

Natasha Zitcer
Ministry of Justice
102 Petty France
London SW1H 9AJ

By e-mail: natasha.zitcer@justice.gsi.gov.uk and privatefundingbranch@justice.gsi.gov.uk

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Dear Madam

Controlling costs in defamation proceedings: Reducing Conditional Fee Agreement Success Fees: Consultation Paper CP1/2010

This is the response by the London Solicitors Litigation Association ("LSLA") to the consultation paper published on 19 January 2010.

The LSLA

The LSLA was formed in 1952 and represents the interests of a wide range of civil litigators in London. It has roughly 1,000 members throughout London amongst all the major litigation practices ranging from sole practitioners to major international firms.

Members of the LSLA Committee sit on or have recently been members of the Civil Justice Council, the Civil Rule Committee, the Law Society Civil Litigation Committee, the Commercial Court Users Committee and the Supreme Court Costs Group, to name but a few. As a consequence, the LSLA has become the first port of call for consultation on issues affecting civil and commercial litigation in London and it has, on many occasions, been at the forefront of the process of change.

The consultation paper

The starting position of the LSLA in relation to this consultation, as for previous consultation papers on defamation costs, is that we see no reasons which are sufficiently persuasive for the costs regime in defamation proceedings to be any different from that for other types of civil

proceedings. Our answers to the questionnaire reflect that. It seems to us that the essence of the concerns expressed by the media, and upon which the government suddenly seems so determined to act, relate primarily to the substantive law of defamation and not, in reality, to the rules of civil procedure and, in particular, costs procedure. Accordingly, the LSLA submits that the proposal to reduce the maximum success fee to 10% in defamation proceedings should not proceed.

If this proposal goes ahead it will in the view of the LSLA:

- Deter solicitors from taking the considerable risk involved in offering CFAs to potential defamation claimants; and therefore
- Restrict access to justice to such claimants, who would not be able to fund their claim other than through a CFA; and consequently
- Allow media defendants who have defamed those who cannot afford to fund a claim to ‘get away with it’.

The consultation paper submits that this change is necessary to uphold the right to freedom of expression. But the whole point of the law of defamation is to restrict freedom of expression by balancing that right with the right to protect one’s reputation. As a matter of substantive English law, there are limits to what a person can say or write about another without fear of redress. If defamation claims are having a ‘chilling effect’ (see paragraph 9 of Annex A) on freedom of expression, such that the balance between freedom of expression and protection of reputation appears to have been wrongly struck, then it is the substantive law itself which should be changed, not the rules on costs. It is therefore highly pertinent to note that the government has formed a working party to review the substantive law. We would urge the government to await the outcome of that review before rushing into procedural reform.

We would add that it is wrong for the government to be putting forward this proposal for reform in one isolated area of costs before Lord Justice Jackson’s carefully formulated recommendations in relation to CFAs have been progressed; a working party has already been set up for that purpose and we see no good reason for rushing ahead with reforms to defamation proceedings in the meantime. Taken together with the foreshortening of the consultation period from the usual 12 weeks to a wholly inadequate 4 weeks, there is a seemingly irresistible inference to be drawn that the government is seeking to curry favour

with the media in the run up to the general election. If that were indeed the case, the rushing through of this proposal will not simply be bad government; it will be unlawful.

There are already safeguards in place to protect unsuccessful defendants against levels of success fee which cannot be justified. There is a ready reckoner for calculating the level of success fee which is appropriate in any case depending on the level of risk to the solicitor taking on that case on a CFA. That success fee can and often is reduced on detailed assessment where the costs judge considers this unreasonable. The assertion in the last sentence of paragraph 9 of Annex A that there is a ‘failure of the cost judges to effectively control CFA costs in defamation proceedings’ is a self-serving one made on behalf of the media in 2004. The assertion was completely unsubstantiated and is not borne out by our own experience. Lord Justice Jackson did not discover any evidence that costs judges were failing effectively to exercise their powers to limit success fees to a reasonable amount.

We would also query the validity of the statistical information quoted at paragraph 11 of the consultation paper given that it is based on data provided solely by the Media Lawyers Association from a small sample of cases. Why does the government not seek data from lawyers acting for defamation claimants by way of comparison? In any event, what is striking about the data provided on behalf of the media is how small is the proportion of claims funded by CFA, just 17.5%. How then can the use of CFAs be said to be a particular problem in defamation proceedings requiring a special solution?

