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Justice Forum

EJF Response to the Ministry of Justice’s Consultation Paper CP 13/10 on Proposals for the Reform of Civil Litigation Funding and Costs in England and Wales

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1. INTRODUCTION:

European Justice Forum (EJF)¹ welcomes the opportunity to comment on this Consultation Paper. Sir Rupert Jackson's report last year on costs and funding was a major piece of work, and we fully support the early implementation of its key proposals, which should help significantly to reduce the costs of civil litigation in England and Wales and to redress imbalances in the litigation process that have arisen over the past years. We also recognise the need to consider alternative forms of funding in light of the increasing pressures on the legal aid budget.

At the same time, we ask the question as to whether there should not be a more detailed impact assessment before some of these proposals are implemented. With so many – in some cases radical – reforms are introduced at the same time, there is a risk of unintended consequences which may be as serious as those that the currently proposed reforms are intended to address. We are also concerned about the suggested extension of damages based agreements (contingency fees) and changes to the traditional “loser-pays” rule. As we argue below, we would urge caution in these areas. .

We see considerable merit in the extension of before-the-event legal insurance, and we would encourage the government to work with the Insurance Industry to explore how this form of funding could be made better known and more widely available.

We are well aware that third party litigation funding is established in the UK and provides alternative finance in party to party litigation. We note that the Consultation Paper contains no proposals on this matter, beyond a reference to the Code of Practice being developed. However, we recommend that if this form of funding is to be more widely used, it should be regulated, particularly if it is to be considered for consumer or group litigation.

Finally, we would urge the government to use this opportunity further to encourage the settlement of disputes by non-court means in preference and in priority to litigation. A wide range of dispute resolution mechanisms is well established in the UK², ranging from industry complaints handling and resolution schemes to formal mediation and arbitration. Coupled with government

¹ European Justice Forum (EJF) is a not-for-profit organisation incorporated in Belgium. Its membership is a coalition of international companies and business organisations that wish to promote fair and balanced systems of civil justice in Europe. EJF seeks to ensure that those with a legitimate grievance have rapid and effective access to justice. By the same token, we are also concerned that claims lacking merit are rapidly dismissed and do not burden the courts or defendants with unnecessary costs. EJF's priority is to support independent legal research at Oxford University into civil justice systems in Europe.

We engage with governments at national and EU level, using the output of the Oxford research as the basis for our recommendations. EJF aims to promote dispute resolution mechanisms that effectively facilitate individual and collective redress while allowing innovation and enterprise to flourish and enhancing competitiveness. We believe that, coupled with the role of public authorities in protecting private rights, such mechanisms provide rapid and cost effective redress for justified complaints while at the same time avoiding the need for litigation, particularly class action.

² A recent academic study found over 130 non-court processes for dispute resolution in the UK: see http://www.csls.ox.ac.uk/european_civil_justice_systems.php.



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ombudsmen and regulators who are tasked with encouraging the resolution of disputes, these schemes are capable of delivering rapid and cost-effective redress to individuals and groups of claimants. This approach will directly reduce the volume and therefore overall cost of litigation and improve restitution of justified claims.

2. MAIN POINTS ARISING from the CONSULTATION

2.1. The Multiplicity of Changes Proposed and the Risk of Unintended Consequences and Satellite Litigation:

Our main concern is the lack of modelling of the potential consequences of the multiple changes being proposed and the potential inter-action of those changes.

Each of Sir Rupert's main proposals is considered separately in the Consultation Paper, and when considered in isolation, each proposal may have a predictable effect. Certainly, the major proposals to eliminate recoverability of success fees and ATE insurance premiums both make sense and can be expected to restore the status quo prior to the 1999 Act.

We are well aware that Sir Rupert presented his proposals as a package that should be implemented in full. The Consultation Paper to a large extent follows this approach. But within that package, Sir Rupert (and the Consultation Paper) the proposed changes are in part presented as "menu" from which selections may be made. Unless the potential interaction of those changes and the possible combination of "menu choices" are examined, we see a risk of unintended consequences that may produce problems greater than the imbalances resulting from the Access to Justice Act 1999 (the 1999 Act), which Sir Rupert Jackson's report and the Consultation Paper are in large part concerned with redressing³.

Taken together, implementation of the proposals in the consultation paper will introduce far-reaching changes in civil litigation, and the risk of unintended consequences may be greater than when the 1999 Act was implemented.

For example, Sir Rupert's report discounted the concerns raised by many groups that the choice of either CFAs or contingency fee could be open to abuse by claimant lawyers who would simply select according to which would yield the greater profit in a particular case. We share the concerns expressed by those groups. However, we would also point out that little if any consideration seems to have been given to the effect of combining both CFAs and contingency fees in the same case.

In this context, we would question some of the "assumptions sensitivities/risks" stated in the Impact Assessments section of the Consultation Paper: For example, it is assumed that the "qualified" element of the QOCS proposal would be properly enforced, and that there would be

³ To give an example. The 1999 Act reduced the scope of legal aid because it foresaw (correctly) that CFA arrangements would provide funding for much of civil litigation. At the time, the conventional wisdom was that success fees would not exceed 25% of normal attorney fees and that the legal profession and the oversight of the judges would prevent excessive fees. In the event, success fees of 100% have become common with the result that the pressure to take out ATE insurance has increased.



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no increase in satellite litigation. It is also assumed that no cases would switch between CFAs and other forms of funding as a result of the proposal or have more than one form of funding. Why should this necessarily be the case?

It is assumed that legal costs, average case lengths and case outcomes would be the same for DBAs and CFAs. It is also assumed that a variant of ATE insurance will become available for DBAs. What is the evidence to support these assumptions?

We therefore recommend that a study be made of the various combinations that could arise and their potential effect. For example, there is no discussion or analysis of claimants and their legal advisers adopting a DBA in combination with a CFA (either with or without third party process funding). Depending on the wording of the eventual reforms, a claimant acting in this way would likely benefit from the application of QOCS. They may at the same time, make an early Part 36 offer. In this way, a claimant would stand to gain an uplift of 20% of damages while avoiding the risk of having to meet the defendant's costs in the event of losing his case. There is nothing in the Consultation Paper to prohibit such a combination, and it would fit with the "menu" of options from which the claimant can choose (implicitly) without restriction.

It should be asked whether in combination these may not be liable to distort the litigation process and to introduce new imbalances. Impact studies should be done to answer this question.

Such a combination of the new measures would change the balance of power in litigation and could well give rise to satellite litigation. Satellite litigation arose when CFAs were first introduced. The introduction of damages uplifts, QOCS, changes to the Part 36 rules, and potentially third party process funding would give greater opportunity and motivation for satellite litigation.

We therefore recommend that the potential combinations of the proposed reforms be identified and impact studies completed to seek to avoid unintended consequences arising.

2. 2: Support for Sir Rupert's main Cost Reduction Recommendations

2.2.1 We support the non-recoverability of Success Fees and ATE Insurance Premiums:

For the reasons given in Sir Rupert's report, it is clear that recoverability of these costs has distorted civil litigation and placed unreasonable burdens on a losing party. In our view non-recoverability of these costs should be implemented as soon as possible.

The removal of these major elements of costs exposure will benefit all parties to litigation. Recoverability of these costs has not been the norm in the UK. They came about in England and Wales following implementation of the 1999 Act. In Scotland these costs have never been recoverable. There is no evidence that access to justice in Scotland has suffered as a result of the non-recoverability of success fees and ATE premiums. Empirical evidence of the Scottish experience supports an immediate elimination of recoverability of these costs in England and Wales.



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In the case of ATE premiums, there will be further benefit in that – if parties take out such insurance in future – the premiums should be lower because the insurance will no longer have to cover the risk of repaying the other side’s ATE premium or success fee.

We further note that the non-recoverability of success fees finds some support in a recent judgement of the Court of Human Rights⁴. In a case concerning defamation and privacy, the court found that the requirement to pay the plaintiff’s success fees was disproportionate to the aim sought to be achieved by the introduction of the success fee system.

