



CAYMAN ISLANDS LAW REFORM COMMISSION



A review of litigation funding in the Cayman Islands- Conditional and contingency fee agreements

Discussion paper

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The Cayman Islands Law Reform Commission

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OVERVIEW

- i. On 27th February, 2012 the Attorney General requested that the Law Reform Commission undertake a review of the law relating to conditional or contingency fee agreements with a view to its reform. This referral was made following the case of *Latoya Barrett v the Attorney General*¹ in which the Honourable Justices called for an examination of the law relating to conditional fee agreements in the Cayman Islands.
- ii. This discussion paper addresses not only the conditional fee agreements which are more prevalent in jurisdictions such as the UK, Australia and New Zealand but also contingency fees which are more familiar to Canada and to the USA.
- iii. A conditional fee agreement is an agreement where the lawyer accepts the client's normal fee only if the action was successful and the lawyer accepts the client's normal fee with an agreed uplift amount in the event of success so as to compensate the lawyer for the risks of not being paid in the event of failure. A contingency fee agreement is one in which the lawyer retains an agreed percentage of the client's recovery, and is paid nothing if the action is unsuccessful, also to compensate for the risks of not being paid in the event of failure. It should be noted however that in the literature the nomenclature is not settled but these are the definitions which the Commission believes best encapsulates the two types of agreements.
- iv. Both types of agreements have been viewed by proponents over the years as fundamental routes to access justice by lower income persons while opponents view such fee agreements as incentive to excessive litigation and argue that they promote a "compensation culture". The advantages and disadvantages of such fee agreements are set out in the paper. It is noted nevertheless that while an examination of the law has been requested, conditional fee agreements have been in use in the Cayman Islands for more than a decade. Their validity have been acknowledged by the courts of the Cayman Islands in several cases to the extent that the court has provided guidelines which attorneys must follow in concluding such agreements with clients. This is notwithstanding the fact that the common law offences of maintenance and champerty have never been repealed and therefore still form a part of the law of the Cayman Islands. *Maintenance* is the ancient crime and tort of assisting a party in litigation without lawful justification. *Champerty* is an aggravated form of maintenance, in which the maintainer receives something of value in return for the assistance given.
- v. The development of such agreements in Canada, the UK, South Africa, Australia and the USA and the problems which have arisen in such jurisdictions by these types of agreements are discussed in the paper as well as the legislative regulation by such jurisdictions. The paper also briefly addresses other types of litigation funding such as before-the-event insurance, after-the-event insurance and litigation funding agreements.

¹ 2012 Vol.1, C.I.L R 127

vi. As conditional fee agreements are already in use, the object of this review is primarily one of codification. In dealing with codification of this area of the law, one of the most important matters to be considered in regulating conditional and contingency fee agreements is the protection of the client. What are the matters which should be brought to the attention of the client before the execution of an agreement? Should there be a cooling off period in which the client may withdraw from the agreement? What penalties should attorneys face when they fail to follow guidelines in the tendering of such agreements?

vii. Also to be considered is to which type of matters should such agreements apply? It is noted that in many jurisdictions these types of agreements are prohibited in family and criminal matters but they flourish in personal injury cases, medical malpractice and class action suits.

viii. The type of oversight which such agreements require is also considered in the paper. Should the court be given oversight of these agreements or could there be a system of review of the agreements by legal associations, similar to South Africa?

ix. Finally should the law of maintenance and champerty be completely abolished or there remain certain types of funding agreements which public policy concerns dictate should never be valid?

CONDITIONAL FEES- LEGISLATIVE RECOGNITION AND REGULATION IN THE CAYMAN ISLANDS

INTRODUCTION

1. On 27th February, 2012 the Attorney General requested that the Law Reform Commission undertake a review of the law relating to conditional or contingency fee agreements with a view to its reform. This referral was made following the case of *Latoya Barrett v the Attorney General*² in which the Honourable Justices called for an examination of the law relating to conditional fee agreements in the Cayman Islands.

2. In that case the Attorney General, and the Cayman Islands Insurance Association, as intervener, appealed an order as to costs recoverable by the respondent Latoya Barrett who succeeded in the Grand Court on the issue of liability in proceedings arising out of a road traffic accident involving a police officer who was on duty. The trial judge³ had ordered that the Attorney General, as the representative of the Government, pay Ms. Barrett's costs. The judge also approved an uplift fee of 33.3% contained in the conditional fee agreement entered into between the Plaintiff and her attorneys-at-law dated 20 August 2008 and the uplift of 33% contained in the Conditional Fee Agreement entered into between the Plaintiff's attorneys-at-law and Counsel dated 4 December 2009. The agreements were adjudged reasonable as between attorney and client and as between barrister and attorney respectively and, on that basis, they were approved.

3. The trial judge further declared that section 7.2 of Practice Direction No 1/2001 titled "*Guidelines Relating to the Taxation of Costs*" did not prohibit the recovery of the uplifts contained in the conditional fee agreement entered into between the Plaintiff and her attorneys-at-law, nor the uplift in the Conditional Fee Agreement entered into between the Plaintiff's attorneys-at-law and Counsel if such uplifts are calculated on an hourly rate basis. The judge was of the view that the taxing officer, when assessing the costs payable under this Order, may, if in the exercise of his discretion he thinks it just to do so, assess such costs on the footing that the appropriate hourly rates are those which include uplifts.

4. In the notice of appeal the Government sought, inter alia, to set aside that part of the judge's order. The intervener questioned the application by the trial judge in the case of the decision of the Grand Court in *Quayam and others v Hexagon Trust Company (Cayman Islands) Ltd*⁴ in arriving at his judgment. In that case, although the Chief Justice had acknowledged that champerty and maintenance are still a part of the law of the

² 2012 Vol.1, C.I.L.R 127

³ Justice Quin

⁴ 2002 CILR 161

Cayman Islands, he went on to consider whether agreements with a success fee were unlawful as being champertous maintenance and void on the grounds of public policy. The Chief Justice decided that the balance of public policy must certainly weigh in favour of allowing the conditional fee arrangements.

5. The Chief Justice at paragraphs 36 and 37 of his judgment stated-

“If a lawyer anywhere has too much at stake in the success of litigation he may be tempted to conduct that litigation in a manner which is unethical. The ultimate concern is that the administration of justice could be impaired by improper conduct of litigation motivated by the self-interest of lawyers becoming common place. It follows that a situation should not be encouraged in which lawyers would be exposed to temptations which might lead them to behave other than in accordance with their best traditions. Improbable though such a scenario might seem in an environment where professional honour remains the norm, those who fear have only to look to the experiences in other places where contingency fees are routinely allowed, to find cause.

There is, however, another equally important and competing public interest: that of ensuring that everyone has access to justice. For many, such as the plaintiffs in this case, that access would be denied for want of legal representation, were it not for the willingness of some lawyers to undertake litigation on the risky basis of a conditional fee arrangement.”.

6. The Practice Direction relied upon by the trial judge was made after the *Quayam* case in 2001 and came into force in 2002. The Court of Appeal in *Barrett* did not address the wider issue of the enforceability of conditional fee agreements generally in the Islands but held that the Practice Direction did not permit a successful party to recover taxation on the standard basis at an hourly rate above the maximum figure permitted in the Practice Direction. In allowing the appeal, the court held that a conditional fee agreement with an uplift fee is unenforceable and that the conditional fee arrangements in the case were to be disregarded.

