any appeal you make against the final judgment order.

### Paying us

If you win your claim, you pay our basic charges, our disbursements and a success fee. You are entitled to seek recovery from your opponent of part or all of our basic charges, our disbursements, a success fee and insurance premium as set out in the document 'What you need to know about a CFA.'

It may be that your opponent makes a Part 36 offer or payment which you reject on our advice, and your claim for damages goes ahead to trial where you recover damages that are less than that offer or payment. If this happens, we will **[not add our success fee to the basic charges] [not claim any costs]** for the work done after we received notice of the offer or payment.

If you receive interim damages, we may require you to pay our disbursements at that point and a reasonable amount for our future disbursements.

If you receive provisional damages, we are entitled to payment of our basic charges our disbursements and success fee at that point.

If you lose you remain liable for the other side's costs.

### **The Success Fee**

The success fee is set at [.....]% of basic charges, where the claim concludes at trial; or [.....] % where the claim concludes before a trial has commenced. In addition [.....]% relates to the postponement of payment of our fees and expenses and can not be recovered from your opponent. The Success fee inclusive of any additional percentage relating to postponement cannot be more than 100% of the basic charges in total.

### **Other points**

The parties acknowledge and agree that this agreement is not a Contentious Business Agreement within the terms of the Solicitors Act 1974.

### **Signatures**

**Signed by the solicitor(s):** .....

**Signed by the client:** .....

## **Appendix 3 - Conditional Fee Agreements: what you need to know leaflet November 2005**



The Law Society

### **Conditional Fee Agreements: what you need to know leaflet November 2005**

- What do I pay if I win?
- What do I pay if I lose?
- Ending this agreement
- Basic charges
- How we calculate our basic charges
- Road Traffic Accidents
- Success fee
- Value added tax (VAT)
- The Insurance Policy
- Law Society Conditions
- Our responsibilities
- Your responsibilities
- Dealing with costs if you win
- Payment for advocacy
- What happens when this agreement ends before your claim for damages ends?
- What happens after this agreement ends
- Explanation of words used

Definitions of words used in this document and the accompanying CFA are explained at the end of this document.

#### **What do I pay if I win?**

If you win your claim, you pay our basic charges, our disbursements and a success fee. The amount of these is not based on or limited by the damages. You can claim from your opponent part or all of our basic charges, our disbursements, a success fee and insurance premium.

It may be that your opponent makes a Part 36 offer or payment which you reject on our advice, and your claim for damages goes ahead to trial where you recover damages that are less than that offer or payment. Refer to the 'Paying Us' section in the CFA document to establish costs we will be seeking for the work done after we received notice of the offer or payment.

If you receive interim damages, we may require you to pay our disbursements at that point as well as a reasonable amount for our future disbursements.

If you receive provisional damages, we are entitled to payment of our basic charges, our disbursements and success fee at that point.

If you win overall but on the way lose an interim hearing, you may be required to pay your opponent's charges of that hearing.

If on the way to winning or losing you are awarded any costs, by agreement or court order, then we are entitled to payment of those costs, together with a success fee on those charges if you win overall.

### **What do I pay if I lose?**

If you lose, you pay your opponent's charges and disbursements. You may be able to take out an insurance policy against this risk. If you lose, you do not pay our charges but we may require you to pay our disbursements.

### **Ending this agreement**

If you end this agreement before you win or lose, you pay our basic charges and disbursements. If you go on to win, you also pay a success fee.

We may end this agreement before you win or lose.

### **Basic charges**

These are for work done from now until this agreement ends. These are subject to review.

### **How we calculate our basic charges**

These are calculated for each hour engaged on your matter. Routine letters and telephone calls will be charged as units of one tenth of an hour. Other letters and telephone calls will be charged on a time basis. The hourly rates are:

Grade of Fee Earner	Hourly Rate
1 Solicitors with over eight years post qualification experience including at least	

eight years litigation experience.	
2 Solicitors and legal executives with over four years post qualification experience including at least four years litigation experience.	
3 Other solicitors and legal executives and fee earners of equivalent experience	
4 Trainee solicitors, paralegals and other fee earners.	

We review the hourly rate on [review date] and we will notify you of any change in the rate in writing.

### **Road Traffic Accidents**

[If your claim is settled before proceedings are issued, for less than £10,000, our basic costs will be £800; plus 20% of the damages agreed up to £5,000; and 15% of the damages agreed between £5,000 and £10,000.] [If you live in London, these costs will be increased by 12.5%]. These costs are fixed by the Civil Procedure Rules.

### **Success fee**

The success fee percentage set out in the agreement reflects the following:

- a) the fact that if you lose, we will not earn anything;
- b) our assessment of the risks of your case;
- c) any other appropriate matters;
- d) the fact that if you win we will not be paid our basic charges until the end of the claim;
- e) our arrangements with you about paying disbursements.

### **Value added tax (VAT)**

We add VAT, at the rate (now [.....]%) that applies when the work is done, to the total of the basic charges and success fee.

## The Insurance Policy

In all the circumstances and on the information currently available to us, we believe, that a contract of insurance with [.....] is appropriate to cover your opponent's charges and disbursements in case you lose.

This is because

*You do not have an existing or satisfactory insurance that would cover the costs of making this claim. The policy we recommend will pay:*

- a) *the costs of the other party in the event that the claim fails, to a maximum of £X;*
- b) *all your disbursements if your claim fails.*
- c) *[add other key features where necessary such as, our costs and the other side's costs (without deduction from your damages) if you fail to beat an (Part 36) Offer to Settle your claim, which you rejected following our advice].*

or:

[We cannot identify a policy which meets your needs but our recommended policy is the closest that we can discover within the products that we have searched. It does not meet your needs in the following respects:

- a) *it has an excess of £Z*
- b) *the maximum cover is £ZZ]*

or:

*[We cannot obtain an insurance policy at this stage but we shall continue to look for one and if we are successful in our search then we shall advise you at that stage of the benefits of the policy and purchasing it]*

**[NB. The italicised reasons in set out are examples only. Your solicitor must consider your individual circumstances and set out the reasons that apply].**

## Law Society Conditions

The Law Society Conditions below are part of this agreement. Any amendments or additions to them will apply to you. You should read the conditions carefully and ask us about anything you find unclear.