2.2.2 Support for Proportionality of Costs:

We support Sir Rupert’s view that proportionality should become a key consideration in the scope of costs orders. The lack of proportion disclosed by Sir Rupert’s report is striking, and the MGN Ltd. Case cited above was an example of such non-proportionality. Given that data about costs in the UK, Sir Rupert was understandably (and in our view correctly) in favour of adoption of a version of the tariff-fee approach applied to the normal range of civil litigation in Germany

2.2.3 Support for Funding through “Before the Event” Insurance:

We support an expansion of such insurance and recommend that it be seen as a significant alternative means of financing litigation. There is great attraction to the population at large having insurance against the cost of litigation in which they may become involved. We note that such policies are more common in Germany because the greater predictability of legal costs makes it easier to calculate premiums. The reforms proposed by Sir Rupert may help the expansion of such insurance by reducing the cost of the bulk of civil litigation.

It would be necessary to ensure there was full understanding of the scope of cover of before the event legal insurance and to ensure policies were drafted in a manner that on the one hand prevented claimants launching unnecessary or ill-founded claims simply because they could do so at “no cost”, and on the other hand avoided insurance companies being able to avoid paying the costs of eventual litigation unless they were fully and fairly justified in doing so. Examination of German experience may assist achieving these drafting objectives.

In our view, legal events insurance offers the most balanced private finance opportunity of covering the costs of potential litigation. It would not introduce the potential distortions and conflicts of interest of other funding proposals such as DBAs or third party process funding. Nor would it involve the high premiums of ATE insurance. It is a mechanism that could have equal attraction for individuals and smaller companies

⁴ MGN Ltd. v The United Kingdom. The case concerned a libel action brought by Ms. Naomi Campbell against Mirror Group Newspapers in which Ms Campbell was awarded a small amount of damages but the defendant was then faced with reimbursing her legal costs which included massive success fees amounting to hundreds of times the damages awarded. The Court found that freedom of speech would be substantially impeded if newspapers were obliged to reimburse such disproportionate costs.



We suggest that government work with the Insurance Industry, both to increase awareness of legal events insurance (which many people already have in some measure through motor or house insurance policies without fully realising it) and to encourage a development and wider uptake of such cover.

2.3 Opposition to DBAs; QOCS; and Uplifts in Damages

2.3.1 Damages Based Agreements:

We oppose the introduction of damages based agreements (“DBAs” or “contingency fees”) in civil litigation. In our view, such measures would introduce potential conflicts of interest between lawyer and client that could not in practice be avoided. We also foresee that such agreements may introduce the kind of abusive litigation experienced in other jurisdictions, particularly the USA.

Civil litigation in the USA has been fuelled by contingency fees to the point where the direct costs of such litigation absorb over 2% of US GDP and cost that nation \$250bn per annum. The profit motive offered by this system to plaintiff lawyers has created a litigation industry which generates very large profits for the lawyers involved. The use of contingency fees has in particular created abusive class action litigation. Weak claims are made on behalf of large numbers of consumers (recruited typically without their direct knowledge or consent on an opt-out basis) in the expectation that the defendant will settle regardless of merits, rather than incur the costs and reputation damage to his business of protracted litigation. Experience has shown that it is extremely difficult if not impossible to establish and maintain effective safeguards against such abuse, and certainly adequate controls have never been established in the USA.

It is too easy to assume that the UK (or indeed the rest of Europe) will be protected from such experience by the differences – when compared to the USA - in their civil justice systems. However, the real reason for abuse in the US system is the profit motive. The opportunity for plaintiff law firms to make huge profits from contingency fee arrangements – particularly when linked to large collective claims – has been the principal cause of the expansion of litigation. If the same opportunities for profit are introduced in the UK, it is reasonable to expect similar results.

Collective litigation in London in the 1980s – 1990s exemplified this risk⁵. Unmeritorious and unsuccessful actions were brought at the expense of the legal aid budget. The cases were largely flawed from the outset, and they could all have been handled without litigation. But the availability of finance and the protection (under legal aid) from having to reimburse the other side’s costs) provided a powerful motivation.

Jackson LJ has recognised the risk of damages based agreements creating potential conflicts of interest between client and lawyer – hence his suggestion that a second lawyer should be involved to advise plaintiffs.

⁵ “Multi Party Actions”, by Dr Christopher Hodges, Oxford University Press, 2001



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In our view, potential conflicts of interest have a tendency to become actual conflicts, and we believe that individual litigants would be placed at risk. We also doubt that a second lawyer could properly protect his client unless he had appropriate experience; reviewed the case in detail; and remained involved throughout the case in order to advise the litigant when conflicts arose. This would both complicate litigation and increase expense. It would also be one of several aspects of the proposed reforms that could give rise to satellite litigation.

Although the Consultation Document asks no specific questions about third party litigation funding, we have taken the opportunity below to explain our concerns about this method of funding also, on the basis that it also introduces a profit motive to support litigation and potential conflicts of interest.

In our view both these forms of funding could raise real risks of abuse and unintended consequences if applied to individual litigation, we see even greater difficulties if such funding were applied to collective litigation. There would be the problem of ensuring independent legal advice reached each of the collective claimants and ensuring they were independently advised throughout the case, with the result that there may be little protection of the claimants in the event of conflicts of interest. We also see the potential for DBAs to encourage lawyers to enlarge collective litigation in order to increase the overall value of the case and thereby the potential reward to be gained under the contingency fee arrangement. This has been the experience in the USA and other jurisdictions where class actions are widely used. The profit motive drives the litigation.

We see risks of inappropriate pressure being placed on a defendant to settle a collective claim regardless of merit, given that the defendant would be facing substantially greater costs exposure in a class action than in a piece of individual litigation. The dynamics of class actions are different from individual claims, and the USA above all has demonstrated the risk of blackmail settlements.

If DBAs (or third party funding) are adopted, we are clear that effective regulation is a prerequisite. We are also clear that effective regulation would be extremely difficult. We see no evidence from other jurisdictions where DBA-funded class actions are common that they have been able to control such arrangements from creating abuse.

We doubt that effective regulation could be implemented over the thousands of practitioners who might offer damages based agreements should such arrangements be allowed. Nevertheless, in view of the proposal that DBA should be used widely in civil litigation, we have attached a preliminary list of safeguards that would be required. We are clear that a new regulatory authority would be required to monitor and enforce these safeguards.

2.3.2 Qualified One-Way Cost Shifting:

While, as stated above, we are in favour of removing the recoverability of costs that distort the system, we strongly support retention of the “loser pays rule” in all civil litigation. It is an



essential factor in considering whether or not to take litigation forward, and modification of this rule is liable to encourage ill-founded litigation.

We therefore view with concern the proposal to introduce QOCS in certain types of civil litigation. Our expectation is that – were they Paper introduced – they would tend to become the norm. We are also unclear why the Consultation Paper seems to propose a wider application of QOCS than Sir Rupert’s report.

We believe that QOCS would introduce imbalances in litigation and would encourage satellite litigation. Once again, we see the potential for the risk and effect of QOCS – combined with DBAs – of particular concern in collective litigation.

2.3.3 Proposed Uplifts in Damages:

While we understand the intention behind the proposed uplift in damages – particularly in routine personal injury cases – we are concerned that they will distort the principle that damages should be awarded simply as compensation for actual loss suffered. Moreover, if such uplifts were to be introduced on each of the areas proposed, there could be a cumulative effect. A plaintiff’s damages could be increased by 10% in general damages (Question 19 of the Consultation Document) and further increased by an additional uplift of 10% of all damages if the claimant benefits from the proposal regarding Part 36 offers (Question 21 of the Consultation Document). In addition, claimants are likely to be advised by their lawyers to enter into a CFA in the hope/expectation that they will be shielded from exposure to paying the other side’s costs if they lose their claim.

These are examples of the potential combination of the proposed reforms about which we have expressed concern above. Are such consequences intended? And would they not be liable to encourage satellite litigation?