7. The Court of Appeal urged a review of the law of maintenance, champerty and conditional fees agreements before the making of any relevant legislation. The court noted that complex issues of public policy were involved and that full account must be taken of all interests involved and most importantly of “the need to provide access to justice for those who cannot afford it”.⁵

8. The court had after the *Quayam* case noted the unsatisfactory state of the law and sought the intervention of the Attorney General. In *National Trust for the Cayman Islands Humphreys (Cayman) Limited*⁶ Justice Zacca, President, observed-

⁵ Justice Campbell, para 37, 2012 Vol.1 C.I.L.R. 127

⁶ [2003] CILR 201

“When it became obvious, during the later stages of argument, that the preliminary objection was likely to succeed, observations were made to us by counsel on both sides, as to the present quite unsatisfactory state of the law in the Cayman Islands in regard to conditional fee agreements. We entirely agree with their observations, which we were given to understand are also concurred in by the Cayman Law Society and the Caymanian Bar Association, the professional bodies representing legal practitioners in these Islands. We therefore urge the Attorney General, and through him the responsible executive and legislative authorities, to give the matter urgent attention. What seems to be needed is:

First, a fresh consideration of whether doctrines of champerty and maintenance, already abolished in England, now serve any useful social purpose in the Cayman Islands.

Secondly, in the light of that decision and any action taken on that point, to eliminate certain apparent contradictions and anomalies in the Grand Court Rules which give rise to uncertainty and may mislead some practitioners in the preparation of bills of costs where conditional fee agreements are involved.”

9. Conditional fees again rose for consideration in the case of *In the Matter of the Companies Law (2012 Revision) and in the Matter of DD Growth Premium 2X Fund (In Official Liquidation) 2009*⁷. In that case, which was heard in the Financial Services Division of the Grand Court, Chief Justice Smellie sanctioned the use of a conditional fee agreement between an insolvent company and its attorneys, which agreement allowed the company to continue its claim for claw back for monies to a redeemed shareholder. In giving his sanction of the agreement Chief Justice Smellie gave effect to criteria set out in *Quayam case* in determining the appropriateness of a particular agreement. The criteria applied were as follows-

- (a) all such arrangements must first receive the sanction of the court to be considered in the context of the client and of the case;
- (b) the court is best placed to consider the reliability and reputation of the attorney, and will do so;
- (c) where there is to be an enhanced fee, a requirement for submission to taxation on the solicitor and own client basis will be imposed and, if appropriate, a cap may be placed upon the quantum of fees recoverable;
- (d) in an appropriate case the court, as a matter of its discretion, can disallow the whole or such part, as it sees fit, of any enhanced fee from the amounts which, upon taxation the unsuccessful opponent may be required to pay. That is the fee will be limited to what is reasonable in the circumstances;
- (e) in an appropriate case, depending, among other things, upon the potential value and size of the litigation, the circumstances of the client and the proposed terms of the conditional fee agreement, the client should be

⁷ Cause No. FSD 0050 of 2009

encouraged to take independent legal advice about it and the court may so require before granting its approval;

- (f) the agreement must be in writing and there must be a mechanism by which the client can discharge the attorney;
- (g) the overriding objective is that the conditional fee arrangement must, from beginning to end, be governed in principle and in practice by what is fair and reasonable. To this end, notwithstanding the prior approval of the court, the court must always be able to oversee its execution, by reference, in particular to the manner of the conduct of the proceedings by the attorney.

10. Chief Justice Smellie further reinforced his acceptance of such agreements by noting *obiter* that the Grand Court has on occasion sanctioned official liquidators in the Cayman Islands to engage US counsel on a contingency basis and noted the cases in which this was done i.e. the cases of *In the matter of AJW Master Fund Limited (In official Liquidation)*⁸ and *in the Matter of SPhinX Group of Companies*⁹

11. In a paper aptly entitled “*Conditional fee agreements in Cayman- how illegal are they?*” local law firm Solomon Harris opined that -

“The DD Growth decision is welcome as it enables clients to pursue meritorious claims where they would otherwise be prevented from doing so due to lack of funding. This is significant for liquidators in a situation where the company has no money due to wrongdoing by persons who could, and should, be held liable for the situation of the company. Without some way to pay for the litigation, those wrongdoers might avoid liability.”

12. We say aptly entitled above because one of the issues to be considered by the Commission is whether the sanctioning of such agreements by the court makes them legal. In this short paper the Commission will be considering the status of the law in the Cayman Islands and the disadvantages and benefits of conditional and contingency fee agreements. The development in this area of the law in the UK and other jurisdictions will be covered although ultimately the determining factor will be what is right and applicable for our developing society.

13. This topic is timely in light of the government’s recent reform of the legal aid system, as more and more government resources are being called for in order to ensure that persons are guaranteed proper access to justice. Conditional fee arrangements have been considered by many as an effective way of ensuring that the legal aid system is not overburdened yet ensuring that persons can obtain effective legal representation.

⁸ 18 December 2012, Cause FSD 200 of 2011

⁹ Cause 258 of 2006 (now FSD 16 of 2009 ASCJ), 14th January 2007

HISTORICAL BACKGROUND AND LEGISLATIVE DEVELOPMENT IN OTHER JURISDICTIONS

Maintenance and champerty

14. The discussion of the law relating to conditional fee and contingency fee agreements revolve around their enforceability in the light of the law of champerty and maintenance which still exists in the Cayman Islands today. The starting point however is what is a conditional fee agreement and what is a contingency fee agreement?

15. The distinction between the two types of agreements is not the same in every jurisdiction and at times both types of agreements are called contingency fee or conditional costs agreements. In this paper we will use the following definitions which we find, for the most part, encapsulate the basics of the agreements-¹⁰ -

- **Conditional fee agreements** are agreements in which the lawyer accepts the client's *normal* fee only if the action was successful or where the lawyer accepts the client's normal fee with an agreed *uplift* amount in the event of success so as to compensate the lawyer for the risks of not being paid in the event of failure (a 'conditional uplift fee' agreement); and
- **Contingency fee agreements** are agreements in which the lawyer retains an agreed *percentage* of the client's recovery, and is paid nothing if the action is unsuccessful, to compensate for the risks of not being paid in the event of failure (the American model or the 'percentage contingency fee').

16. Historically however such types of agreements were not legal as they offended against the ancient crime and tort of maintenance and the crime of champerty. Maintenance is the crime and tort of assisting a party in litigation without lawful justification. Champerty is an aggravated form of maintenance, in which the maintainer receives something of value in return for the assistance given.

17. The UK Law Commission in its 1966 report¹¹ noted that the English law of maintenance "was the product of particular abuses which arose in the conditions of mediaeval society and later led to a series of statutes reinforcing the common law by imposing penalties for the offences of maintenance and champerty". Nobles used, as a tool of oppression, a systematic promotion of lawsuits, as it was seen as an effective method of inflicting harm. Lord Esher MR in *Alabaster v Harness*¹² observed as follows-

“ the doctrine of maintenance... does not appear to me to be founded so much on general principles of right and wrong or of natural justice as on considerations of public policy. I do not know that, apart from any specific law on the subject, there

¹⁰ We are guided in this by the definitions of the agreements provided by Gary Chan Kok Yew in his paper entitled "*Examining Public Policy- A case for conditional fees in Singapore*"

¹¹ Report No. 7, 1966 "Proposals for reform of the law relating to maintenance and champerty"

¹² [1895] 1 Q.B 339, 342

would necessarily be anything wrong in assisting another man in his litigation. But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful.”.

18. Lord Mustill in *Giles v Thompson and related appeals*¹³ opined that-

“My Lords, the crimes of maintenance and champerty are so old that their origins can no longer be traced, but their importance in medieval times is quite clear. The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims which the defendant lacked the resources and influence to withstand. The fact that such conduct was treated as both criminal and tortious provided an invaluable external discipline to which, as the records show, recourse was often required.”.

