

Annex C: The funding of defamation cases

47. While it seems that conditional fee agreements (CFAs) are a minority form of funding for defamation cases,²¹ there is no doubt some cases would not be funded in the absence of CFAs. CFAs are a type of 'no win no fee' agreement under which a lawyer does not receive a fee from their client if they lose a case, but can charge an uplift (known as a 'success fee') on top of their base costs if they win. The maximum success fee that a lawyer may charge is 100% of the ordinary legal costs. For those of modest means, the only option for funding a defamation case might be through a CFA; legal aid has never been available for these cases.
48. The other side's costs can be covered by after the event (ATE) insurance. ATE insurance protects the claimant from having to pay certain legal costs; this is a form of costs protection. It is a type of insurance taken out after the decision is made to begin legal proceedings, with the premium typically increasing as the case progresses and the costs incurred increase. ATE insurers undertake to pay the defendant's costs in the event that the claimant loses the case. They may also cover the claimant's disbursement costs and other expenses. The premium is typically never paid by claimants, but is recovered from defendants in cases which defendants lose. These additional costs – CFA success fee and ATE insurance premiums – are paid by the losing party, which is often a news publisher in defamation cases.

Lord Justice Jackson's Review

49. The Government has been concerned about the disproportionate costs of civil litigation, and the relatively risk free nature of bringing claims funded by 'no win no fee' CFAs. This issue was looked at in detail by Lord Justice Jackson, a Court of Appeal judge, who was appointed by the then Master of the Rolls in 2008 to investigate the high costs of civil litigation and to make recommendations for reform.
50. In January 2010, Lord Justice Jackson published his *Review of Civil Litigation Costs: Final Report*. He found that the CFA arrangements which then existed were 'the major contributor to disproportionate costs in civil litigation in England and Wales'.²² The rules on the recoverability of success fees and ATE insurance premiums, which still apply to defamation cases, mean that losing defendants have to pay winning claimants significantly more than they would be required to without this recoverability (often nearly three times their legal costs – base costs, (up to) 100% success fee, and ATE premium which can be 85% of the sum insured). He recommended that the recovery of CFA success fees and ATE premiums be abolished; he said that this

²¹ Statistics from the High Court suggest that 158 defamation proceedings were commenced in the Queen's Bench Division in 2010, although these do not provide a further breakdown of how these cases were funded. Data provided by the Media Lawyers Association to Lord Justice Jackson suggested that 27 out of 154 libel and privacy cases against the media in 2008 were funded by way of a CFA.

²² *Review of Civil Litigation Costs: Final Report* p. xvi.

would lead to 'significant costs savings, whilst still enabling those who need access to justice to obtain it'.²³

51. The Government consulted on the Jackson recommendations in November 2010 and published its response²⁴ in March 2011. The Government accepted the recommendations so far as they affected the funding of defamation cases and these reforms have been taken forward in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012. A regime of costs protection, in the form of qualified one way costs shifting (QOCS), as recommended by Lord Justice Jackson was drawn up for personal injury cases. While the Government did not at first accept the case for costs protection in defamation cases (as recommended by Lord Justice Jackson),²⁵ it subsequently accepted Lord Justice Leveson's recommendations, which endorsed Lord Justice Jackson's recommendation on this point.
52. In addition, in January 2011, the European Court of Human Rights (ECtHR) delivered its judgment in *Mirror Group Newspapers (MGN) v UK*. This case involved a privacy claim by a very wealthy celebrity against a newspaper publisher. The ECtHR found that requiring the defendant media organisation to pay the success fee and ATE insurance premium of a very wealthy claimant was contrary to the Convention. The relevant provisions in the LASPO Act will address this and the Government intends to implement them at the same time as costs protection is introduced.