## Our responsibilities

We must:

- always act in your best interests, subject to our duty to the court;
- explain to you the risks and benefits of taking legal action;
- give you our best advice about whether to accept any offer of settlement;
- give you the best information possible about the likely costs of your claim for damages.

## **Your responsibilities**

You must:

- give us instructions that allow us to do our work properly;
- not ask us to work in an improper or unreasonable way;
- not deliberately mislead us;
- co-operate with us;
- go to any medical or expert examination or court hearing.

## **Dealing with costs if you win**

- You are liable to pay all our basic charges, our disbursements and success fee.
- Normally, you can claim part or all of our basic charges, our disbursements success fee and insurance premium from your opponent.
- If we and your opponent cannot agree the amount, the court will decide how much you can recover. If the amount agreed or allowed by the court does not cover all our basic charges and our disbursements, then you pay the difference.
- You will not be entitled to recover from your opponent the part of the success fee that relates to the cost to us of postponing receipt of our charges and our disbursements. This remains payable by you.
- You agree that after winning, the reasons for setting the success fee at the amount stated may be disclosed:
  - i. to the court and any other person required by the court;
  - ii. to your opponent in order to gain his or her agreement to pay the success fee.
- If the court carries out an assessment and reduces the success fee because the percentage agreed was unreasonable in view of what we knew or should have known when it was agreed, then the amount reduced ceases to be payable unless the court is satisfied that it should continue to be payable.
- If we agree with your opponent that the success fee is to be paid at a lower percentage than is set out in this agreement, then the success fee percentage will be reduced accordingly unless the court is satisfied that the full amount is payable.
- It may happen that your opponent makes an offer of one amount that includes payment of our basic charges and a success fee. If so, unless we consent, you agree not to tell us to accept the offer if it includes payment of the success fee at a lower rate than is set out in this agreement.
- If your opponent is receiving Community Legal Service funding, we are unlikely to get any money from him or her. So if this happens, you have to pay us our basic charges, disbursements and success fee.

As with the costs in general, you remain ultimately responsible for paying our success fee.

You agree to pay into a designated account any cheque received by you or by us from your opponent and made payable to you. Out of the money, you agree to let us take the balance of the basic charges; success fee; insurance premium; our remaining disbursements; and VAT.

You take the rest.

We are allowed to keep any interest your opponent pays on the charges.



### *If your opponent fails to pay*

If your opponent does not pay any damages or charges owed to you, we have the right to take recovery action in your name to enforce a judgment, order or agreement. The charges of this action become part of the basic charges.

## **Payment for advocacy**

The cost of advocacy and any other work by us, or by any solicitor agent on our behalf, forms part of our basic charges. We shall discuss with you the identity of any barrister instructed, and the arrangements made for payment.

### *Barristers who have a conditional fee agreement with us*

If you win, you are normally entitled to recover their fee and success fee from your opponent. The barrister's success fee is shown in the separate conditional fee agreement we make with the barrister. We will discuss the barrister's success fee with you before we instruct him or her. If you lose, you pay the barrister nothing.

### *Barristers who do not have a conditional fee agreement with us*

If you win, then you will normally be entitled to recover all or part of their fee from your opponent. If you lose, then you must pay their fee.

## **What happens when this agreement ends before your claim for damages ends?**

### *a) Paying us if you end this agreement*

You can end the agreement at any time. We then have the right to decide whether you must:

- pay our basic charges and our disbursements including barristers' fees but not the success fee when we ask for them; or
- pay our basic charges, and our disbursements including barristers' fees and success fees if you go on to win your claim for damages.

### *b) Paying us if we end this agreement*

i. We can end this agreement if you do not keep to your responsibilities. We then have the right to decide whether you must:

- pay our basic charges and our disbursements including barristers' fees but not the success fee when we ask for them; or
- pay our basic charges and our disbursements including barristers' fees and success fees if you go on to win your claim for damages.

ii. We can end this agreement if we believe you are unlikely to win. If this happens, you will only have to pay our disbursements. These will include barristers' fees if the barrister does not have a conditional fee agreement with us.

iii. We can end this agreement if you reject our opinion about making a settlement with your opponent. You must then:

- pay the basic charges and our disbursements, including barristers' fees;

- pay the success fee if you go on to win your claim for damages.

If you ask us to get a second opinion from a specialist solicitor outside our firm, we will do so. You pay the cost of a second opinion.

- iv. We can end this agreement if you do not pay your insurance premium when asked to do so.

c) *Death*

This agreement automatically ends if you die before your claim for damages is concluded. We will be entitled to recover our basic charges up to the date of your death from your estate.

If your personal representatives wish to continue your claim for damages, we may offer them a new conditional fee agreement, as long as they agree to pay the success fee on our basic charges from the beginning of the agreement with you.

## **What happens after this agreement ends**

After this agreement ends, we may apply to have our name removed from the record of any court proceedings in which we are acting unless you have another form of funding and ask us to work for you.

We have the right to preserve our lien unless another solicitor working for you undertakes to pay us what we are owed including a success fee if you win.