19. Champerty was an aggravated form of maintenance because of the accompanying strong temptation to suborn witnesses in order for the champertor to pursue a worthless claim. In *Giles v Thompson*¹⁴ Steyn LJ discussed the historical origin of champerty and observed-

“it seems that one of the abuses which afflicted the administration of justice was the practice of assigning doubtful or fraudulent claims to royal officials, nobles or other persons of wealth and influence, who could in those times be expected to receive a very sympathetic hearing in the court proceedings. The agreement often was that the assignee would maintain the action at his own expense, and share the proceeds of a favourable outcome with the assignor. Often these disputes involved a claim to the possession of land, and the subsequent sharing of land if the action was successful. Two factors contributed to the growth of these abuses. First, detachment and disinterestedness was not the hallmark of the mediaeval judiciary. There was in truth no independent judiciary. Secondly, the civil justice system was not yet developed, and it was not capable of exposing abuses of legal procedure and giving effective redress. In these conditions a patchwork of statutes created the offences of maintenance and champerty as well as the torts of maintenance and champerty. And there was apparently a parallel common law development in respect of maintenance and champerty.”.

20. As legal systems evolved with the growth of independent judiciary and as the subsidization of a cause of action came to be seen as justified in certain circumstances where there was legal justification, the ambit of the crimes and torts of maintenance and

¹³ [1993] 3 All ER, 321

¹⁴ ante

champerty became more restricted. As noted by Lord Esher in the citation above, apart from the law at the time, there would necessarily not be anything wrong in assisting another man in his litigation. In 1920 Lord Dunedin in *Weld-Blundell v Stephens*¹⁵ described the action of maintenance as a “cumbersome curiosity of English law.” Danckwerts J in *Martell and Others v Consett Iron Co. Ltd*¹⁶ opined that “unless the law of maintenance is capable of keeping up with modern thought, it must die in a lingering and discredited old age.”.

21. In relation to maintenance and champerty as crimes, the UK Law Commission in 1966 stated that-

“Maintenance and champerty as crimes are a dead letter in our law. There are no records of any prosecution for either for many years past. They do no more today than add unnecessarily to the length of legal textbooks and the statute book. To rid the law of these crimes would be merely to clear away lumber discarded in practice, though not in theory destroyed.”.

22. As to their status as torts the Commission was of the view that the action for damages for maintenance is “today no more than an empty shell.” The Commission however was more reticent in its discussion of champerty which it felt in some cases plays an effective role and one of those roles related to the practice of solicitors. The recommendations of the Commission were as follows-

- (a) The common law and statutory misdemeanours of maintenance and champerty should be abolished.
- (b) Maintenance and champerty as actionable wrongs should cease to exist.
- (c) Champertous agreements (including “contingency fee” arrangements between solicitor and client) should, for the present, continue to remain unlawful as contrary to public policy. Meanwhile, further study, in consultation with the Law Society, should be given to the question of “contingency fee” arrangements.

23. Further to those recommendations, the Criminal Law Act of 1967 abolished both as crimes and independent torts. However, section 14(2) of the Act provides that the abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal. The result of such a provision is that a person who would have profited from a case in which he has no interest still cannot go to court to enforce such contract.

¹⁵ [1920] AC, 977

¹⁶ [1954] 3 All ER 339

Development of conditional fee agreements and other forms of litigation funding in the UK

24. Notwithstanding the abolition of maintenance and champerty as common law offences, for many years after the passage of the legislation the UK courts continued to find conditional fees agreements to be champertous. Lord Denning in 1975 noted in *Wallerstenier v Moir*¹⁷, that-

“English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a “contingency fee”, that is, that he gets paid the fee if he wins, but not if he loses. Such an agreement was illegal on the ground that it was the offence of champerty.”.

25. In 1979 the Royal Commission on Legal Services rejected contingency fees on the ground that they “may lead to undesirable practices including the construction of evidence, the improper coaching of witnesses, the use of professionally partisan expert witnesses and lead the courts into error and competitive touting.”¹⁸

26. Up to 1989 the UK Law Society rejected conditional fees as an acceptable form of litigation funding but in that year the Law Society’s working party in its second report recommended to the Council of the Law Society that statutory bars on contingency fees should be removed and that if that is done the Council should immediately permit speculative funding of all types of cases.¹⁹

27. It was not until more than twenty years after the Criminal Law Act that the legislature provided legislative regulation of conditional fee agreements by the Courts and Legal Services Act 1990.²⁰ Under that Act, a conditional fee agreement is defined as an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances. A conditional fee agreement can provide for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances. Section 58 of the Act provides that a conditional fee agreement which satisfies all of the conditions applicable to it by virtue of the section shall not be unenforceable by reason only of its being a conditional fee agreement, but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.

28. Section 58 of the Act provides that every valid conditional fee agreement must comply with the following conditions-

¹⁷ (No. 2) [1975] 1 QB 373

¹⁸ Cmnd 7648, para 16.4 p. 177 (1979)- sourced from “Ligation funding- key issues and background information”, the Law Society, 18 December 2008

¹⁹ *ibid*

²⁰ Since amended by the Access to Justice Act, 1999

- (a) it must be in writing;
 - (b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and
 - (c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor.
29. Where a conditional fee agreement provides for a success fee-
- (a) it must relate to proceedings of a description specified by order made by the Lord Chancellor;
 - (b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and
 - (c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor.
30. In accordance with section 58, if a conditional fee agreement is an agreement to which section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies, subsection (1) of section 58 shall not make it unenforceable. A solicitor acting under a conditional fee agreement must give the client all relevant information relating to the arrangement.
31. Regulations made under the Act provide that a success fee can be as high as 100% of the fee that would be otherwise payable.
32. Proceedings which cannot be the subject of an enforceable conditional fee agreements are criminal proceedings, (apart from proceedings under the Environmental Protection Act 1990) and certain family proceedings, which include proceedings under the Matrimonial Causes Act 1973, the Adoption and Children Act 2002, the Domestic Proceedings and Magistrates' Courts Act 1978, the Matrimonial and Family Proceedings Act 1984 Pt III, the Children Act 1989 Pts I, II and IV.²¹
33. The regulation of conditional fees in the UK has seen many changes since 1990 with amendments to the Court and Legal Services Act by the Access to Justice Act and by the Legal Aid, Sentencing Act and Punishment of Offenders Act of 2012. The Explanatory Note to the Access to Justice Act described the evolution of the law of litigation funding since 1990 as follows-

“Since the introduction of conditional fees, the common law has been developed by two recent decisions of the courts (*Thai Trading Co.(A Firm) v Taylor*, [1998] 3 All ER 65 CA; and *Bevan Ashford v Geoff Yeandle (Contractors) Ltd*, [1998] 3 All ER 238 Ch D). In the first of these cases the Court of Appeal held that there were no longer public policy grounds to prevent lawyers agreeing to work for less

²¹ See Halsbury's, Volume 65, para 724 for list of all legislation

than their normal fees in the event that they were unsuccessful, provided they did not seek to recover more than their normal fees if they were successful. (The latter was only permissible in those proceedings in which conditional fee agreements were allowed). In *Bevan Ashford*, the Vice Chancellor held that it was also lawful for a conditional fee agreement to apply in a case which was to be resolved by arbitration (under the Arbitration Act 1950), even though these were not court proceedings, provided all the requirements specified by regulations as to the form and content of conditional fee agreements were complied with.