2.4 General Comments:

2.4.1 Discouragement of unnecessary Litigation:

Any reform of civil litigation in England and Wales should have the objective of rapid resolution of claims that have merit and the equally rapid dismissal of claims that do not have merit. Accordingly, any reforms should be crafted with the aim on the one hand of *discouraging* unnecessary or abusive claims or litigation, and on the other hand of *encouraging* claimants to use alternative means of obtaining redress.

Such an approach conforms to the government’s general policy of promoting redress through the established regulatory regimes⁶ and encouraging the use of ADR mechanisms.

We appreciate the Ministry shares these concerns and that many of the proposed reforms are presented with the aim of avoiding or vexatious litigation. However, in our view, the combined

⁶ The Regulatory Sanctions and Enforcements Act, 2008

effect of a number of the proposed reforms may well be the opposite, particularly in the context of collective redress. For example, the combination of QUOCS, uplifts in general damages, and the introduction of DBAs would reduce the claimant's costs and risks of litigation and could combine to persuade claimants to use the courts rather than dispute resolution processes.

2.4.2 Collective Redress

EJF's principal aim is improve justified individual and collective redress by encouraging the resolution of disputes without the need to resort to litigation. In this context, collective claims require particular consideration. A reform that may be acceptable in party-to-party disputes may not be acceptable in mass claims. This issue is not addressed in the Ministry's consultation paper, and we would encourage further consideration and modelling before adopting the same proposals in relation to collective litigation as are proposed in party to party litigation.

2.4.3 Alternative Dispute Resolution

Our aim is to encourage the rapid and cost effective resolution of disputes by non-judicial methods in preference and priority to litigation. We note that in Sir Rupert Jackson's final report, emphasis was laid on the importance of a wider awareness and use of voluntary dispute resolution procedures to resolve disputes.

While we appreciate that the Ministry's consultation paper relates specifically to the costs and funding of *litigation*, we would nevertheless urge such reforms are placed in the context of efforts further to enhance voluntary and other non-court based methods of resolving disputes.

We attach for further information a summary of our position paper setting out an alternative - non-litigious – model for redress, particularly collective redress (Appendix III).

3. EJF's RESPONSES to the QUESTIONS in the CONSULTATION PAPER

3.1. Success Fees should not be Recoverable

Q1: *Should success fees be no longer recoverable from the losing party in any case?*

We strongly support this proposal. For the reasons set out in Jackson LJ's report, we believe that the current recoverability of the success element of any CFA arrangement has produced an unreasonable burden on defendants and has encouraged claimants to proceed even where their claim is questionable and to fuel a litigation culture. We also agree that the recoverability of success fees discourages careful cost control on the part of the claimant's lawyers.

We note that recoverability of success fees is a relatively recent innovation and should not be considered to be the norm in the civil justice system of England and Wales.

On the basis of this reply, Q2 is not relevant.

Q3: *Should success fees remain recoverable in cases where damages are not sought.*



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No We do not support this proposal, and we do not believe that sufficient evidence has been produced to justify such a distinction being made. Whether or not damages are being sought, the same objections apply to the recoverability of success fees. There is an unreasonable burden on defendants, and litigation may be encouraged rather than discouraged.

Moreover, we believe that wherever possible, reforms should be simple and clear cut. If distinctions are introduced whereby success fees are recoverable in some cases but not in others, we think that the result will be unnecessary complexity and potential satellite litigation over areas of potential confusion.

Q4: If Success Fees are recoverable in cases where damages are not sought, should there be a 25% cap on the part of the success fee that is recoverable?

Without prejudice to our view that success fees should be wholly non-recoverable, if a distinction were to be made in respect of non-damages cases, there would clearly be merit in limiting the amount of any success fee that was recoverable. Since (below) we argue that 25% should be the absolute maximum of any success fee, we believe that any recoverability in non-damages cases should be limited to a success fee of no more than 10%.

We also recommend that if any part of a success fee is to be recoverable, there should be no recoverability if the overall claimant's legal costs are disproportionate to the importance of the case.

In general, the court should use its power to reduce the amount recoverable or to refuse recoverability altogether when it finds it appropriate to do so.

Q5: Should Success Fees remain recoverable in certain cases where damages are sought – e.g. complex clinical negligence cases?

No. We do not support such a proposal. As stated above, reforms should be as simple and clear cut as possible. Distinctions such as the one proposed are likely to introduce uncertainty and the prospect of satellite litigation. The definition of “complex” cases is likely to be extremely difficult, and the result is likely to introduce undesirable anomalies.

Q6: If Success Fees are recoverable in certain cases, what should be the maximum recoverable success fee and should it be different in different cases?

Without prejudice to our view that no such recovery should be allowed, if some such recovery is to be allowed, the same rules should apply to each of the cases in which recoverability is possible. To make distinctions in the rate of recoverability in different cases would introduce unnecessary complexity and risk further argument and satellite litigation.

For the same reasons, we think that 25% is the absolute maximum and that a lower cap should be considered. Consistent with our answer to Q5 above, we further recommend that if any part of a success fee is to be recoverable, that amount should be reduced where the claimant's lawyers have conducted the litigation in such a way as to result in legal costs that are disproportionate in relation to the monetary or other advantage gained by the claimant. The court should not be

reluctant to use its existing power to reduce the amount recoverable or to refuse recoverability altogether.

Q7: Should the maximum Success Fee that lawyers can charge remain at 100%

No. In our view such rates of success fee are inappropriate and introduce financial motivation that can create conflicts of interest.

When the 1999 Act was implemented, the general expectation was that 25% would be the maximum of any success fee arrangement. No need was seen to implement such a cap on CFAs in the legislation because it was expected that the legal profession and the Courts would ensure CFAs stayed at or below the 25% level. Experience has shown this has not been the case, and that therefore regulation is required.

Moreover, as pointed out above, if the proposals in the Consultation Paper are implemented as they are currently expressed, there is opportunity for practitioners to recommend clients to combine different elements of those proposals. Consequently, a CFA may lie alongside a DBA together with an expectation of protection for claimants against costs orders. Were this to happen, in our view reforms intended to promote access to justice could in practice create situations in which a law firm's profits were a more important consideration than the client's interests.

As recommended above (Question 4) the cap on CFAs should be less than 25%. Moreover, the Ministry should consider how it would limit the overall effect of combining several elements of the proposed reforms.

Q8: Should there be a cap on the amount of damages that may be charged as a success fee in personal injury cases?

Yes, there should be such a cap, and it should be no more than 25% of general damages awarded (excluding damages for future care or future loss) or 25% of normal legal fees, whichever the lower.

Q9: Should the cap be 25% of some other figure.

See above. The cap should not be more than 25%.

Q10: Not relevant.

3. 2. ATE Premiums should not be recoverable from the Losing Party

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

Yes. We support this proposal. For the reasons set out in Jackson LJ's report, we believe that the current recoverability of the success element of any CFA arrangement has produced an unreasonable burden on defendants. Moreover, by essentially removing the claimant's exposure to costs, such insurance may encourage claimants to proceed even where their claim is or becomes questionable in the hope of forcing a settlement.

As noted above, the recoverability of success fees is a relatively recent innovation and should not be considered to be the norm in the civil justice system of England and Wales. A market for ATE insurance existed before the introduction of recovery of ATE premiums and would presumably continue to exist if recoverability were removed. Non recoverability in Scotland has not impeded access to justice.

Q12 and 13: Not relevant

Q14. Do you consider that ATE insurance premiums relating to disbursements only should remain recoverable in any categories of civil litigation?

No. We agree with Jackson LJ's view that claimants should bear the cost of their own disbursements. There is no logic in the defendant having to do so.

If general, ATE insurance is taken out by a claimant, we can also see practical difficulties in determining the amount of premium levied in respect of the insurer's exposure to disbursements.

We repeat our view that simple and clear cut reforms are to be preferred. If ATE premiums are not to be recoverable, there should be no exceptions to this new rule.

Q 15 and 16: Not relevant.

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

Such costs should be borne by the litigant. We note from Jackson LJ's report that the median of such costs in personal injury cases is not great – between £441- £590 - and it is personal injury claims that concerned Jackson LJ most in his report. If a claimant is to undertake litigation, such levels of costs exposure are not unreasonable.