## **Explanation of words used**

a) *Advocacy*

Appearing for you at court hearings.

b) *Basic charges*

Our charges for the legal work we do on your claim for damages.

c) *Claim*

Your demand for damages for personal injury whether or not court proceedings are issued.

d) *Counterclaim*

A claim that your opponent makes against you in response to your claim.

e) *Damages*

Money that you win whether by a court decision or settlement.

f) *Our disbursements*

Payment we make on your behalf such as:

- court fees;
- experts' fees;
- accident report fees;
- travelling expenses.

g) *Interim damages*

Money that a court says your opponent must pay or your opponent agrees to pay while waiting for a settlement or the court's final decision.

h) *Interim hearing*

A court hearing that is not final.

i) *Lien*

Our right to keep all papers, documents, money or other property held on your behalf until all money due to us is paid. A lien may be applied after this agreement ends.

j) *Lose*

The court has dismissed your claim or you have stopped it on our advice.

k) *Part 36 offers or payments*

An offer to settle your claim made in accordance with Part 36 of the Civil Procedure Rules.

l) *Provisional damages*

Money that a court says your opponent must pay or your opponent agrees to pay, on the basis that you will be able to go back to court at a future date for further damages if:

- you develop a serious disease; or
- your condition deteriorates;

in a way that has been proved or admitted to be linked to your personal injury claim.

m) *Success fee*

The percentage of basic charges that we add to your bill if you win your claim for damages and that we will seek to recover from your opponent.

n) *Trial*

The final contested hearing or the contested hearing of any issue to be tried separately and a reference to a claim concluding at trial includes a claim settled after the trial has commenced or a judgment.

*o) Win*

Your claim for damages is finally decided in your favour, whether by a court decision or an agreement to pay you damages or in any way that you derive benefit from pursuing the claim.

'Finally' means that your opponent:

- is not allowed to appeal against the court decision; or
- has not appealed in time; or
- has lost any appeal.

## Appendix 4 - The Litigation Funding Table

This table which appeared in the December 2011 edition of *Litigation Funding* represents a snapshot of the ATE market as at that date. The ATE market is constantly changing and evolving, and each entry in the table is checked and updated in every issue and new entrant to the market added. To subscribe to *Litigation Funding* a bi-monthly magazine please contact subscriptions on 020 7841 5523.

# The Litigation Funding table

AFTER-THE-EVENT INSURANCE FOR USE WITH CONDITIONAL FEES

	Name of main conditional fee ATE product	Delegated authority (DA) or individually underwritten (IU)	Main areas covered	Special features	Limit of indemnity	Premium or basis for premium calculation	When are premiums payable?	Disbursements include own counsel's fees?	Date of launch	Underwriters	Disbursement funding	Notes
1ST CLASS LEGAL 0845 241 2076 WWW.ATEINSURANCE.COM WWW.LEGALCASEFUNDING.COM	1st Class Legal Litigation Costs Insurance Policy	IU	Most types of CFA and non-CFA litigation, including commercial, general civil litigation, prof neg, insolvency	Tailored to individual case needs and ease of recovery; competitive premiums, including deferred options; highly experienced underwriters, available for pre-assessment discussion	Up to £5m	Individually assessed as % of LOI	Outset, part-outset/ part-deferred, deferred – all options available – individually assessed	Yes, if counsel not on CFA	2005	Gable Insurance AG	Own and other facilities available	Access to full commercial litigation case funding, including own costs
80E 0117 934 0087 WWW.80E.COM	Justice Solutions	DA	PI, clin neg, ID, prof neg, general civil litigation	3-stage deferred premium for all case types with full premium indemnity and shortfall cover. Online application and no assessment fee	Up to £250,000	RTA from £75, non-RTA PI from £395 clin neg/ID individually assessed Non-PI from £2,500	End of case	Yes	2000	DAS	No	UK-based A rated insurer. ATE/BTE top-up cover available. Full protection for part 36. Full cover for mediations