In addition, it is now possible for someone contemplating litigation to take out an insurance policy to cover, in the event that the case is lost, both the costs of the other party and his or her own legal costs (including the solicitor's fees if these are not subject to a conditional fee agreement). Some of these policies were developed to support the use of conditional fee agreements but others are used to meet lawyers' fees charged in the traditional way. The Act makes premiums paid for protective insurance recoverable in costs.

The principles behind the Government's desire to see an expansion in the use of conditional fee arrangements were set out in a consultation paper, "Access to Justice with Conditional Fees," Lord Chancellor's Department, March 1998."

34. According to the Notes, the intention of the amendments in the Access to Justice Act was to-

- ensure that the compensation awarded to a successful party is not eroded by any uplift or premium - the party in the wrong will bear the full burden of costs;
- make conditional fees more attractive, in particular to defendants and to plaintiffs seeking non-monetary redress - these litigants can rarely use conditional fees now, because they cannot rely on the prospect of recovering damages to meet the cost of the uplift and premium;
- discourage weak cases and encourage settlements; and
- provide a mechanism for regulating the uplifts that solicitors charge - in future, unsuccessful litigants will be able to challenge unreasonably high uplifts when the court comes to assess costs.

35. Thus, for example, section 58A(6) had been amended to provide that a costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee. This provision was changed by the Legal Aid, Sentencing Act and Punishment of Offenders Act to provide that a costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement. That Act also provided further regulation on how a success fee is to be calculated in certain proceedings.

36. It has been argued by some in the UK that conditional fee agreements fed the growth of a compensation culture in the UK similar to that of the USA. In 2008 BBC news published an article on the effect of the “notorious” conditional fee agreements where it stated that the changes in the law regulating conditional fee agreements prompted “a blizzard of negative press stories about the legal industry, particularly in its most reported sector, personal injury”. The article went on- “Headlines like "Legal 'vultures' are making £2m out of the NHS each week" or "Compensation culture is killing equestrianism" or "Compensation culture wrecking small firms" have their effect on the public's imagination. The suggestion is that grasping lawyers vastly inflate their fees for no-win no-fee cases, leading to a drain on the public purse.”.

37. However, statistics provided for a seven year period from 2001 to 2008 did not readily support such dismal headlines. Cases involving compensation for accidents and diseases which were reported to the Compensation Recovery Unit of the Department of Work and Pensions showed that between those years there was no significant increase in numbers. The number of cases registered to the Unit in 2000/1 was 735931 and the number in 2007/8 was 732750. It was further noted as follows-

“Clinical negligence cases notified to the unit have fallen from 10,890 in 2000/1 to 8,872 in 2007/8. Accidents at work cases have fallen from 97,675 in 2000/1 to 68,497 in 2007/8. Only motor accident claims have risen rapidly, rocketing from 403,892 cases in 2004/5 to 551,899 cases in 2007/8.

In its 2006 report on the "compensation culture", the House of Commons Constitutional Affairs Committee heard evidence that personal injury claims had gone up from about 250,000 in the early 1970s to the current level, but that the introduction of no-win no-fee had coincided with this levelling off.”²²

38. The 2006 report published by the House of Commons Constitutional Affairs Committee followed an inquiry by that Committee to examine the compensation system in the United Kingdom. The Committee examined, among other things, the effect of the move to “no win, no fee” conditional fee agreements, the Compensation Bill [Lords], the NHS Redress Bill [Lords] and allegations of excessive risk aversion in public bodies i.e.– the propensity of organisations to avoid undertaking work which might have some risk attached, however slight. The BBC article noted that as well “as the drain on resources, no win no fee has also been blamed for creating a “risk averse” culture where games of conkers are banned, lamp posts are padded and playgrounds closed.”.

39. Contrary to the prevailing views, after interviewing many persons and organisations and considering 60 written submissions, the Committee concluded that while there was evidence of growing risk aversion it was not caused by the introduction of conditional fee agreements and that statistics did not show the existence of a compensation culture. The Committee stated that-

²² Extracted from 2008 BBC News “How did no-win no-fee change things?”

“We found no evidence that conditional fee agreements or personal injury litigation were a significant factor in causing risk aversion, and personal injury litigation has not increased in recent years. Risk aversion has a number of complex causes, including advertising by claims management companies, selective media reporting, a lack of information about how the law works and, on occasion, a lack of common sense amongst those who implement health and safety guidelines. Risk aversion of this sort is a concerning modern phenomenon that has an adverse effect on both individuals and the economy as a whole.”.

40. In its conclusion in the report the Committee noted that-

“The introduction of CFAs was designed, in part, to widen access to justice. The evidence appears to show that it has had some success in meeting that aim, although perversely, some cases which previously would have received legal aid funding may not receive CFA funding because the chances of success are not high enough. Conditional fee agreements have not directly caused the perception of a compensation culture. The statistics demonstrate that the number of claims has not risen since CFAs were introduced as the primary method of funding personal injury claims. Nonetheless, we agree with the conclusions drawn by Citizens Advice, that the introduction of CFAs (and with it a class of unregulated intermediaries acting as claims managers) has adversely affected the reputation of legal service providers, whether professional lawyers or not. The increased awareness of the public that it is possible to sue without personal financial risk, when combined with media attention to apparently unmeritorious claims being brought, has contributed to a widely held opinion that we do indeed have a compensation culture.”

41. The view of the Committee has been supported in other publications with one writer describing the allegations of increasing litigation as “loose talk”. It was felt that people in the UK are more likely to “lump it” rather than litigate, while another paper found that although there was a growing compensation culture it was unlikely to reach the levels of the USA.²³

42. Since the introduction of conditional fee agreements and, notwithstanding the criticisms highlighted above, other similar means of accessing justice have developed in the UK. The Access to Justice Act also reformed the law to provide for litigation funding agreements. Essentially, by such agreements third parties could fund litigation in return for a share of the proceeds. Based on our research it appears that provisions of the Act regulating the litigation funding agreements are still not yet in force. However it seems that the practice is well known and growing in the UK and litigation funders are regulated by a voluntary code of conduct which was introduced in 2011 and updated in 2014.

²³ “State of fear: Britain's ‘Compensation culture’ reviewed”-, Kevin Williams, Reader in Law, Sheffield Hallam University; compare “The Cost of Compensation Culture” , General Insurance Communications Committee of the UK Actuarial Profession, working party. 2002

43. In accordance with the Code, a litigation funder must have access to funds immediately within its control, including within a corporate parent or subsidiary or it must act as the exclusive investment advisor to an entity or entities having access to funds immediately within its or their control. A funder must fund the resolution of disputes within England and Wales and such funding should include funds to enable the litigant to meet costs, including pre-action costs, of resolving disputes by litigation, arbitration or other dispute resolution procedures. A funder receives a share of the proceeds if the claim is successful, as defined in the agreement, and must not seek any payment from the litigant in excess of the amount of the proceeds of the dispute that is being funded, unless the litigant is in material breach of the provisions of the funding agreement.

44. Further to the Code, a funder must, among other things-

- (a) take reasonable steps to ensure that the litigant has received independent advice on the terms of the litigation funding agreement, which obligation will be satisfied if the litigant confirms in writing to the funder that the litigant has taken advice from the solicitor instructed in the dispute;
- (b) not take any steps that cause or are likely to cause the litigant's solicitor or barrister to act in breach of their professional duties;
- (c) not seek to influence the litigant's solicitor or barrister to cede control or conduct of the dispute to the Funder;
- (d) maintain at all times adequate financial resources to meet its obligations to fund all of the disputes that it has agreed to fund, and in particular will maintain the capacity-
 - (i) to pay all debts when they become due and payable; and
 - (ii) to cover aggregate funding liabilities under all of its agreements for a minimum period of 36 months.