An alternative means of funding disbursements presents itself if the recommendation (below) is adopted that there should be a wider uptake of Legal Event Insurance, which we support.

Q18. If Recoverability of ATE Insurance Premiums is abolished, should the recoverability of the self-insurance element by membership organisations provided for under section 30 of the Access to Justice Act 1999 be similarly abolished?

Yes. If ATE premiums are not to be recoverable, it is consistent and logical that the costs of self insurance should also not be recoverable. Organisations should not be treated more favourably than individual claimants.

3.3 There should be no blanket 10% Increase in General Damages

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

No. We do not agree, and we view any such proposal with considerable concern.



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We understand that this is intended to compensate for the non-recoverability of CFAs. However, we note that non-recoverability of CFAs in Scotland has not led to any increase in the level of general damages. Considerable weight should be given to the empirical evidence that, in Scotland, civil cases are run perfectly satisfactorily without success fees being recoverable.

We agree with the Government that such a reform would change the principle that damages should only compensate a claimant for the actual loss or injury that he has suffered. Such a change is undesirable, and as pointed out in the Consultation Document, it would be likely to be used as precedent for further calls to depart from the compensatory nature of damages.

We understand the Government's desire not to alter the principle that lies behind an award of damages, but we do not support the alternative approach suggested in paragraph 100 of the Consultation paper. The idea of retaining recoverability of an element of success fees up to an amount equal to 10% of general damages is, in our view, a play on words. The reality of such a proposal would actually be an increase in the level of general damages. This is how it would be seen and this is how it would be referred to.

The objections expressed in the Consultation Document to a 10% uplift in damages, and the concerns that this would undermine the current principle behind an award of damages, would not be addressed by using a form of words presenting the uplift as retaining an element of recovery up to 10% of the general damages awarded. It is much better to keep the present "loser pays" rule intact and not to complicate matters.

We also fail to understand why this proposal in the Consultation Paper is couched in terms that would cover all claimants. The concerns raised by Jackson LJ were centred on the position of claimants on CFAs, and the 10% uplift was proposed by him as a means of compensating for the success element of a CFA not being recoverable. Where is the logic of extending that uplift to claimants who are not on CFAs? The result would simply be to provide a windfall for claimants not on CFAs.

That being said, if the government does indeed introduce an uplift in damages for successful claimants who have entered into a CFA, we believe that their lawyers will advise all claimants to enter into a CFA (even at a marginal rate of success fee) simply in order to benefit from an uplift in general damages if they are successful in their claim.. Under the proposals as couched in the Consultation Document, even a minimal CFA of (say) 1% of legal cost would give a claimant increased general damages if he succeeded. Is this what is intended?

This is another example of how the proposed changes could be manipulated to produce new imbalances in the civil justice system.

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

Without prejudice to our views that no increase of general damages is justified, if the Government were to introduce such a reform, it would be logical to limit that reform to CFA claimants and claimants on legal aid. In this way, a windfall to other claimants would be avoided.

At the same time, we repeat our view that – as they are currently proposed – the changes contemplated by the Consultation Paper would be likely to persuade all claimants to enter into CFAs. How would abuse in this area be controlled, and would the court not be involved in litigation over “abusive” arrangements?

3.4. There should be no blanket increase in Damages relating to Part 36 Offers

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

Q22. *Do you agree that this proposal should apply to all claimant Part 36 offers (including cases where no financial remedy is claimed or when the offer related to liability only)?*

No. We do not agree with either proposal.

We are certainly in favour of encouraging sensible Part 36 offers, but we think that the changes proposed could introduce similar imbalances as the proposed increase for plaintiffs under a CFA.

The current Part 36 rules already bear more on the defendant than the claimant, with the defendant having to pay interest on damages as well as on the claimant’s costs and having costs assessed on indemnity basis. To introduce a 10% uplift would further unfairly change the balance between claimant and defendant to the latter’s disadvantage.

We note, moreover, that the proposal with regard to Part 36 Offers is that the whole award of damages would be increased by 10%. This would potentially be a far richer reward to the plaintiff than an uplift in “general damages”, such as is proposed to apply to CFA arrangements. Would this note encourage a claimant’s lawyer unfairly to place pressure on a defendant by putting forward a low Part 36 offer even though the case was not strong.

Further, the opportunity to gain an overall 10% increase in damages, a 10% increase in general damages, and protection from the loser pays rule would provide encouragement to take cases to court rather than dispute resolution. Once more, this gives reason to complete detailed modelling on the potential effect of the reforms before going ahead.

We note that, because it would apply to damages as a whole, the proposed Part 36 uplift would have a considerably greater impact than the CFA uplift on the principle that damages should be compensation for loss or injury, and not some kind of costs penalty.

If contrary to our views a 10% increase in damages is introduced as proposed, it should certainly only be applied to general damages and not to other damages relating, for example, to future care or future financial losses.

In cases where no financial remedy is sought, it would be even more anomalous to introduce a new and additional payment to the claimant.



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Q23: Do you agree that the proposal should apply to incentivise early offers?

Without prejudice to our views above, if such penalty is introduced, the purpose should be to encourage reasonable settlements. Consequently, before allowing any such uplift, the court should be confident that – at the time it was made – the Part 36 offer was motivated genuinely by a desire to settle the case and not as a piece of gamesmanship to increase pressure on the other party by exposing it to the potential uplift.

If the proposal is implemented, we can see potential for satellite litigation.

Q24: Should the increase be less than 10% if the amount of award exceeds a certain level?

Q25: Should there be a staged reduction in the amount of uplift?

While we can see logic to this proposal, in our view if an uplift is introduced, the rules relating to that uplift should be kept simple. On balance we would oppose the complexity of introducing a scale of uplift that depended on the amount of general damages awarded.

However, we do think that an absolute cap on the amount that could be awarded under any such uplift. That cap should be no more than £50,000. If there is no such cap, the uplift could reach unreasonable amounts in major commercial litigation.

Q26: Should the Effect of Carver be reversed.

Q27: Should a scheme such as FOIL be introduced?

We are attracted to the logic of Carver, but once again – on balance – we see greater merit in keeping the rules on Part 36 orders simple and reducing the risk of satellite litigation. For that reason we would not support a reversal of the effect of Carver.

However, we do support the adoption of an approach similar to the FOIL model.

3.5 There should be No Qualified One-Way Cost Shifting (QOCS)

Q28: Do you agree with the proposed rule set out (in paragraphs 135-137 of the Consultation Document)[personal injury claims]

No. We object to QOCS being introduced in these or any other cases

The traditional “loser pays” rule has served as an important safeguard against frivolous or ill founded litigation and against the continuation of litigation beyond the point at which the risks involved are justified. Removal of exposure to payment of the opponent’s legal costs would remove that safeguard. The present rule should be kept unchanged.

There seems to be an underlying assumption that personal injury or clinical negligence claims always have underlying merit: but this is not necessarily the case, particularly with regard to collective claims.



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The 1980s and 1990s saw a series of claims launched in England and Wales seeking damages for loss and harm alleged to have been incurred by large groups of claimants. These claims failed at the cost of many millions of pounds of public money paid to the claimants by way of legal aid⁷. Had the claimants – or their legal representatives – been exposed to the potential reimbursement of the defendants’ claims, there might have been a more realistic assessment of the chances of success in these claims, with the result that unnecessary litigation might have been avoided⁸.

Accordingly, in our view, it is important to keep the loser pays rule in personal injury and medical negligence claims (and particularly in collective claims for redress) in order to discourage unmerited claims.

We note that, in any case, the Court already has discretion to vary the loser-pays rule if it would be unjust to require the claimants in a particular case to pay the entire amount of the defendants’ costs. We do not think it is necessary to add further limitations on the loser-pays rule.

We are also concerned that if introduced in personal injury and medical negligence claims, there would be pressure to expand QOCS to other types of claim. We view with concern this potential “thin end of the wedge”.

The rationale given by Jackson LJ for QOCS was “the inequality of arms”. However, if QOCS were introduced in collective litigation, the claimants would over-night gain a significant advantage. The prospect of not recovering their costs would place huge pressure on defendants and would be likely in practice to force defendants to accept to blackmail settlements regardless of merits. The effect could be simply to reverse the “inequality of arms” rather than to get rid of it.