ABBEY LEGAL PROTECTION 0870 607 8999 WWW.ACCIDENTLINEDIRECT.CO.UK	Accident Line Protect Plus	Both	PI	Tailored to needs of each area; web-based policy administration	£100,000	Staged fixed premiums. RTA claims process stage 1 and 2 £Nil; stage 3 £100; non-process RTA from £375; non-RTA from £685; ID from £850; plus IPT in each case	At the end of the case and only if the case is won	No	2006	Brit Insurance Ltd	No	No minimum volumes; guaranteed cover and fixed-priced premiums for all multi-track cases
0845 0750 900 WWW.ABBEYLEGAL.COM	Abbey Legal Protection ATE	IU	All types of civil and commercial dispute resolution	CFA not essential; various funding options, including contingent premiums and staging retrospective cover available	Up to £1m. Higher limits available on application	% of sum insured	Outset, staged or at end of cases on a contingent basis	Yes	2007	Brit Insurance Ltd and others	No	No assessment fee. A rated insurers. CFA not always essential. Informal enquiries welcome
AMICUS LEGAL 01206 731 950 WWW.AMICUSLEGAL.CO.UK	Justice Justice Plus	IU	PI, clin neg, ID, prof neg	No CCA; paid up front and deferred premiums available; all cases individually assessed	Justice: £50,000; Justice Plus: £100,000 (up to £250,000 available on request)	RTA from £95 Non-RTA from £500 ID from £600 Clin neg from £3,000	Outset or deferred	Justice – no Justice Plus – yes	1998	DAS Group	No	£250 assessment fee for clin neg cases – refunded against premium if insurance taken out
AMTRUST EUROPE LEGAL 0844 815 8501 WWW.AMTRUSTEUROPE-LEGAL.COM	AmTrust Europe Legal	DA & IU	PI, ID, clin neg, prof neg, general civil litigation and commercial. Bespoke schemes available upon request	Simple online application and policy issue; guaranteed premium recovery; no credit agreements; bespoke facilities available; clin neg covers preliminary investigation costs	£50,000 for PI and ID – more on request. £100,000 for clin and prof neg	RTA £395; EL/PL £800; ID £2,200 (regardless of track); clin neg from £5,000 (all premiums + IPT); prof neg and bespoke schemes on application	Deferred to end of case	Yes	2003	AmTrust Europe Ltd	Any-purpose practice funding available of up to £5,000 per case	Schemes administered through online AmTrust Europe Legal system
ARAG 0117 917 1680 WWW.ARAG.CO.UK	Recourse	IU	PI, clin neg, ID, contract, insolvency	Online assessment; no CCA required; no minimum volumes; top-ups considered	Up to £500,000	Staged. RTA from £94; EL/PL from £700; Clin neg from £4,950; ID from £1,500; Contract from £1,575	At outset or contingent on successful completion	No, unless successful and costs are not recovered	2006	Brit Insurance Ltd AmTrust Europe Ltd	No	
ATE 0161 955 4218 WWW.ATEBUSINESS.CO.UK	ate/Fairway/ Litigation Plus	DA & IU	PI, clin neg, ID, contract, insolvency	Online reporting; insured shortfall of premium	£100,000	Single or staged RTA from £94; EL/PL from £700; clin neg from £4,950; ID from £1,500; contract from £1,575	End of case	No	2002	Brit Insurance Ltd, Allianz Insurance Plc, 80e and AmTrust Europe Ltd	No	
	Fairway Personal and Business Litigation	IU	Tenancy disputes, debt recovery prof neg, and contract disputes on goods and services for both personal and business clients	Deferred premiums, shortfall cover on personal disputes, insured premium on failure	£100,000	Individually assessed	End of case	No	February 2008	Brit Insurance Ltd, Allianz Insurance Plc, 80e and AmTrust Europe Ltd	No	
BENCHMARK INSURANCE (NAH) 01536 527 500 WWW.BENCHMARKINSURANCE.CO.UK	Benchmark 3	DA	PI, fast-track and multi-track; clin neg for specialist firms on application	Includes premium discounts for liability admissions for RTA and non-RTA cases	£100,000	RTA from £92 + IPT (new process), non-RTA from £544.50 + IPT, multi-track and clin neg on application	End of case	No	2000	Allianz Insurance PLC	No	For all specialist PI firms, subject to approval