45. Chief Justice Smellie noted in his decision in *DD Growth Premium 2X Fund* that the courts here have on occasion sanctioned official liquidators in the Cayman Islands to engage US counsel on a contingency basis. Presumably such agreements were the US model contingency fee agreements which can best be described in a few words i.e. “*no win, no fee*”. According to our research such agreements originated as far back as 1786 in the United States and largely found root in order to combat the fact that the US does not have a loser pay policy as in the Commonwealth. One source noted that-

“Contingency fee arrangements have existed in the US at least since 1786, when a Massachusetts pamphleteer called them a “pernicious practice [that forced people to] give one quarter part of their property to secure the remainder, when they appeal to the laws of their country.” Records indicate that during America’s first decades, a variety of litigation involved contingency fees, and clients included merchants, creditors, wealthy heirs, Revolutionary War veterans, American diplomats, Indian tribes and settlers with conflicting land grants.

Contingency fees were also a preferred method for US Civil War veterans to sue the US Government after the war concluded.”²⁴

46. ²⁵In 2008 the UK Law Society considered key issues in the growth of litigation funding in the UK and provided arguments for and against contingency fees which are similar to the US model. They noted that some solicitors have suggested that “a prohibition against contingency fees on public policy issues is now outdated as long as clients are protected against unfair or unreasonable agreements. This is supported by the increasing change in attitude of the judiciary towards champerty and maintenance.”

47. In its paper²⁶ the Society put forward the following arguments for and against such agreements-

Arguments in favour of Contingency Fee Agreements

The arguments in favour of permitting contingency fee agreements appear to involve the following elements-

- It could be argued that they give greater access to justice as there are instances where other forms are not available often in what might be seen as the most deserving of cases.
- In seriously contested cases they may offer clients an assurance of their lawyer’s motivation to win their case.
- They may offer a wider range of choice for funding litigation required because After the Event insurers are not supporting some types of CFA cases due to perceived higher than acceptable risks of not succeeding.
- They are already used to fund a wide range of disputes in the Employment Tribunals including certain types of contractual disputes and injury disputes where the contentious tribunals have a parallel jurisdiction.
- They are already extensively used in some areas of contentious work without any apparent problems, for example the predictable costs regime in RTA cases is to all intents and purposes a contingency fee regime in that costs in the event of success are percentage of the damages recovered payable by the Defendants.
- They offer costs recovery which is proportionate to the value of the case meeting the increasing call for costs to be so proportionate as reflected in the increasing move to fixed costs

²⁴ “Contingency fees as an incentive to excessive litigation”- Walter Olson, US legal analyst

²⁵ Ante note 18

²⁶ *ibid*

- The recovered costs may be structured as capped/ recoverable in a way that they do not put at risk certain client recoveries for example future care costs.

48. The Society further noted that “where people are involved in civil litigation, the funding of such litigation is a crucial issue and one which can deter people from obtaining appropriate compensation. While the conditional fee system has significantly widened access to justice, there remain gaps. Also, CFAs have proved to involve complications whereas contingency fee agreements may prove simpler in operation. It must also, as a matter of policy, be appropriate for individuals to have a choice about the way in which litigation is funded, provided that there are appropriate safeguards for the administration of justice and to protect clients and their opponents being faced with unjustified costs demands.”

49. The arguments put forward by the Law Society against contingency fees were as follows-

- They give solicitors an interest in the action, which may conflict with the duties they owe to their clients and to the court.
- The English legal system aims that damages should cover the actual loss suffered and make appropriate provision for the future, particularly in the case of seriously injured claimants – there is a danger that this could be jeopardised if costs account for a substantial proportion of those damages.
- If costs are to be recovered from the other side, there may well be an increase in the costs of litigation generally.
- There might be an increase in unmeritorious claims.
- They may lead to an increase in damages to compensate for the fact that damages will be eroded.
- Although they offer proportionality they do not get over the fact the client may be paying a proportion of their damages towards the solicitors costs.
- There may be reputational damage to the profession as has arisen to an extent from the conditional fee system.”.

50. In support of contingency fees, writers such as such as Professor Michael Zander²⁷ have argued for the introduction of contingency fees. In an article for the DePaul University entitled “*Will the evolution in the funding of civil litigation in England eventually lead to contingency fees?*” Professor Zander noted as follows-

²⁷ Emeritus Professor of Law, London School of Economics

“Describing the introduction of conditional fees, the current edition of a leading work on costs says, “Contingency fees were still an abhorrence, but conditional fees were given cautious approval. It was a distinction without a difference.”.

Under both English-style conditional fees and American-style contingency fees, the lawyer's fee is determined by the result. If conditional fees are permitted, why not contingency fees? If contingency fees are banned because of fear that the lawyer might be tempted to stoop to unethical conduct to win in order to earn his fee, why does that same fear not apply to CFAs?”.

51. Further to the growing support for the introduction of such fees in contentious litigation²⁸ Lord Justice Jackson, who was commissioned to review the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost, in his final report²⁹ recommended that lawyers should be able to enter into contingency fee agreements but on the basis that the unsuccessful party in the proceedings will only be ordered to pay an amount that, had the action not involved a contingent fee, would reflect an award of the successful party's costs on a conventional basis, with any difference to be borne by the successful party. The recommendation was that-

“Having weighed up the conflicting arguments, I conclude that both solicitors and counsel should be permitted to enter into contingency fee agreements with their clients on the Ontario model. In other words, costs shifting is effected on a conventional basis and in so far as the contingency fee exceeds what would be chargeable under a normal fee agreement, that is borne by the successful litigant.”.

52. Lord Justice Jackson noted in relation to contingency fee agreements that “permitting the use of contingency fee agreements increases the types of litigation funding available to litigants, which should thereby increase access to justice”. He opined in his analysis of conditional fee agreements that-

“³⁰Although many people formerly regarded it as an anathema for lawyers to have a financial stake in the outcome of litigation which they were conducting, this is no longer the case. In the course of the Costs Review I have encountered no tenable arguments for returning to the position which existed before style 1 CFAs³¹ were permitted. In my view, there can be no objection in principle to lawyers agreeing to forego or reduce their fees if a case is lost. Nor can there be any objection to clients paying something extra in successful cases as compensation for the risks undertaken by their lawyers, provided that the extra payment is reasonable. Therefore I do not recommend that the clock should be put

²⁸ Contingency fees had been in use in the UK for some years in all tribunals other than employment appeals tribunal and land tribunals- sourced from the preliminary report of Lord Justice Jackson

²⁹ “Review of Civil Litigation Costs, Final Report”, 2009

³⁰ Para. 1. 8 of report

³¹ Original conditional fee agreements

back, so as to prohibit “no win, no fee” agreements. Nor do I recommend any ban upon style 1 CFAs, which remain perfectly lawful.”.

53. Further thereto, the Legal Aid, Sentencing and Punishment of Offenders Act introduced the damages-based agreement (the UK version of the contingency fee agreement) which is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that-

- the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided; and
- the amount of that payment is to be determined by reference to the amount of the financial benefit obtained.

54. In accordance with the legislation, a damages-based agreement must be in writing, must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement or to proceedings of a description prescribed by the Lord Chancellor. Further, if the regulations so provide, the agreement must not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner.

55. The agreement must also comply with other prescribed terms and conditions and must be made only after the person providing services under the agreement has complied with such requirements (if any) as may be prescribed as to the provision of information. An agreement which does not satisfy those requirements is not enforceable.³²

56. In effect, notwithstanding the nomenclature, the UK in April 2013, the date of commencement of the provisions, introduced US style contingency fee agreements to the jurisprudence of the UK.