Q29: Would QOCS substantially reduce the claimant’s need for ATE Insurance?

In our view, this is not the relevant consideration. The current principle of the loser-pays rule should not be lost.

That said, the claimant would benefit from the recommendations that the losing party should not be exposed to reimbursing the other side’s ATE premium or any success fee paid to the lawyers for the winning party. This is a real benefit and a substantial reduction in the claimants cost exposure. Logically, that would reduce the need for the claimant to take out ATE insurance.

However, in the context of insurance, we would encourage the government to focus on the fits of extending “before the event legal insurance” and not just of reducing the need for ATE insurance. See our comments above and below.

⁷ See “Multi Party Actions” by Dr Christopher Hodges, Oxford University Press, 2001

⁸ It is important to note that one result of these claims was that the amount of money subsequently available under legal aid for collective litigation was greatly reduced, thus making access to justice more difficult for stronger claims. While the scope of legal aid is now much reduced, the lessons of this experience should be borne in mind in relation to the development of alternative sources of funding for claimants. Removal or substantial weakening of the loser pays rule for claimants would have an impact on the defendant’s funding and introduce new imbalances. At the least, satellite litigation could be expected.

Q30: Should QOCS be extended beyond personal injury cases?

For the reasons stated above, even if QOCS were introduced for PI and clinical negligence cases, it should absolutely not be extended to other cases.

We are concerned that, as formulated in the Consultation Document, the introduction of QOCS might NOT be limited to personal injury or clinical negligence cases but might become applicable to all civil litigation. PI and clinical negligence cases were identified by Jackson LJ as the fields in which QOCS should be introduced. If QOCS is to be implemented, this limitation should be retained and there should be no general introduction of QOCS.

Q31: What principles should determine whether QOCS should apply in a certain case?

Without prejudice to our opposition to QOCS, if such a rule were to be introduced it should be applied on a restrictive basis.

Jackson LJ indicated three circumstances in which the court should make a costs order against an unsuccessful PI claimant, namely where:

- the claimant has behaved unreasonably (e.g. by bringing a fraudulent or frivolous claim);
- the defendant is neither insured nor a large corporation; and/or the claimant is conspicuously wealthy.

In our view, these do not present significant limitations. Moreover they are an invitation to satellite litigation. Costs in civil litigation can be prodigious and either party could have considerable motivation to litigate to gain reimbursement of those costs. Litigants could easily argue over “unreasonable behaviour” or what constituted being “conspicuously wealthy”.

Why should the existence of insurance be a reason for not making a costs order. If this were to become the norm, such insurance cover would simply become much more expensive. It would be better to recommend that both sides had insurance.

It is also worrying that being a “large corporation” would be a reason not to gain reimbursement of costs. Why should corporations be penalised and in any event, what qualifies as a “large” corporation?

If QOCS were to be introduced, there should be further limitations on its application. The following restrictions should be included.

Any QOCS proposal should be limited to claimants on CFAs (although our concerns expressed above apply: CFAs – at least at a minimal level may become the norm with all the advantages being associated with them);

There should be no QOCS applied if the claimant’s costs of litigation are borne by a third party, for example as foreseen by Jackson LJ (and by the Consultation Document) in cases where a PI/medical negligence claimant is financed by a third party litigation funding; or where the claimant had entered into a DBA.



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We are opposed to either such litigation financing mechanisms, particularly in the case of collective litigation. That opposition would be all the more strong if those financing the litigation knew that they were protected by QOCS from the risk of paying the defendant's costs. The removal of costs exposure would greatly affect the evaluation of the case and would encourage third parties to finance cases they would otherwise regard as too weak to support.

The risk of an adverse costs order leads to a more careful consideration of the merits of a case by any person offering to provide third party or contingency fee finance. Experience has shown that – particularly in PI cases – there is a risk of weak cases being brought in the hope of achieving at least a compromise settlement⁹.

QOCS should not be applied to collective litigation. Although initially, Jackson LJ considered abandoning the loser pays rule for unsuccessful claimants in collective litigation, he concluded that no such general exemption should be applied. We welcome this recommendation. However, we view with concern his recommendation that QOCS be applied to collective litigation concerning personal injury and medical negligence claims.

In our view, the weight of evidence is that the loser pays rule helps to deter weak or spurious claims from being pursued in the hope of forcing a favourable settlement regardless of merit. In collective litigation, it is important that those providing the funding should realise that they are exposed to the potential expense of paying the others side's costs. It leads to a more realistic initial consideration of the merits of the case, and it encourages the parties to keep that analysis under review as the case proceeds. The lack of this rule in the USA contributes heavily to the volume of abusive class actions.

These arguments apply as much to collective PI cases as to other collective litigation. There is clear evidence that substantial sums of public and corporate money were wasted in the group actions brought in respect of PI cases in England and Wales in the 1980s, 1990s and 2000's under the one-way cost regime that existed under Legal Aid, because lawyers pursued one after another massive case that proved to be unmeritorious¹⁰. To risk going back to this situation would be undesirable.

We also note that the Ministry of Justice as recently as July 2009 declared Government policy to be the retention of the loser pays rule, in particular in collective litigation.¹¹ This policy should not now be changed.

It should be remembered that in practice the decisions on the claimants' side in collective actions are taken by the lawyers or those providing the funding (see below). The experience of the cases referred to above in the last three decades strongly suggests that lack of the risk of an adverse

⁹ See "Multi Party Actions" by Dr Christopher Hodges, Oxford University Press, 2001

¹⁰ Ibid

¹¹ The Government's Response to the Civil Justice Council's Report: "Improving Access to Justice through Collective Actions", Ministry of Justice, 20 July 2009 at <http://www.justice.gov.uk/about/docs/government-response-cjc-collective-actions.pdf>

costs order was an important factor in bringing cases that had at best a weak chance of success. The normal loser pays rule provides an effective check on such behaviour.

Q32: Should QOCS apply to claimants on CFA's or all claimants?

Without prejudice to our opposition to QOCS, if such a rule is introduced it should logically be restricted to claimants on CFA arrangements. Jackson LJ's concern was access to justice. If a claimant can afford to litigate without recourse to CFAs, there is no logic in applying QOCS to them.

However, as indicated above, the attraction of benefitting from QOCS would be a strong incentive on all relevant claimants entering into – at least – a minimal level of CFA. It would be necessary to ensure that claimants did not adopt a CFA simply to shield themselves from the loser-pays rule.

The practical difficulty of ensuring that this is the case is a strong reason against introducing QOCS.

Q33: Do you consider that QOCS should only cover claimants that are individuals?

If QOCS is introduced, it should certainly only apply to individual litigants. Neither corporations nor groups of litigants should be able to benefit from QOCS. See our comments above and below.

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

The answer is, of course, "Yes" – but we think it would be difficult to formulate clear and equitable rules. We expect that such distinctions will fail to give clarity, and that satellite litigation will be encouraged by a QOCS rule.

We also agree with the proposal in paragraph 146 of the Consultation Document that (if QOCS is introduced) it should certainly not be applied in cases where the defendant itself is of limited means.

If QOCS is introduced, we agree with the Government's concerns (paragraph 169 of the Consultation Document) that QOCS should not be applied to cases in which the claimant proceeds on a traditional hourly fee basis and should not apply to judicial review.

We also agree that if QOCS is introduced, the claimant should nevertheless be exposed to an element of the defendant's costs. We think that this exposure should amount to not less than 50% of the costs that would have been awarded in the absence of QOCS.

3.6 Should there be a Supplementary Legal Aid System (SLAS)?

We note that the Consultation Document asks no specific questions on this matter. However, we wish to endorse Jackson LJ's recommendation that, before any SLAS is introduced, there should be a full consideration of its viability and a full consultation on the matter. We would, however,

comment that if the outcome of the present consultation is a substantial enhancement of the claimant's position, it would be fair and sensible to subject some of the claimant's benefits to a SLAS.