	<i>Name of main conditional fee ATE product</i>	<i>Delegated authority (DA) or individually underwritten (IU)</i>	<i>Main areas covered</i>	<i>Special features</i>	<i>Limit of indemnity</i>	<i>Premium or basis for premium calculation</i>	<i>When are premiums payable?</i>	<i>Disbursements include own counsel's fees?</i>	<i>Date of launch</i>	<i>Underwriters</i>	<i>Disbursement funding</i>	<i>Notes</i>
<b>BOX LEGAL</b> <b>0870 766 9997</b> WWW.BOXLEGAL.CO.UK	ClaimSafe	Similar to DA via website	PI multi and fast-track, RTA EL, PL, ID	Developed by solicitors; minimal reporting; website or spreadsheet submission; cancellable if BTE discovered/ range of circumstances	£25,0000/£125,000	RTA £350, EL & PL £600, ID £1,000 (+IPT) for fast-and multi-track. All fixed, not staged	Deferred until costs recovered/No CCA agreement	Yes	2004	Unspecified	Premium is deferred so does not require funding	Average time for claim payment: 6.1 days. Prior authority to issue or incur disbursements not needed
	DebtSafe	Similar to DA via website	Bankruptcy and winding-up petitions	No reporting; premium shortfall insured; partial cover for own costs	£15,000	£650 + IPT	Deferred until costs recovered	Yes	Mid-2008	Unspecified	No	Enables 'free service' to clients when combined with CFA; debtor pays premium otherwise normally cancellable
<b>CLIENT COVER</b> <b>0845 643 4133</b> WWW.MEDICATECOVER.COM	MedicATE Cover	IU	Clinical negligence	Pre-investigation cover based on medical records alone	£100,000 but can be increased	Staged	End of case	On request	2009	LAMP	Via partner	No panel membership required
<b>COLLEGIATE</b> <b>020 7459 3469</b> WWW.COLLEGIATE.CO.UK	Collegiate After the Event	IU	Commercial recovery cases	No need for CFA. Conditional premiums and security for costs can be given	Up to £5m	Individually assessed	Conditional on successful outcome and recovery of funds	Yes	2006	AmTrust	No	A rated security; prompt turnaround time
<b>COMPOSITE LEGAL EXPENSES</b> <b>0871 423 5240</b> WWW.COMPOSITE-LEGAL.COM	Conditional Fee Care; eventlitigationfunding	Both	PI, ID, clin neg	Solicitors online – web-driven funding and insurance package; deferred premium facility	£10-100,000	From RTA £375; non-RTA PI £800, ID £1,200; clin neg variable	Outset or deferred	Yes	2000	LAMP and Focus Insurance Company and others	Various	Available pre-proceedings only – other on application
<b>ELITE INSURANCE COMPANY</b> <b>0845 601 1221</b> WWW.ELITE-INSURANCE.CO.UK	Legal Protection Plan	Both	PI, RTA, multi-track commercial insolvency, clin neg, prof neg and general civil litigation	Cancellable if a genuine BTE policy is in force; minimal reporting; developed by lawyers; premium recovery guarantee; online portal for DA, members of LEIG, CJA and RIAD	£50,000 to £5m	RTA from £350; non-RTA from £650 staged; multi-track on application; commercial litigation risks; and early settlement discounts available	Outset and deferred	Yes	2005	Elite Insurance Company Ltd	Yes	Available to defendants; bespoke both sides' cover available; no min volume; no application fee; available with or without CFA
<b>EQATE</b> <b>01604 715 768</b> WWW.EQATE.COM	Activate	DA	RTA, non-RTA, ID – fast and multi-track	Insurance mediation remuneration; online one-page application;cancellable at any time; no joining or application fees	£25,000 & £125,000	RTA £350; Non-RTA: £600 ID £1,000 (all plus IPT, not stepped)	Deferred until costs recovered	Yes	2006	Unspecified	No	No minimum volume. No obligation to use on all cases. Product available to sole practitioners and partnership
<b>FINANCIAL &amp; LEGAL</b> <b>0161 603 2230</b> WWW.FINANCIALANDLEGAL.CO.UK	Magnus ATE Policy	Both	RTA, EL, PL, ID and commercial contracts	Competitive premiums; various payment options, including deferred	£25,000 basic, up to £100,000	RTA from £395, non-RTA from £795, staged or single premium, other covers on application	Deferred	No	1996	Financial & Legal Insurance Company Limited	No	Bespoke products, contact to discuss
<b>FIRST ASSIST LEGAL EXPENSES INSURANCE LIMITED</b> <b>0845 077 5547</b> WWW.LEGALEXPENSES.CO.UK	Pursuit	Both	All main CFA areas including clin neg, prof neg, insolvency, commercial property,civil and IP	SCCO-approved model; part 36 cover; proportionate premiums; cases up to £5m exposure	Adverse costs up to £2m, higher by agreement; own costs by agreement	% of insured exposure	At end if agreed definition of win met; upfront on request	Yes	1999	Great Lakes Reinsurance (UK) Ltd	No	Both sides' cover available
	Watermark	DA	Multi-track and fast-track; PI, RTA, EL, PL, ID	Competitive premiums; part 36 cover; streamlined, efficient reporting process	£125,000	From £345	At end if agreed definition of win met; upfront on request	On request	2003	Great Lakes Reinsurance (UK) Ltd	No	
<b>FIRST LEGAL INDEMNITY</b> <b>020 7977 1408</b> WWW.FIRSTLEGAL.CO.UK	Insured's costs Opponent's costs	IU	Commercial litigation, insolvency	S&P A+ rated insurers; high limits of indemnity; fast response	None, subject to merits test	15-35% of sum insured	Outset, by stages or deferred	Yes	1998	QBE and ACE	No	No application fee
<b>GUARDIAN LEGAL SERVICES</b> <b>0844 414 2124</b> WWW.GUARDIANLEGAL.CO.UK	ATE Insurance	DA & IU	All types of litigation including PI, clinical & dental negligence, professional negligence, commercial disputes, insolvency, contentious probate; claims against MoD or police etc; IP breach of agency disputes; BTE for cyber protection, pre-nuptial agreements divorce proceedings	No CCA required; deferred self-insured premiums; claimant or defendant cases; indemnity to suit requirement; CFA/part CFA/no CFA cases considered; retrospective cover where specified premium shortfall guarantee available in some instances	As specified from £10,000 to £5m	RTA from £80 inc IPT; non-RTA from £725; non-PI, ID, multi-track, multi def, clin neg and ad hoc applications, POA, various premium options available, including staged	Premiums due end of case upon successful outcome	On request	2005	Allianz, Amicus, AmTrust ARAG, Brit, Elite, First Assist, Great Lakes, MGIC, QBE, Temple Zurich and others	Deferred self-insured premiums; litigation funding available for large commercial cases quantum in excess of £5m	Only offers policies protected by the Financial Services Compensation Scheme; no application or case review charges; BTE top-up policies available
<b>IBEX LEGAL</b> <b>0161 955 4218</b> WWW.IBEXLEGAL.CO.UK	ATE Legal Expenses	Both	Multi- and fast-track, PI, clin neg, prof neg, ID, inheritance, insolvency, contracts & commercial, police actions	Cover for premium and part 36 risk is standard; stepped deferred premium available	£10,000-£500,000	% of LoI depending on case type and assessment of risk	Outset or deferred	Yes	2005	LAMP	No	Bespoke policy specialists; no application or assessment fee charged