Conditional fee and contingency fee agreements in other jurisdictions

57. Conditional fee agreements and contingency fee agreement exist in various forms in other Commonwealth jurisdictions such as Australia, Canada and South Africa.

Canada

58. Today, all provinces in Canada permit contingency fees, subject however to differing rules. The Ontario model for contingency fees was recommended by the Jackson report. It is a model which the Commission also believes should be considered, not least for its clarity but for the protections which are given to the clients under the statute. In Ontario contingency fees agreements were introduced in 2004 and are governed by the Solicitors Act and by the Contingency Fee Agreement Regulations. In

³² *ibid*

accordance with the Act, a solicitor may enter into a contingency fee agreement that provides that the remuneration paid to the solicitor for the legal services provided to or on behalf of the client is contingent, in whole or in part, on the successful disposition or completion of the matter in respect of which services are provided. However, a solicitor must not enter into a contingency fee agreement if the solicitor is retained in respect of a proceeding under the Criminal Code (Canada) or any other criminal or quasi-criminal proceeding or a family law matter.

59. Like all of the contingency fee agreements in Canada, in Ontario a contingency fee agreement must be in writing. If a contingency fee agreement involves a percentage of the amount or of the value of the property recovered in an action or proceeding, the amount to be paid to the solicitor must not be more than the maximum percentage, if any, prescribed by regulation of the amount or of the value of the property recovered in the action or proceeding, however the amount or property is recovered. However, a solicitor may enter into a contingency fee agreement where the amount paid to the solicitor is more than the maximum percentage prescribed by regulation of the amount or of the value of the property recovered in the action or proceeding, if, upon joint application of the solicitor and his client the agreement is approved by the Superior Court of Justice.

60. In determining whether to grant an application, the court must consider the nature and complexity of the action or proceeding and the expense or risk involved in it and may consider such other factors as the court considers relevant.

61. A contingency fee agreement must not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement, unless-

- (a) the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and
- (b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a proportion of them.

62. For purposes of assessment, if a contingency fee agreement is not one which must be submitted to the court, the client may apply to the Superior Court of Justice for an assessment of the solicitor's bill within 30 days after its delivery or within one year after its payment. If it is one to which must be submitted to the court, the client or the solicitor may apply to the Superior Court of Justice for an assessment within the time prescribed by regulations.

63. Regulations govern, among other things, the maximum percentage of the amount or of the value of the property recovered that may be a contingency fee as well, including the maximum amount of remuneration that may be paid to a solicitor pursuant to a contingency fee agreement.

64. It has been argued that the court approval is intended to discourage frivolous lawsuits and to protect attorney's clients. However, some have criticised the restrictions, claiming that the restrictions attempt to give judges the power to determine what an attorney's time is worth or to speculate on how long attorneys work on specific cases.³³ However, the Ontario Court of Appeal in a securities class action case of *Strosberg LLP v. Atlas Cold Storage*³⁴ affirmed that the court will intervene in contingency fee agreements in order to ensure that legal fees remain fair and reasonable. In the case at first instance, the motion judge, whose decision was confirmed on appeal, considered a contingency fee agreement which the applicants had alleged provided for fees which were excessive. The judge fixed the Class Counsel's fees at \$6,300,000, plus \$315,000 for G.S.T whereas the amount that was agreed for fees under the contingency agreement had been a fee of \$12 million where the base fee claimed was approximately \$3.25 million.

65. The appellants in the Court of Appeal had argued that the amount fixed was approximately one-half the amount agreed upon in their contingency fee agreements. In giving her judgement, the motion judge had listed the factors (with which the Court of Appeal agreed) that are relevant in determining the reasonableness of the fee and the factors were as follows-

- (a) the time expended;
- (b) the factual and legal complexities of the matters to be dealt with;
- (c) the degree of responsibility assumed by the lawyer;
- (d) the monetary value of the matters in issue;
- (e) the importance of the matter to the client;
- (f) the degree of skill and competence demonstrated by the lawyer;
- (g) the results achieved;
- (h) the ability of the client to pay; and
- (i) the expectations of the client as to the amount of the fee.

66. The motion judge ultimately concluded that the 7,400 docketed hours for a three day pleadings motion, preparation for a certification motion that was never argued, which included 12 days of cross-examination, and a three day mediation was not justified. She further held that the base fee of \$3.25 million was not a reasonable base fee for the work that was performed.

67. In summarizing, the motion judge stated that-

"I believe that it is important to encourage experienced counsel to take on meritorious cases that are tough and this is particularly so in shareholder class actions, which are really in their infancy in Canada. I accept that the result achieved was probably the best that could be achieved in the circumstances. I accept that the risks were great, although perhaps not as great as counsel contend.

³³ Legal Finance Journal

³⁴ 2009

I do not, for example, accept that this was a “bet your firm” litigation referred to in *Endean v. Canadian Red Cross Society*, [2000] B.C.J. [N]o. 1254. The risks were spread across three firms and support was obtained from the Class Proceedings Fund. The members of the class counsel team are very experienced, very creative and they did a thorough and diligent job. They are deserving of being fairly compensated at a level significantly above an amount that might be considered a reasonable base fee given the risks involved. However, I do not believe that the base fee of \$3.25 million is reasonable or that the requested fee of \$12 million, representing 30% of the gross recovery and a much greater percentage of the net recovery is fair and reasonable. In my opinion, it is excessive in relation to the recovery for the class.”.

68. In analysing the case, a commentator³⁵ from Osgoode Hall Law School noted that-

“*Atlas* is a good example of the practical considerations that have to be kept in mind when considering contingency fees. The courts in *Atlas* disregarded the contingency fee agreement in favor of an amount that is “fair and reasonable”. No matter how well a contingency fee agreement is drafted, if the case does not warrant the work involved, or does not reflect the level of complexity or skill required, then the court will throw out the agreement and enforce their own “fair and reasonable” amount. Thus, a detailed analysis and investigation of the facts must be conducted before taking on any case. *The question is whether contingency fee agreements hold any value in the face of court discretion.*”.

69. In the province of Saskatchewan, contingency fees are permitted but must be in writing. As well, clients may still be responsible for some fees, such as disbursements. In the province of Quebec contingency fees of 15% to 25% have been approved, but all contingency fees in that province are subject to claims of reasonableness.³⁶

70. Contingency fees³⁷ are regulated in British Columbia by the Legal Profession Act and by the Law Society Rules. Under the Rules a lawyer who enters into a contingent fee agreement with a client must ensure that, under the circumstances existing at the time the agreement is entered into, the agreement is fair, and the lawyer’s remuneration provided for in the agreement is reasonable. A lawyer who prepares a bill for fees earned under a contingent fee agreement must ensure that the total fee payable by the client does not exceed the remuneration provided for in the agreement, and is reasonable under the circumstances existing at the time the bill is prepared.

71. Subject to the court’s approval of higher remuneration under the Legal Profession Act, the maximum remuneration to which a lawyer is entitled under a contingent fee agreement for representing a plaintiff up to and including all matters pertaining to the trial of an action is as follows:

³⁵ Sona Dhawan

³⁶ Legal Finance Journal

³⁷ In some provinces called contingent fees

- (a) in a claim for personal injury or wrongful death arising out of the use or operation of a motor vehicle, 33 1/3% of the amount recovered; and
- (b) in any other claim for personal injury or wrongful death, 40% of the amount recovered.³⁸

72. However, a contingent fee agreement may provide that the lawyer may elect to forego any remuneration based on a proportion of the amount recovered and receive instead an amount equal to any costs awarded to the client by order of a court.