3.7 Alternative Recommendations on Recoverability

Q36: Should Alternative Package 1 or Alternative Package 2 be implemented?

In common with the Government, we strongly support Jackson LJ's primary recommendations on the recovery of success fees and ATE premiums. However, if these are not to be implemented in full, then Alternative Package 2 (as summarised in paragraph 187 of the Consultation Document) is to be preferred over Alternative Package 1.

Q37: To what categories of case should fixed recoverable success fees be applied?

Given our opposition to QOCS, to the extent it is applied there should in no case be recoverability of success fees above a fixed (low) level.

Q38: If Recoverability of ATE Insurance remains, should the alternative package of measures apply to the self-insurance element of membership organisations?

No. There should be no circumstances in which such organisations can recover either actual ATE insurance premiums or any self insurance element.

Q39: What elements of the alternative packages should not be applied?

No comment.

3.8 Proportionality

Q40: If Sir Rupert's primary recommendations for CFAs are implemented, should a new test of proportionality along the lines proposed by Sir Rupert be introduced?

Yes. The current situation has lead to recoverability of disproportionate fees and this needs to be amended.

In this context, the proposal in paragraph 219 of the Consultation Document would not, in our view, be helpful (i.e. that a Costs Practice Directions should emphasise that the test is intended to be applied only in the small number of cases in which costs assessed as reasonable are nevertheless disproportionate). In our view, such a rule would tend to increase rather than decrease the risk of satellite litigation. There is still the concept of proportionality over which parties may argue.

Q41 and 42: Not relevant

Q43: See above

Q44: In light of our comments, we believe this question is irrelevant.

3.9 There should be no expansion of damages-based agreements.

We are opposed to any arrangement whereby a lawyer's fees are calculated as a percentage of the damages recovered by a successful claimant – particularly in the case of collective litigation. We believe that such arrangements would open the door to the kind of abuse experienced in class actions in the USA and in certain other countries, where there is clear evidence that contingency fees have helped fuel a litigation industry. A relatively small number of leading US plaintiff law firms shares enormous revenues generated by contingency fees. They literally become litigation banks with the resources to fund any case against a defendant with deep pockets who can be expected on a pragmatic, economic basis to prefer early settlement to protracted litigation, with scant regard to the merits of the case. Several of those firms have already established offices in the UK and elsewhere in Europe.

We would draw particular attention to the escalation of risk that would arise if DBAs were allowed in collective litigation. Up to now, such litigation has not been available in the UK, and we sincerely hope that it will not be allowed in the future. Nevertheless, we are concerned at the frequency with which class action litigation has been advocated by certain groups.

The problem would become even more acute if DBAs were allowed in combination with qualified one-way costs shifting for individual and collective personal injury cases (let alone other cases). One of the many reasons for abuse, and the creation of a litigation industry in the US, is the way their rules work in combination with each other. Litigation abuse is rampant in the US because claims are often brought on a contingency fee basis and there is no costs-shifting to the claimant or the claimant's lawyer. Quite simply, there is no financial incentive to conduct a thorough review of the case before filing. Under the changes considered in the Consultation Document, the combination of one-way costs shifting for personal injury cases and contingency fees would enter the system in England and Wales and could create a situation that is close to the problematic US system. The potential consequences should give the legislators reason for pause.

If DBAs are to be allowed, we agree with the recommendation that an independent solicitor should advise the litigant of the implications in order that the litigant's rights are properly protected. A lawyer acting on a DBA is not only acting in his client's interests, but is also seeking to maximise his profits. He therefore inevitably has a potential conflict of interest. This conflict may be mitigated by a requirement that the claimant is independently advised. Such advice should be given by an experienced lawyer after a full review of the case and its suitability for a DBA. Moreover, we believe that such independent legal advice should be given throughout the case to ensure the claimant makes balanced decisions. For example, settlement offers should be reviewed in advance by such an independent lawyer.

Such independent advice could (at a not inconsiderable additional cost) provide some protection, although, in our view, this would not necessarily be sufficient. Before DBAs are to be allowed, there should be a more detailed study of how such independent legal advice should be given to ensure it is a thorough exercise.

We further recommend that – if DBAs are to be introduced - independent solicitors should be required to present a report to the court setting out the DBA arrangements and giving reasons



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why, in their opinion, those arrangements will not encourage unnecessary litigation; distort the course of litigation; or impede any settlement of the dispute. They should have the responsibility throughout the case of ensuring that any conflicts of interest are resolved in favour of the litigant and that his interests are protected. Similarly, the independent lawyer should be responsible for ensuring that a DBA lawyer complies at all times with any rules and regulations introduced with respect to DBAs.

We are concerned about the situation in which a potential conflict of interest becomes a real conflict between the interests of a client and his lawyer acting on a DBA. Who would then protect or indeed act for the client? What would be the role of the independent lawyer? This is just one area in which closer consideration is needed before any decision was taken to introduce DBAs widely in civil litigation.

We are also clear that the losing party should not be required to reimburse a winning party any costs incurred by it as a result of engaging a second lawyer in connection with a DBA arrangement. Moreover, the costs of such a second lawyer could not be properly met by any lawyer engaged on a DBA basis since that would vitiate the independence of the second lawyer.

We note that Jackson LJ recommends application of the Ontario rules to costs shifting, and if there are to be contingency fees, we certainly agree with this approach.

We also note that Jackson LJ calls for there to be clear regulations on DBAs, and again, if there is to be a wider use of contingency fees, we agree that such regulations are essential. The regulations should be part of any consultation prior to any expansion of the use of DBAs. We also believe that any such regulations should be wider than the matters referred to in paragraph 4.5 of Chapter 12 of your Jackson LJ's Report. The regulations should be designed not just to protect the interests of the client but those of society in general.

We would also ask that there be debate on the scope of regulations and the practicalities of enforcing regulations on all the several thousand solicitors and counsel who might be engaged in contingency fee arrangements. Here there is a contrast with the parallel recommendation in Jackson LJ's Report that there should be controls on the provision of third party litigation financing. There are less than 20 such firms operating in London at present, and even if the third party finance market were to expand, the number of firms to oversee would remain far less than the number of practitioners. Consequently, the practical difficulties of applying regulations to practitioners would be considerably greater than applying controls to third party litigation funders.

If DBAs are to be used, we agree with Jackson LJ's recommendation that the claimants and/or their lawyers should be responsible for any adverse costs orders. QOCS should not be applied to such arrangements, and a means must be found to make the DBA lawyer directly liable to the other party if his client fails to meet any costs order.

Q45: Do you agree that lawyers should be permitted to enter into DBAs with their clients in civil litigation?

For the reasons given above, we are strongly opposed to such arrangements. As argued above, we are particularly concerned that DBAs should not be allowed in respect of collective litigation.

Q46: Should DBAs not be valid unless the claimant has received independent advice?

It should be a requirement that independent *legal* advice is given, and any costs of obtaining such advice should not be recoverable from the defendant.

The advice should be given by lawyers competent to advise on such arrangements. Their advice should be made available to the court and should state the reasons why a DBA is used rather than conventional legal fees. There should be a presumption that the claimant is able to enter into a conventional fee arrangement unless strong grounds are given.

As argued above, the independent lawyer should have a role – solely at the cost of the litigant – throughout the litigation to make sure that the DBA does not result in the client's interests being compromised and to ensure compliance with rules applicable to DBAs.

Q47: Would DBAs require specific regulation? If so, what should the regulation cover?

If DBAs were to be introduced, strong and effective regulation would be essential. We set out in Annex I a preliminary set of safeguards that would need to be enforced. We have not considered the monitoring and enforcement provisions that would be necessary to ensure compliance with these regulations. In our view, in addition to the role of an independent lawyer, such enforcement would require a fully staffed regulator with the powers to impose sanctions on lawyers infringing the DBA regulations. There would, of course, be costs attached to the establishment and maintenance of such regulatory controls. Those costs would either have to be absorbed by the government or – if practical – covered by a levy on lawyers acting on a DBA basis.

Q48: If DBAs are allowed, should costs recovery be limited to the conventional basis and not be reference to the DBA?