	<i>Name of main conditional fee ATE product</i>	<i>Delegated authority (DA) or individually underwritten (IU)</i>	<i>Main areas covered</i>	<i>Special features</i>	<i>Limit of indemnity</i>	<i>Premium or basis for premium calculation</i>	<i>When are premiums payable?</i>	<i>Disbursements include own counsel's fees?</i>	<i>Date of launch</i>	<i>Underwriters</i>	<i>Disbursement funding</i>	<i>Notes</i>
<b>KEYSTONE LEGAL BENEFITS</b> <b>01252 354100</b> WWW.KEYSTONELEGAL.CO.UK	Bespoke	IU	PI and commercial	No CCA needed. Premium self-insured	£50,000, but can be increased	Staged as above. All premiums bespoke	End of case	Considered	1994	Bastion Insurance Company Ltd	No	Top-up cover. No part 36 set-off
	SafetyNet	Semi DA	PI	No CCA needed. Premium self-insured	£50,000 but can be increased	Staged. Fixed first stage. RTA £400; EL £685; PL £785; Slip/trip £885. Bespoke second stage on service, bespoke third stage 28 days pre-trial (part rebateable) One-offs, top-up cover available	End of case	No	2000	Bastion Insurance Company Ltd	No	No volume requirement. No part 36 set-off. Possible reciprocal work
<b>LAMP</b> <b>01444 451752</b> WWW.LAMPINSURANCE.COM	Conditional Fee Insurance	Both	All main CFA areas	Responds to individual needs	Up to £500,000	RTA from £202.50, EL from £490.50, PL from £562.50, ID from £765	Outset, funded or deferred	Yes	1998	LAMP	Various	Top-up cover available; no assessment fee
<b>LAWASSIST</b> <b>01903 883811</b> WWW.LAWASSIST.CO.UK	Litigator, Clinical Justice Plan, Early Bird, Clinical Assist, Insolvency Assist, Personal & Business and Litigation Insurance	Both. DA for PI, clin neg, insolvency cases and civil/commercial by arrangement	PI, clin neg, insolvency, defamation and all types of CFA and non-CFA civil/commercial litigation	Non-recovery cover; guaranteed premium recovery; no set-off clauses; investigation insurance for clin neg; online case submission	£25,000 to £750,000 higher by agreement	PI from £350; clin neg from £2,500; civil/commercial from £2,500; staged and fixed-rate premiums available	Deferred until damages and costs recovered	Yes	1995	DAS/80e, Elite, Templeton, OBE	No	Non-CFA cover available; no assessment fee; ATE/BTE top-up cover available
<b>LAWLINK</b> <b>0161 777 1102</b> WWW.LAWLINKATE.CO.UK	RTA, EL, PL, ID, financial irregularity, commercial and bespoke	Both	RTA, EL, PL, ID financial irregularity commercial and bespoke	Straightforward reporting; deferred facility; funding partners available	£25,000	RTA £395; EL/PL £795; ID from £995 (all plus IPT); financial irregularity: 3-stage premium; commercial: bespoke premiums	Upfront or deferred options	No	2000	Financial & Legal Insurance Co Ltd and others	Various facilities available	Funding schemes available for WIP and ongoing cases
<b>LITIGATION PROTECTION</b> <b>0845 557 0845</b> WWW.LITIGATIONPROTECTION.CO.UK	Various	IU	All types of commercial dispute resolution	Tailor-made policy wording specific to case; cover for very large case; own fees do not necessarily on CFA basis; both sides' costs considered	Up to £5m (more in exceptional cases)	Individually assessed	Generally on acceptance of policy cover or stage payments during case	Yes	1992	Various	Yes	Cover generally arranged in conjunction with third-party funding of legal costs
<b>MASS</b> <b>0117 925 9604</b> WWW.MASS.ORG.UK	FastAid	DA	ATE, BTE, rehabilitation, lifestyle	ATE rehabilitation indemnity	Various	£50 plus IPT	At end of month inception	Yes	2005	Unspecified	Available	MASS membership required
<b>MOUNT GRACE INSURANCE</b> <b>01670 528 295</b> WWW.MOUNT-GRACE.CO.UK	Mount Grace (MGIC)	Both	ID, PL, EL, RTA, complex high-value PI, prof neg, commercial and general civil litigation	Competitive premiums; extensive multi-track insurance experience; quotes within five working days	£15,000-£100,000; bespoke available	RTA from £75, EL/PL/OL from £800, diseases from £1,400, full range of bespoke policies for commercial cases/higher-value PI available on request	Deferred to end of case	Can, if counsel is not on CFA	2005	Mount Grace (MGIC)	No	APIL membership required for PI cases
<b>OBE</b> <b>0207 105 5169</b> WWW.OBEEUROPE.COM/ATE	OBE	IU	All types of CFA and non-CFA civil and commercial litigation	No assessment fee; staged and self-insured premiums; interim adverse costs cover	Limits of indemnity to suit 'run of the mill' cases or complex cases	Court of Appeal-approved model; individually assessed and staged on request	End of case (no CCA)	Yes	1998	OBE (based in London, FSA regulated)	No tied arrangements but ask for details	Top-up cover provided. Bonds available for security of costs
	OBE	DA	All types of CFA and non-CFA – civil and commercial litigation	Off-the-shelf and bespoke schemes available; staged and self-insured premiums; interim adverse costs cover	Limits of indemnity to suit the cases run under the scheme	Court of Appeal-approved model. For example, commercial schemes start from £2,950 for £135,000 of cover	End of case (no CCA)	Yes	1998	OBE (based in London, FSA regulated)	No tied arrangements but ask for details	Top-up cover provided. Bonds available for security of costs
<b>OLP LEGAL</b> <b>020 7626 0191</b> WWW.OLP.LTD.UK	Various	Both	All CFAs	Straightforward underwriting procedure, minimal paperwork, tailored service	£125,000-plus	RTA from £375; PI from £900; multi-track on application	Deferred	Yes	2000	FirstAssist and others	No	Application fee on some case types; available to defendants
<b>SPECIAL RISK SOLUTIONS</b> <b>0151 649 9199</b>	ATE Litigation Indemnity Insurance Facility	IU	RTA, PI, EL and PL	Simple and fast online application, policy authorisation and claims	Usually £50,000 but can be assessed	RTA from £395, non-RTA variable premium	Outset or deferred to end of case	No	2003	AmTrust Europe Ltd & SRS Insurance	Disbursements not funded, premiums deferred	
<b>TEMPLE LEGAL PROTECTION</b> <b>01483 577 877</b> WWW.TEMPLE-LEGAL.CO.UK	Litigation Advantage	IU	All types of CFA and non-CFA litigation, PI, general commercial	No assessment fees; provides top-up cover for BTE cases; no CCA; stepped and deferred premiums; part 36 cover; can offer terms right up to trial date	Up to £5m	Individually assessed and stepped, depending on type of case and progress of case	End of case	Can, if counsel is not on CFA	1999	AmTrust Europe Ltd and Lloyd's	Various banks, details supplied on application	Available with or without a CFA and available also to defendants
	Litigation Advantage Plus	DA	All types of CFA litigation, PI, clin neg, commercial, prof neg, defamation, insolvency	Court of Appeal-approved model; no CCA; fixed, stepped and deferred premiums; competitive premiums; bespoke schemes	Delegated authority up to £500,000	RTA from £90; EL/PL from £425; ID from £425; clin neg from £525	End of case	Can, if counsel is not on CFA	1999	AmTrust Europe Ltd and Lloyd's	Various banks, details supplied on application	Available with or without a CFA and available also to defendants
<b>WESTONGATE ASSOCIATES</b> <b>01625 667 165</b> WWW.WESTONGATEASSOCIATES.COM	CFA/ATE	Both	PI; RTA, EL, PL, OL, ID including complex multi-track and all commercial disputes	Staged and deferred premiums; bespoke schemes written; both sides' costs covered; all risks considered up to trial date	Unlimited	Quotes on an individual bespoke basis	Outset of case or deferred	No	2006	Lamp Insurance, AmTrust Europe Ltd	No	Available to all PI firms