73. In accordance with the rules, a contingent fee agreement must be in writing and must state that the person who entered into the agreement with the lawyer may, within 3 months after the agreement was made or the retainer between the solicitor and client was terminated by either party, apply to a district registrar of the Supreme Court of British Columbia to have the agreement examined, even if the person has made payment to the lawyer under the agreement. Such agreement cannot include any of the following provisions-

- (a) the lawyer is not liable for negligence or is relieved from any responsibility to which a lawyer would otherwise be subject;
- (b) the claim or cause of action that is the subject matter of the agreement cannot be abandoned, discontinued or settled without the consent of the lawyer, a law firm or a law corporation; or
- (c) the client may not change lawyers before the conclusion of the claim or cause of action that is the subject matter of the agreement.³⁹

South Africa

74. After the acceptance by the South African Government of the South African Law Reform Commission's report on contingency fees i.e. '*Speculative and Contingency Fees*'⁴⁰(Project 93) (1996), South Africa introduced contingency fees in 1997 pursuant to the Contingency Fee Act. Under that Act a contingency fee agreement includes both the "no win, no fee model" as well as the UK style conditional fee model. Both are defined as contingency fees. A contingency fee agreement must be in writing signed by or on behalf of the client and by the attorney-at-law. The legislation⁴¹ provides that each such agreement must contain at least the following-

- (a) the proceedings to which the agreement relates;
- (b) that before the agreement was entered into, the client-
 - (i) was advised of any other ways of financing the litigation and of their respective implications;

³⁸ Rule 8.2

³⁹ Rule 8.3

⁴⁰ Project 93, 1996

⁴¹ Section 3

- (ii) was informed of the normal rule that in the event of his, her or it being unsuccessful in the proceedings, he, she or it may be liable to pay the taxed party and party costs of his, her or its opponent in the proceedings;
- (iii) was informed that he, she or it will also be liable to pay the success fee in the event of success; and
- (iv) understood the meaning and purport of the agreement;
- (c) what will be regarded by the parties to the agreement as constituting success or partial success;
- (d) the circumstances in which the legal practitioner's fees and disbursements relating to the matter are payable;
- (e) the amount which will be due, and the consequences which will follow, in the event of the partial success in the proceedings, and in the event of the premature termination for any reason of the agreement;
- (f) either the amounts payable or the method to be used in calculating the amounts payable;
- (g) the manner in which disbursements made or incurred by the legal practitioner on behalf of the client shall be dealt with;
- (h) that the client will have a period of 14 days, calculated from the date of the agreement, during which he, she or it will have the right to withdraw from the agreement by giving notice to the legal practitioner in writing: Provided that in the event of withdrawal the legal practitioner shall be entitled to fees and disbursements in respect of any necessary or essential work done to protect the interests of the client during such period, calculated on an attorney and client basis; and
- (i) the manner in which any amendment or other agreements ancillary to that contingency fees agreement will be dealt with.

75. Under section 5 of the Act a client who has entered into a contingency fees agreement and who feels aggrieved by any provision thereof or any fees chargeable in terms of such agreement may refer the agreement or fees to a professional controlling body or, in the case of a legal practitioner who is not a member of a professional controlling body, to such body or person as the Minister of Justice may designate by notice in the *Gazette* for the purposes. A professional controlling body is defined by the Act to include any body established by or under any law for the purposes of exercising control over the carrying on of business of the attorney's profession, and of which such an attorney is a member.

Australia

76. Australian states provide for conditional fee agreements under several legal Profession Acts.⁴² Such legislation expressly excludes the US contingency fee agreement and it is in certain states a criminal offence to enter into such agreements⁴³. For example, the Legal Profession Uniform Act of New South Wales provides for conditional costs

⁴² Such legislation may be found in the Capital Territory, Tasmania, New South Wales, Victoria, Northern Territory, South Australia and Queensland

⁴³ E.g. see Legal Profession Acts of Tasmania and Queensland

agreements. Section 181 of that Act provides that a conditional costs agreement may provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate. A conditional costs agreement must be in writing and in plain language and set out the circumstances that constitute the successful outcome of the matter to which it relates. The agreement must also be signed by the client and include a statement that the client has been informed of the client's rights to seek independent legal advice before entering into the agreement.

77. The Act provides for a cooling off period of not less than 5 business days during which the client, by written notice, may terminate the agreement, but this requirement does not apply where the agreement is made between law practices only. If a client terminates a conditional costs agreement within the cooling-off period, the law practice may recover only those legal costs in respect of legal services performed for the client before that termination that were performed on the instructions of the client and with the client's knowledge that the legal services would be performed during that period. The law practice cannot however recover any uplift fee.

78. A conditional costs agreement may provide for disbursements to be paid irrespective of the outcome of the matter and such agreement may relate to any matter, except a matter that involve criminal proceedings, proceedings under the Family Law Act 1975 of the Commonwealth or under rules made under the Act. A contravention of the provisions relating to conditional costs agreements by a law practice is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention.

United States

79. Notwithstanding the historical use in the United States of contingency fee agreements, there have been divided views on the use such fee agreements for many years. While the contingency fee agreements are viewed as a valuable source for the funding of cases by lower income persons many persons, including those pursuing tort reform in the USA, have argued that they are an incentive to excessive litigation. It has been opined that "lawyers have erected toll booths across the courthouse steps, exacting not a fee for passage but a percentage of all business transactions upon traversal. Overcharging clients is routine and typically unquestioned, especially when the client is unaware of the degree to which it has occurred"⁴⁴

80. In his book "*Litigation Explosion*"⁴⁵ legal analyst Walter Olson in discussing the growth of conditional fees in Europe noted that "[a]t a time when the US civil justice system is trying to return to policies reflective of its European legal roots, it would be ironic if European legislators began experimenting with fee policies that have brought so much harm to America's legal and economic systems. It has been argued that

⁴⁴ Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29 (1989).

⁴⁵ 1991

“contingency fees have been blamed for the skyrocketing of civil litigation costs in the last fifty years, as well as for encouraging predatory attorneys and the proliferation of frivolous lawsuits.”⁴⁶

81. In response to a letter which formed a part of a campaign to overhaul the system of contingency fees and to find certain fee practices unethical, which was started by the Manhattan Institute in 1994, the Standing Committee on Ethics and Professional Responsibility of the American Bar Association, by a unanimous vote, gave an ethic opinion⁴⁷ in which they concluded that contingency fees do not violate ethical standards as long as they are “appropriate and reasonable” and clients are fully informed of appropriate alternative billing arrangements. The summary of the opinion of the Committee is as follows-

“It is ethical to charge contingent fees as long as the fee is appropriate and reasonable and the client has been fully informed of the availability of alternative billing arrangements. The fact that a client can afford to compensate the lawyer on another basis does not render a contingent fee arrangement for such a client unethical. Nor is it unethical to charge a contingent fee when liability is clear and some recovery is anticipated. If the lawyer and client so contract, a lawyer is entitled to a full contingent fee on the total recovery by the client, including that portion of the recovery that was the subject of an early settlement offer that was rejected by the client. Finally, if the lawyer and client agree, it is ethical for the lawyer to charge a different contingent fee at different stages of a matter, and to increase the percentage taken as a fee as the amount of the recovery or savings to the client increases.”.