The Leveson Inquiry

53. In July 2011, the Prime Minister announced a two-part inquiry, chaired by Lord Justice Leveson, investigating the role of the press and police in the phone-hacking scandal. The Inquiry published the Leveson Report in November 2012, which reviewed the general culture and ethics of the British media, and made a number of recommendations including introducing a costs protection regime for defamation cases.
54. Lord Justice Leveson, in particular, recommended that '...qualified one way costs shifting be introduced for defamation, privacy, breach of confidence and similar media related litigation as proposed by Lord Justice Jackson'.²⁶
55. The Government has accepted Lord Justice Leveson's recommendation on costs protection and, as a result, on 12 December 2012,²⁷ the Government announced that implementation of the LASPO Act reforms – recoverability of CFA success fee and ATE insurance – would be delayed in defamation cases until a costs protection regime has been introduced.

²³ *ibid.*

²⁴ <http://webarchive.nationalarchives.gov.uk/20111209131620/http://www.justice.gov.uk/consultations/jackson-review.htm>

²⁵ The Government confirmed during the passage of the LASPO Act that QOCS would initially be available for personal injury cases only but it would consider the extension of QOCS – or a variant – to other categories of law, in due course, once there is some experience of the regime in personal injury.

²⁶ Inquiry Report, Chapter 3 para 6.10.

²⁷ Government written ministerial statement at: <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121212/wmstext/121212m0001.htm#12121236000008>

56. The Government gave its commitment to provide some form of cost protection so as not unduly to damage the interests of impecunious parties and, as a result, the Government announced on 9 October 2012²⁸ that it had asked the Civil Justice Council an independent advisory body, chaired by the Master of the Rolls, to look at the issue of costs protection in these cases, and report by the end of March 2013.
57. The Leveson Inquiry proposed a new self-regulatory body for media cases. Discussions on that proposal continue. The proposals in this paper would not cover those cases which are dealt with by a new self-regulatory body, but they would cover any cases which go to court (subject to the effect of section 40 of the Crime and Courts Act 2013 when implemented).

The Civil Justice Council (CJC)

58. The Government asked the CJC to undertake the following work:
1. To identify whether there are meritorious actions for defamation and privacy, which could not properly be brought or defended without some form of costs protection;
 2. If so identified, to advise –
 - (a) in which types of cases (or stages of cases) some form of costs protection should apply; and
 - (b) what options for costs protection might be considered, with their advantages and disadvantages.
 3. To provide written advice to the Ministry of Justice by the end of March 2013.
59. The CJC set up a Working Group and its report was published on 18 April 2013.²⁹ The Working Group's membership was drawn from a representative range of interested parties and its report sets out many of the issues involved. While the report recommended a variation of the QOCS regime, it did not seek to provide definitive answers and conceded that further work would be necessary. The Government welcomed the report and committed to consult on proposals for costs protection in defamation cases before they come into effect.³⁰

²⁸ Hansard, 9 October 2012: Col 935:
<http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121009-0001.htm#12100930000302>

²⁹ http://www.judiciary.gov.uk/Resources/JCO/Documents/CJC/Publications/CJC%20papers/Defamation%20costs_final%20report_18%204%2013%20d.doc

³⁰ <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130423-0001.htm#13042379000274>

The benefits of a reformed CFA regime with costs protection

60. When the costs protection regime for defamation cases is implemented alongside the LASPO Act reforms, a claimant whose claim is funded under a CFA and qualifies for full or partial costs protection, and wins, will be liable to pay the success fee out of damages. However, it is worth noting that general damages for non-pecuniary loss such as pain, suffering and loss of amenity are being increased by 10%,³¹ in part to compensate for claimants having to pay the success fee. The 10% increase applies in all tort cases and successful claimants in a defamation case will receive the 10% increase when the Part 2 reforms apply to these cases.
61. A losing party will remain liable for the winning party's costs in the usual way but will not pay either the success fee or the ATE insurance premium. This will lead to considerable costs savings for defendants.

³¹ *Simmons v Castle* [2012] EWCA Civ 1288.