Turning to the specific questions posed in the consultation paper:

- 1 *Do you agree that the Conditional Fee Agreements Order 2000 should be amended to reduce the maximum success fee to 10% in some other defamation proceedings?[sic] If you disagree please give your reasons.*

We do not understand the reference to ‘some other’ in the question. We suspect this is a mistake, reflective of the way in which this proposal has been unnecessarily rushed out for consultation.

We do not agree that the success fee in defamation proceedings should be capped at 10%. We see no good reason for this whether in defamation proceedings or indeed in

any other type of proceedings. Success fees are already open to challenge under the current costs assessment procedures if they are not reasonable.

To impose an arbitrary reduction of the maximum possible success fee from 100% down to 10% would be Draconian. However, we do see the merits in imposing a requirement that the success fee be staged. Staged success fees are often appropriate in all types of litigation where CFAs are offered. Indeed, this was supported in the responses to the 2007 consultation paper, *Conditional fee agreements in defamation proceedings: Success Fees and After the Event Insurance*, details of which are set out in paragraph 21 of the consultation paper. As stated in that paragraph, some responses to the consultation supported in principle the introduction of fixed recoverable staged success fees and ATE insurance premiums; however, particularly in the light of media objection, the scheme was not implemented. We would suggest that this scheme should be reconsidered rather than the blanket 10% cap being proposed at present and in considerable haste.

For example, a cap of 10% on pre-action success fees would give the defendant a reasonable opportunity to respond to a letter of claim and dispose of genuine claims at relatively less expense and thus avoid the risk of the substantially higher costs of a claim that progresses to or near trial on a higher success fee. Also, initial risk assessment can be difficult, particularly before a letter before claim is sent and a response received and this could justify capping a success fee at 10% pre-action.

2 *What evidence would you offer in support of a maximum success fee in excess of 10%?*

The level of success fee should reflect the risk the claimant's solicitor is taking on offering a CFA to the claimant; there needs to be flexibility on this which a maximum success fee of 10% will simply not provide. We would submit that in almost all cases where the two sides are prepared to go all the way to trial, there will be a significant litigation risk – and a success fee of 10% will simply not be a fair reflection of that risk in such a case.

- 3 *If you do not agree with the proposal on reducing success fees to 10%, what evidence would you offer in support of maintaining the status quo?*

As we say above, we see no reasons which are sufficiently persuasive for the costs regime in defamation proceedings to be any different from that for other types of civil proceedings. We believe that staged success fees could provide the answer to media objections, without unduly restricting access to justice.

- 4 *Do you think our proposal will affect competition in this area? If so please provide details.*

Yes. If there was a different costs regime for defamation to that for other types of litigation this would be likely to result in defamation becoming an even more specialist area of the law carried out only by niche firms. This will be anti-competitive to the detriment of solicitors who currently carry out defamation work in addition to other work and will thus limit the choice for claimants.

- 5 *Do you think our proposal to reduce success fee would have any particular impact on small firms? If so please give details of the likely costs and effects you believe they will have and what action might be taken to reduce this impact.*

Yes. Smaller practices are less able to run the risk of not being paid for the work they carry out. The effect of reducing the potential reward for running that risk will accordingly have a disproportionate impact on small firms.

- 6 *Do you agree with our initial assessment that the proposed changes will have no equality impacts? If not, please explain what the impacts are and who they affect.*

No. Although there are a small number of niche firms specialising in defamation, at present defamation claims are also dealt with by a much wider range of solicitors' firms, including practices that traditionally service a BME client base. These more general practices tend to charge lower hourly rates than specialist defamation practices, or certainly do not charge higher hourly rates for defamation work. If general practice firms are discouraged from offering defamation services due to there being a separate costs regime, with regard to success fees or any other aspect of costs, there will be less choice.

7 *Do you agree with our assessment of the Human Rights impact of the proposal? If not, please detail what other impact you think they will have.*

We agree that the proposal is likely to have the impact detailed in paragraph 4.12 of the impact assessment, ie, the reform will likely reduce the availability of CFAs in defamation proceedings resulting in cases of defamation, libel and invasion of privacy not being addressed and reducing protection for claimants under Article 8 of the Human Rights Act (right to respect for private and family life).

Yours faithfully

London Solicitors Litigation Association

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