## Appendix 5 - Road Traffic Accidents– Fixed recoverable costs

For accidents which occurred between 6 October 2003 to 29 April 2010 and those which exit the low value personal injury claims in road traffic accidents scheme the fixed recoverable costs scheme – see above, **CPR Part 45 and the accompanying Practice Direction about costs (PD43-48)** at s25A still applies. Below is a basic overview of the some relevant sections of the **CPR**. Solicitors must study the CPR themselves in detail to ensure that they are in compliance with the rules of the scheme.

### What is covered?

**Part 45.7(2) of the CPR** deals with what is covered by the fixed recoverable costs scheme:

1. This section applies where:
  - a) the dispute arises from a road traffic accident;
  - b) The agreed damages include damage in respect of personal injury, damage to property, or both;
  - c) the total value of the agreed damages does not exceed £10,000; and
  - d) if a claim had been issued for the amount of the agreed damages, the small claims track would not have been the normal track for that claim.

Directions relating to **Part 45 - fixed costs - Section 25A** provides as follows:

**‘25A.1** Section II of Part 45 (“the Section”) provides for certain fixed costs to be recoverable between the parties in respect of costs incurred in disputes which are settled prior to proceedings being issued. This Section applies to road traffic accident disputes as defined in rule 45.7(4)(a), where the accident which gave rise to the dispute occurred on or after **6 October 2003**.’

**25A.2** The Section does not apply to disputes where the total agreed value of the damages is within the small claims limit or exceeds £10,000...

NB The small claims limit is £1,000 in relation to personal injury but £5,000 otherwise. Thus either the damages for personal injury must exceed £1,000 or the settlement must exceed £5,000.

**25A.3** Fixed recoverable costs are to be calculated by reference to the amount of agreed damages which are payable to the receiving party. In calculating the amount of these damages:-

- a) account must be taken of both general and special damages and interest;
- b) any interim payments made must be included;
- c) where the parties have agreed an element of contributory negligence, the amount of damages attributed to that negligence must be deducted.
- d) any amount required by statute to be paid by the compensating party directly to a third party (such as sums paid by way of compensation recovery payments and National Health Service expenses) must not be included.

### **What is not included in the scheme?**

- a) Litigants in Person
- b) Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents – see above

### **What disbursements are allowed under the scheme?**

- a) medical records
- b) a medical report
- c) a police report
- d) an engineer's report
- e) a search of the records of the Driver Vehicle Licensing Authority
- f) an insurance premium as defined in rule 43.2 (1) (m)
- g) where the disbursements are incurred by the claimant who is a child or protected party as defined in Part 21 counsel's fees and court fees on application are included
- h) any other disbursement that has arisen due to a particular feature of the dispute are allowed at the discretion of the court.

### **Fixed Recoverable Costs under the scheme**

Subject to rule **45.12**, the only costs which are to be allowed are-

- a) fixed recoverable costs calculated in accordance with rule **45.9**;
- b) disbursements allowed in accordance with rule **45.10**; and
- c) a success fee allowed in accordance with rule **45.11**

(**Rule 45.12** provides for where a party issues a claim for more than the fixed recoverable costs).

The effect of the indemnity principle is that any agreed fixed fee between a solicitor and client will also be the maximum that is recoverable from the other side.

**CPR 48.8** requires that if a solicitor wants to charge his client in excess of what is recoverable from the other side he needs to include this in his terms of business.

## Appendix 6 – Frequently asked questions

### 1. What is the difference between a contingency fee agreement and a conditional fee agreement?

The term “contingency fee” is generic in that it covers all agreements where the fee (whether fixed, or calculated either as a percentage of the proceeds or otherwise howsoever) is payable only in the event of success.

However, “contingency fee agreements” are traditionally known to be agreements whereby the fee is calculated as a percentage of the proceeds recovered. Such contingency fee agreements are only permissible in non-contentious matters (see SRA Code of Conduct 2011, Chapter 1 on Client care, where solicitors' attention is drawn to **Outcome 1.6 and IB 1.27**, which replaced Rule 2.04 of the Solicitors' Code of Conduct 2007).

A conditional fee agreement is a statutory species of contingency fee.

Conditional fee agreements are agreements where the fee charged depends on whether you win or lose the case. They are commonly known as ‘no win, no fee’ agreements. The fee may consist of basic or reduced costs or basic costs plus a success fee of anything up to 100 per cent of the basic costs, although the wording of s27 of the Access to Justice Act 1999 is wide, and covers any arrangement where certain fees are payable only in specified circumstances.

If you are considering entering into a conditional fee agreement, you should familiarise yourself with the following:

- s58A of the Courts and Legal Services Act 1990 (as amended by s27 of the Access to Justice Act 1999);
- The Civil Procedure Rules 1998
- The Practice Direction supplementing parts 43 to 48 of the Civil Procedure Rules 1998.
- The SRA Code of Conduct 2011

General guidance on contingency fee agreements and conditional fee agreements is also available in our booklet called ‘Payment by Results’ which you can find at [www.lawsociety.org.uk/practiceadvice](http://www.lawsociety.org.uk/practiceadvice).

### 2. In which areas of law is it possible to use a conditional fee agreement?

S58A of the Courts and Legal Services Act 1990 (as amended by s27 of the Access to Justice Act 1999) states that “the proceedings which cannot be the subject of an enforceable CFA are (a) criminal proceedings, apart from those under s82 of the Environmental Protection Act 1990 and (b) family proceedings”; the definition of family proceedings can also be found in this section. The Conditional Fee Agreement Order 2000 allows all such agreements to provide for success fees except for proceedings under s82 of the Environmental Protection Act 1990 where success fees are not permissible (s3).

**3. In a family matter, with the agreement of my client at the outset, can I charge extra if she is awarded a financial settlement which exceeds her expectations?**

No. This arrangement would constitute a Conditional Fee Agreement which is prohibited in family matters under Section 58A of the Courts and Legal Services Act 1990 as substituted by s.27 of the Access to Justice Act 1999.

**4. Can I use a conditional fee agreement in housing disrepair cases?**

Yes. Section 58A of the Courts and Legal Services Act 1990 (which was introduced by s27 of the Access to Justice Act 1999) allows proceedings under s82 of the Environmental Protection Act 1990 to be prosecuted under a conditional fee agreement although they cannot provide for a success fee. Section 82 cases are statutory nuisance cases and this is the criminal provision relating to housing disrepair cases. See *Birmingham City Council v Forde* [2009] EWHC 12 (QB), 13 January 2009.

**5. Once my client and I have agreed to enter into the Law Society's CFA should I recommend that he seek independent legal advice before signing the agreement?**

No. There is no requirement that the client take independent legal advice before signing the CFA. This assumes that by using the plain English version of the model, its terms will have been fully explained. It is, therefore, reasonable to expect the client to be able to determine unaided whether to go ahead. If you use a different version, other than the Law Society's model agreement, particularly one that is not in plain English, you should consider whether the client can make an informed decision about its terms without independent advice.