Yes. To allow recovery of the cost of DBA arrangements would introduce the same (if not worse) distortions that Jackson LJ and the Consultation Document identified in the recovery of success fees and ATE insurance premiums. Consequently, the reimbursing party would only be exposed to normal legal costs. He would not be required to reimburse the cost of the DBA arrangement or the costs of a second lawyer engaged to advise on and monitor the operation of the DBA arrangement.

Q49: To the extent that QOCS is allowed for claims under CFAs, should it be applied to claims under DBAs?

No. It is important that claimants understand that DBAs do not offer them a more advantageous means of financing claims. If the defendant's costs remain wholly recoverable in claims covered by a DBA, the claimant and his advisers will consider more carefully the use of a financing mechanism that inevitably brings with it the risk of abuse.

We are in any event attracted by Jackson LJ's proposal that *if* DBAs are applied, there should be adequate resource on the losing side for a successful party to recover his costs, if necessary at the expense of the lawyers providing the DBA arrangement. This would mean introducing rules making the DBA lawyer potentially directly obliged to the winning litigant to reimburse his costs.

Q50: Do you consider that the maximum fee that lawyers can recover from damages under a DBA in personal injury cases should be limited to 25% of damages excluding any damages referable for future care or loss?

Yes. If DBAs are introduced the maximum amount recoverable by lawyers should be 25% of general damages, excluding any amounts awarded in respect of future care or loss. This limit should apply to *any* case in which DBAs are allowed.

However, in our view, the court should be required to approve any DBA arrangement and should be critical of any arrangement that incorporates the maximum 25% recovery level. The maximum of 25% should not become the norm for DBAs and should be allowed only if there are particular potential costs or exposure that would justify the 25% level.

Q51: Do you consider that in personal injury cases where the solicitor accepts liability for paying the claimant's disbursements if the claim fails should remain at 25% of general damages excluding amounts awarded for future loss or care?

Yes. Such a limitation should apply to any lawyer (solicitor or counsel) entering into such DBAs.

As stated above, 25% of general damages should be the maximum allowable and should be applied only if there are particular circumstances justifying it. The agreement by the lawyers concerned to pay any disbursements (including the costs of a successful opponent) would be one reason justifying this maximum level of recovery.

These rules should apply in all cases where DBAs are allowed.

Q52: Should there be a limit to the maximum fee that lawyers can recover from damages in personal injury cases?

Yes. We see no reason why the lawyer should be entitled to gain amounts that are excessive in relation to his normal fee rate. We suggest that there be consultation on this point, but in our view, under a DBA arrangement, the lawyer should not stand to gain more than his normal fee plus 50%. This 50% maximum would be justified only if the lawyer undertook (for example) to absorb disbursements that would normally be for the client or to cover the client's potential liability under the loser-pays rule. These restrictions should apply to any case in which DBAs are allowed.

Q53: How should disbursements be financed by claimants operating under DBAs?

The claimant should remain responsible for all disbursements – including liability for a successful opponent's costs – unless the lawyers concerned agree to cover that liability under a higher level of DAB – see Q51 and Q52 above.



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3.10 Rates for Litigants in Person

Q:54 – 56: Should the rate for litigants in person be increased.

Yes. But we agree with the government that the increase should be to no more than £16.50, roughly in line with inflations since the current limit was set. For cases on the small claims track, the rate should be increased to £90 per day, again roughly in line with inflations since the rate was originally set in 1996.

There should be an overall rule that the litigant cannot recover more than the daily rate he would otherwise have been paid by his employer, and that if he receives payment from his employer during the case, he cannot recover a daily rate in addition. This rule would apply also to litigants who were unemployed (and not self employed) and were in receipt of benefits. Any rate paid to such litigant should not exceed the amount of any benefits he would otherwise receive, and if benefits continue during the case, there should be no payment of any additional daily rate.

4. MATTERS NOT COVERED in the CONSULTATION

While we will not comment on all the recommendations made by Sir Rupert and not covered by the Consultation Document, we should like to take the opportunity of commenting on the following.

4.1 Before the Events Insurance

We support an expansion of such insurance and would recommend that the government publicise the fact that many people already have such insurance in certain areas – e.g. motor insurance and house insurance policies. The more such insurance is taken up, the lower the premiums are likely to become. The government should work with the insurance Industry on this matter.

4.2 Third Party Funding

We recognise that such funding exists already, and to the extent that it applies to conventional party to party litigation, we see little risk in continuing this practice. But we oppose the use of third party funding (TPF) to support collective litigation. We see real risk of litigation being launched mainly for the financial purposes of the funding company. If there were any suggestion that should be applied to collective litigation, the practice should be controlled not just by a code of practice but also by statutory regulation. Such regulation should build in effective safeguards against abuse. We provide a preliminary list of such safeguards in Annex II.

We do agree that a code of practice covering the current party to party use of TPF would be useful, but we see a number of flaws in the draft circulated by CJC in its consultation on the subject. We have already copied the Ministry of Justice on our response last year to the CJC consultation.

While a code of practice is sensible, we do not believe that the Civil Justice Council should not be seen as organising or endorsing such a code. There are a very great number of industry codes of practice. They are put normally published by trade associations representing industry sectors



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and their members are required to comply with them. But in no case is the Civil Justice Council involved, and we do not understand why it should be in this case.

In cases covered by TPF arrangements, the funder is normally responsible for paying the other side's costs in the event that the funded case is unsuccessful. It is important that TPF funders be obliged to complying with the loser-pays rule, and a court should be satisfied that the funder has the necessary resources to do so.

Since the TPF industry is essentially a form of investment industry, it should be subject to the financial services regulators in the same way that other investment companies are controlled.

European Justice Forum
11 February 2011

We attach four annexes to this paper: giving further information and responses

Annex I: Preliminary safeguards for Damages based Agreements

Annex II: Preliminary safeguards for cases in which third party funding is used;

Annex III: Summary of EJF's approach to collective redress

Annex IV: EJF's membership.

Annex I

Preliminary Summary of Safeguards for Damages Based Agreements (Contingency Fees)

Among the safeguards recommended by EJF are the following.

- Damages based agreements must be regulated and provided exclusively by undertakings that are registered with and subject to the supervision of a newly established DBA regulator. There should be appropriate penalties for breach of those regulations.
- The guiding principle of DBA regulations should be to ensure that control of the litigation (and of any settlement) lies with and is solely in the interests of the litigants and the interests of the lawyers acting on a DBA basis should not influence the conduct of the litigation.
- The terms of any DBA arrangements (and in particular any potential profit element) must be disclosed to the Court and subject to the Court's power to forbid any arrangements that could distort the proper and sound administration of justice. Court rules and guidelines should be issued to the Courts indicating how DBA arrangements can lead to abuse and the need to ensure that appropriate safeguards are applied.
- Claimants entering a DA arrangement must be given expert independent legal advice both before entering into the DBA and at critical points of the litigation. The independent lawyer must follow the case as it proceeds and ensure that the claimant is properly advised if any conflict of interest arise between the claimant and his principal lawyers. Rules must be established as to how a case is to continue if the principal lawyer is so caught in a conflict of interest that he cannot properly continue to represent his client.
- Lawyers acting on a DBA basis may not gain more than 25% of damages awarded, subject to the comments in our answers above to questions 50 and 51 of the Consultation Document.
- Claimants entering into a DBA arrangement cannot recover costs from the defendant in excess of normal reasonable attorney fees. In particular, they shall not be entitled to recover any contingency or success element of the fees charged by the lawyers concerned.
- Lawyers acting on a DBA basis should be obliged to continue the case on that basis until the claimant decides to abandon the claim; or to accept a settlement; or the case is won.
- If lawyers acting on a DBA basis agree to be responsible for any costs to be reimbursed to the other side under the loser-pays rule, the Court should satisfy itself that they have the financial resources to do so. The Court should be able to require a DBA lawyer to make an appropriate payment into court in order sufficient to cover this eventual liability.
- In recent years, the sale of asset backed securities has become common. It is foreseeable that projected income streams from litigation backed by third party funding organisations could provide the "asset backing" for such financial instruments. This would be distasteful and highly undesirable. Accordingly, such securitisation of income streams from third party process funding should be prohibited.
- DBAs must not be permitted in any case that is subject to TPF funding (and vice versa).