**6. Has the Law Society produced a model CFA agreement for use in non-personal injury cases?**

No. The model agreement is specifically for use in personal injury and clinical negligence cases only. The current version was published for use from 1st November 2005 following the introduction of the new CFA regime. See Practice Advice booklet *Payment by Results*, which is available on the Law Society's website at [www.lawsociety.org.uk/practiceadvice](http://www.lawsociety.org.uk/practiceadvice).

**7. Has the Law Society produced a model conditional fee agreement (CFA) in light of the regime that came into force on 1st November 2005?**

Yes. The model agreement may be used in both personal injury and clinical negligence matters. There is also an information leaflet for clients called 'Conditional

Fee Agreements: What you need to Know'. Please see our 'Payment by Results' booklet which is available on the Law Society website at [www.lawsociety.org.uk/practiceadvice](http://www.lawsociety.org.uk/practiceadvice).

**8. I represent a client in a commercial litigation matter. I would like to instruct counsel on a Conditional Fee Agreement (CFA) basis. Are there any precedent agreements available?**

One is the joint APIL/PIBA (Association of Personal Injury Lawyers/Personal Injuries Bar Association) agreement for use in personal injury (PI)/clinical negligence cases and the other is the Chancery Bar Association terms of engagement.

The first represents a compromise reached between PI solicitors and barristers. APIL/PIBA 6 was drafted specifically with PI and clinical negligence proceedings in mind where the solicitor is also working under terms with his client (on the Law Society model agreement). It is an industry-wide agreement and there is little prospect of a prudent PI solicitor departing from its key clauses.

The Chancery Bar Association agreement is a much more flexible instrument and is more effective at protecting the interests of barristers. In particular it contains express provision allowing the CFA to be treated as a contractual retainer and it allows for fees to be agreed on a differential basis (reduced fees rather than no fees in the event of failure). The Chancery Bar Association terms of engagement can be easily adapted to cover a very wide range of circumstances.

For further information, please see the Law Society publication 'Conditional Fees', 3rd Edition 2008, which may be purchased from our on-line bookshop at [www.lawsociety.org.uk/bookshop](http://www.lawsociety.org.uk/bookshop).

## Appendix 7 - Examples of Contentious and Non-Contentious Matters

Contentious	Non-contentious
1. Proceedings actually begun in the County Court, High Court, Magistrates Court Crown Court and the Court of Protection	<p>Proceedings before all tribunals other than the Land, Property and Housing Chamber First Tier Tribunal and the Employment Appeal Tribunal.</p> <p>The recent case of <i>Tel-ka Talk Limited v HMRC</i> (in which The Law Society intervened) reconfirmed the position that proceedings before tribunals are non-contentious. (Please see below for further information*)</p>
2. Proceedings actually begun before the Land, Property and Housing Chamber First Tier Tribunal and the Employment Appeal Tribunal	Planning and other public enquiries including Coroners Court work.
3. Contentious probate proceedings actually begun.	Non-contentious or common form probate business.
4. Proceedings on appeal to the Court of Appeal, Privy Council and House of Lords.	Conveyancing, company acquisitions and mergers, the administration of estates and trusts out of court, the preparation of wills, statements and contracts, and any other work not included in the 'contentious' column.
5. Proceedings in arbitration.	Criminal Injuries Compensation Authority.

6. Motor Insurers Bureau Uninsured drivers' claims (proceedings issued)	Motor Insurers Bureau Untraced drivers' claims.  Motor Insurers Bureau Uninsured drivers' claims (proceedings not issued).
7. Work done preliminary to proceedings covered by 1-5 above including advice, preparation and negotiations provided the proceedings are subsequently begun (although see note below**).	Work done preliminary to the proceedings included in the 'contentious' column if such proceedings are not subsequently begun.
8. Licensing (appeals to Magistrates Court)	Licensing (administered by Local Authority)

### **\* Validity of contingency fee arrangements in Tribunals**

#### **Tel-Ka Talk Limited v The Commissioners of Her Majesty's Revenue & Customs (HMRC) 17 June 2010 (Case No: SCCO Ref: PTH0904822), [2010] EWHC 90175 (costs)**

In the case of Tel-Ka Talk Limited (the company) had appealed against decisions of HM Revenue and Customs (HMRC) to refuse repayment of VAT input tax credit claimed by the company.

As a result of the withholding of VAT, the company suffered cash flow difficulties, and experienced difficulty in funding the legal costs of the tribunal hearings.

The solicitors agreed to continue to act on a contingency fee basis and entered into a non-contentious business agreement. The contingency fee arrangement enabled the company to continue to pursue its claim and recover the VAT repayment it was owed by HMRC. HMRC argued that a contingency fee was unenforceable as tribunal proceedings were contentious.

The Law Society intervened in this case to protect access to justice. It was essential for the Courts to allow contingency fee arrangements with solicitors to be valid in order to ensure that the right to a fair hearing in a tribunal was not denied.

Master Hurst, Senior Costs Judge in this case ruled that the use of contingency fees or a no win, no fee arrangement in tribunal cases was lawful.

The judge considered whether proceedings before the Tribunal fall within the definition of non-contentious business as defined in s87(1) of the Solicitors Act 1974.

The Law Society was successful in maintaining its long held view that work in Tribunals is non-contentious. Therefore, a Non Contentious Business Agreement in the form of a contingency fee arrangement under s57 of the Solicitors Act 1974 can be lawfully entered into.

Master Hurst also referred to Lord Justice Jackson's review of Civil Costs in which he also stated that:

*"The Employment Tribunals jurisdiction is characterised as non-contentious and so the use of contingency fees is not prohibited by either law or professional conduct rules"*

Master Hurst was not persuaded that a Tribunal is a 'court' or that proceedings before a Tribunal are contentious business. He therefore concluded that contingency fees before a Tribunal are lawful.

Please note that Parliament has specifically sanctioned the use of contingency fee arrangements in Employment Tribunals by the Damages Based Agreements Regulations 2010.

\*\* If proceedings are subsequently issued, it is a moot point whether all prior work leading to the action automatically becomes contentious. Please see obiter comment of Lord Justice Brooke in **Crosbie v Munroe [2003]** EWCA Civ 350.