Annex II
Preliminary Summary of Safeguards for Third Party Funding

The following is not a final statement of safeguards required. Indeed, EJJ does not believe that – if third party funding is allowed in collective litigation – it would be possible to regulate so as wholly to exclude the risk of abuse. However, any safeguards should at least include the following:

- Third party funding must be regulated and provided exclusively by undertakings that are registered with and subject to the supervision of the Financial Services Authority.
- A register should be maintained of those who provide third party process funding. Appropriate regulations should be applied with penalties for breach of those regulations.
- The main guiding principle of any such regulations should be to ensure that control of the conduct of the litigation (and of any settlement of the litigation) lies solely with the litigants and not with third party process funders. The third party process funder must not control the litigation or act in a manner that amounts to effective control.
- The terms of any funding arrangements (and in particular any potential profit element) must be disclosed to the Court and subject to the Court’s power to forbid any arrangements that could distort the proper and sound administration of justice. The Court must ensure that there is no distortive effect resulting from any profit-motive on the part of providers of funding, and must have power to take appropriate measures to prevent this. Court rules and guidelines should be issued to the Courts indicating how funding arrangements can lead to abuse and the need to ensure that appropriate safeguards are applied.
- The Court should examine the extent of the financial reward which a third party funder may make in the event of his client winning the case. Binding guidelines should be developed in this area and introduced by way of legislation. These guidelines should include reasonable limits to the rewards that can be earned by the funder, in order that the UK may not experience the litigation industry that has developed in the USA. In particular, the guidelines should set reasonable limits to the extent to which a third party process funder may share in any damages awarded, so that any such arrangement does not adversely affect the proper and sound administration of justice.
- If plaintiffs who are dependant on a third party process funder win their case, they shall not be entitled to recover costs from the defendant in excess of a normal reasonable attorney fee and necessary outgoings. In particular, they shall not be entitled to recover any contingency or success element of the fees charged by the third party process funder, nor will they be entitled to recover from the losing party any amount of the damages awarded to them that is paid to the third party funder in consideration of his services.
- In assessing whether it is prepared to invest in a piece of litigation, a third party funder will consider the experience and ability of the lawyers chosen by the party in question. While this makes sense, a third party funding organisation must not be allowed actually to select the law firm that handles the case. That is a decision for the plaintiffs alone, and the



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plaintiffs and their attorneys alone should be responsible for the management, conduct and any eventual settlement of the case.

- While a third party process funder should be entitled to receive information on the progress of a case and any significant changes to the prospects of success, such funders should not be able to exercise directly or indirectly any control or influence over the conduct or settlement of litigation.
- If a litigant wishes to settle a case, the terms of the funding agreement must not allow the third party funder to prevent the litigant from doing so, but must oblige the funder to continue financing the case until such settlement is reached.
- It is important that the Court satisfy itself that the TPF funder has the resources to meet the cost of reimbursing the defendant's costs if the funded case is unsuccessful. The Court should be able to require a TPF funder to make an appropriate payment into court in order sufficient to cover this eventual liability.
- Any third party funding contract must be between the funding company and the litigants. The agreement with the lawyers must be between the lawyers and the litigants and not with the provider of the finance. The reason for this is to minimise the risk of abusive behaviour in relation to the litigation and in particular of the funder being able to exercise any control or influence over the conduct or settlement of the case.
- For similar reasons, while careful analysis of the merits of a case by third party funders is to be encouraged – including analysis from in-house or external lawyers, the litigation itself must not be handled or controlled by lawyers engaged by the third party funder nor may the third party funder be owned or controlled by law firms or lawyers.
- In recent years, the sale of asset backed securities has become common. It is foreseeable that projected income streams from litigation backed by third party funding organisations could provide the “asset backing” for such financial instruments. This would be distasteful and highly undesirable. Accordingly, such securitisation of income streams from third party process funding should be prohibited.
- The lawyers involved must have no financial interest in the damages awarded. Their financial interest should be limited to charging reasonable fees. By the same token, there must be a limit on any uplift in normal fee rates permissible under any conditional or success fee arrangement.
- Contingency fees, which involve an attorney or his firm personally benefitting from a percentage of any damages awarded, should not be permitted in any case that is subject to TPF funding.

Certain costs should not be recoverable by the winning party. These include the cost of insurance premiums; any amount in excess of the lawyer's normal fee; the costs of taking out third party process funding and any amount payable to the funder upon conclusion of the case.



Annex III

Summary of EJF's Position Paper on Collective Redress

European Justice Forum (EJF)¹² is a coalition of international companies and organisations that support fair and balanced civil justice systems. EJF supports accessible and rapid resolution of claims that have merit, but at the same time it calls for an equally rapid and effective dismissal of claims that do not have merit. EJF seeks to avoid Europe experiencing the damage created by class actions in the United States.

European legislators are pursuing two policy goals:

- to ensure that – where it is merited - compensation is paid to more individuals and businesses more frequently, especially where there are multiple small claims; and
- to rectify wrongful market activity, through equalising imbalances, deterring wrongdoing and otherwise affecting behaviour, so as to encourage maximum competition and innovative, vibrant markets.

Until recently, the mechanism principally used by the authorities to achieve these ends was to adopt the US class action model. But a new model is emerging among policy makers. This model is based on;

- Encouragement of voluntary settlement - ADR;
- The role of public authorities ranging from regulators to ombudsmen in helping to resolve disputes and to secure deserved restitution for consumers;
- Oversight by the court to ensure due process in settlement proceedings and to ensure that once a matter is resolved, no further proceedings are started;
- Use of collective litigation only in the last resort.

This new model offers a more flexible and effective way of achieving consumer redress and avoiding the risks presented by class actions. The new model needs to include safeguards be applied in a manner that avoids unintended consequences.

Among the principal safeguards needed are:

- maintenance of the traditional European approach that enforcement of citizens' rights should be for the public authorities, thus minimising the need for any private litigation to enforce those rights;
- recognition of the fact that there are some types of actions that *must not* be submitted to any collective process, because the individual claims and characteristics of individual plaintiffs need to be assessed - product liability and medical negligence claims being examples;
- recognition that, if a claim has merit and a company wants to resolve the matter voluntarily, such resolution is beneficial to all parties and can have the advantage of avoiding litigation and minimising potential reputational damage. In those circumstances, claimants should show reason why the claim cannot be settled before

¹² For further information please see our website: <http://www.europeanjusticeforum.org> or contact the EJF Secretariat at info@europeanjusticeforum.org



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- they are entitled to start a class action;
- public authorities playing a neutral role both in filtering out meritless claims and, in other cases, encouraging voluntary restitution;
 - at the same time, preventing public authorities from dictating the terms of any settlement or the amount of any compensation or exerting inappropriate pressure. The authorities should encourage voluntary resolutions of disputes but they should not act as judge and jury;
 - ensuring that the courts provide oversight and endorsement of voluntary agreements so that on the one hand settlement agreements can be enforced and on the other hand, once a settlement has been reached, no one else can make new claims based on the same subject matter;
 - reserving collective litigation to the last resort and, if collective litigation is to be employed, ensuring that the necessary safeguards and controls are in place;
 - in cases involving both the imposition of financial penalties by a regulatory authority *and* the award of damages for any consequent loss suffered by third parties, ensuring that the combined economic impact is taken into account so as to prevent organisations being unjustly burdened; and
 - recognising that there will be occasions when the court must be involved. This may be to resolve particular points of law that need to be determined before the parties can sensibly settle a matter. It may also be the case that a compromise settlement is not acceptable to one or party and that there is a genuine need for a court judgment to determine legal rights and obligations.

On this basis, it should be possible to promote resolution of disputes more quickly and cheaply than by litigation; to minimise the risk of frivolous or unmerited claims; to ensure that rights to defend and due process are upheld; and to promote better access to justice while keeping the costs of dispute resolution to a reasonable level.



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