82. The opinion holds that, among the factors that should be considered and discussed in relation to charging such fees, are the following-

- (a) the likelihood of success;
- (b) the likely amount of recovery or savings, if the case is successful;
- (c) the possibility of an award of exemplary or multiple damages and how that will affect the fee;
- (d) the attitude and prior practices of the other side with respect to settlement;
- (e) the likelihood of, or any anticipated difficulties in, collecting any judgement;
- (f) the availability of alternative dispute resolution as a means of achieving an earlier conclusion to the matter;
- (g) the amount of time that is likely to be invested by the lawyer;
- (h) the likely amount of the fee if the matter is handled on a non-contingent basis;
- (i) the client's ability and willingness to pay a non-contingent fee;

⁴⁶ Kristin Sangren, *Legal Finance Journal* 2012

⁴⁷ Formal Opinion 94-389, 1994

- (j) the percentage of any recovery that the lawyer would receive as a contingent fee and whether that percentage will be fixed or on a sliding scale;
- (k) whether the lawyer's fees would be recoverable by the client by reason of statute or common law rule;
- (l) whether the jurisdiction in which the claim will be pursued has any rules or guidelines for contingent fees; and
- (m) how expenses of the litigation are to be handled.

83. The Association of trial lawyers of America had viewed the letter as part of a “political agenda of the rich and powerful to try to shut the courthouse doors to ordinary Americans” and the opinion was widely supported by that organization

84. In the United States, the American Bar Association Model Rules of Professional Responsibility, which form the basis for the rules of professional conduct adopted by the State Bar Associations, set out when an attorney may agree to take on a matter on a contingency fee and the terms that must be included.

85. Rule 1.5 (c) and (d) of the Model Rules provide-

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect-

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

86. However, the ABA rule relating to contingent fees cannot be read in isolation. It is merely a part of the overall rules that apply to the lawyer-client relationship, for example, the rule relating to the duty of loyalty to client. Under Rule 1.7, loyalty and independent judgment are essential elements in the lawyer's relationship to a client and the fee arrangement must be fair and reasonable under the circumstances. In those cases

where a contingent fee is permitted, there must be an agreement that states in writing the method by which the fee is calculated and specifically addresses the percentages that accrue to the lawyer, the expenses to be deducted from the recovery, and whether the fee is computed on the gross recovery or the recovery net of expenses. Thus, unlike other engagements, contingent fee cases explicitly require a written fee agreement. On the conclusion of a contingent fee matter, the lawyer must provide the client with a statement showing the fee and its calculation. An unsigned contingent fee agreement is not enforceable. To justify a contingent fee there must be some element of uncertainty as to a client's recovery. State Courts have upheld discipline imposed on lawyers for the collection of contingent fees on accidental death benefits; for collecting the inheritance of the sole beneficiary of an estate; and for collecting insurance benefits in cases in which there was no real uncertainty as to collection.

87. In addition to satisfying the requirement of uncertainty of recovery, contingent fees must satisfy the reasonableness standard applied to other fees. The reasonableness standard requires an examination of the appropriateness of the fee on billing as well as at the initiation of the engagement. The amount of time involved, the difficulty of the legal issues involved, and the benefit to the client are relevant factors. A Virginia opinion held that it is improper to use a contingent fee structure that requires the client to pay a fee equal to the higher of 20 percent of any recommended settlement that is rejected or 25 percent of any court recovery.⁴⁸

88. Also recognised in the United States are reverse contingency fees agreements. The fees under such agreements are defined as “a fee that is based upon the difference between the amount a third party demands from a lawyer’s client, and the amount ultimately obtained from the client, whether by settlement or judgment.”⁴⁹ In Formal Opinion 93-373 (1993), the American Bar Association concluded that “[t]he Model Rules do not prohibit “reverse” contingent fee agreements for representations of defendants in civil cases where the contingency rests on the amount of money, if any, saved the client, provided the amount saved is reasonably determinable, the fee is reasonable in amount under the circumstances, and the client’s agreement to the fee arrangement is fully informed.”⁵⁰

89. In an inquiry whether, and under what circumstances, a reverse contingency fee comports with the Rules of Professional Conduct, the DC Bar noted that the ABA identified several significant differences between typical, recovery-based contingent fees and reverse contingent fees. The opinion went on to state as follows-

“First, while the setting of percentages in the typical contingent fee cases is susceptible to abuse or over-reaching by the lawyer, the “profession’s long experience with straight contingent fees and the active regulation by the courts and the legislatures” have “pretty well established” the “range of reasonable percentages.” For reverse contingent fees, reasonableness “will not be so readily

⁴⁸ Legal Ethics Opinion 365

⁴⁹ Ethic Opinion 347, DC Bar

⁵⁰ Noted in the opinion ante

determinable.” The legal profession “has not built up a long term common experience with the concept. The fact that straight contingent fees typically range from 25% to 33% does not necessarily mean that the same percentage is reasonably applied to the potential savings of a defendant.” Second, even if a fair percentage can be set, reverse contingency fees have the added complication of calculating the amount saved the client. A plaintiff’s demand may be overstated or not specifically enumerated; thus, “the amount demanded cannot automatically be the number from which saving resulting from a judgment or settlement can reasonably be calculated.”

While not leading it to conclude that reverse contingency fee arrangements were unethical, the ABA determined that the above considerations require that the lawyer exercise greater care and consultation than in the typical “straight” contingency fee case. A lawyer must “fairly evaluate the plaintiff’s claim and set a reasonable number as the amount from which the plaintiff’s recovery will be subtracted to determine the defendant’s savings.” The lawyer has the burden of “demonstrating fairness in this process,” a burden that is significantly greater when negotiating with an unsophisticated client than it is when dealing with, for instance, an organization represented by an experienced in-house counsel.”.

90. Several other states have recognised reverse contingency fee agreements, such as Iowa, Kentucky and Pennsylvania. A useful discussion on the position taken in other states on such reverse contingency fees is found in an article entitled “*Reverse contingent fees*” prepared by Peter H. Geraghty, Ethics Director of the ABA.

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91. There are other aspects of litigation funding which have not been highlighted in this paper as the Commission requires feedback as to whether they exist here at this time and, if not, whether they could or should form a part of the justice reform in this area. In the UK, for example, such other types of funding include legal expenses insurance comprising before the event insurance and after the event insurance.

(a) **Before the event insurance-**

A before the event legal expenses policy allows the insured to recover the costs of litigation. The policy will generally provide that the insured must have a reasonable prospect of success in the proceedings and some policies require the case to be assessed by counsel to determine the likelihood of a successful outcome. Before the event policies are regulated by the Insurance Companies (Legal Expenses Insurance) Regulations 1990, the purpose of regulation being to ensure that there is no conflict of interest where the same insurer is both the legal expenses insurer of a claimant to proceedings and the liability insurer of the defendant in the same proceedings, as there may be a temptation for the insurer to

refuse to support the claimant's action even though it has a strong prospect of success.⁵¹

A before-the-event policy is mainly sold together with other insurance for example, car insurance to cover car-related disputes, or house insurance. It cannot generally be bought once a problem exists. In effect, if a person has this kind of insurance to cover legal costs, a conditional-fee agreement is not required.⁵² The insurance will usually pay for solicitor's fees and expenses; costs for expert witnesses; court fees; and opponent's legal costs.

(b) After the event insurance-

After the event insurance (“ATE insurance”) has developed since the abolition of legal aid for most civil actions, and provides a mechanism for the claimant to bring an action in the knowledge that, if the action is unsuccessful or if costs are otherwise not recoverable, the costs awarded against the insured will be paid by the after the event insurers. In practice the claimant will, when instructing solicitors in respect of his claim, be advised by them whether it is appropriate to take out after the event cover and the arrangements will be made by them. It is likely that after the event insurance will be available only where the insured has a better than 50 per cent chance of succeeding with his claim.”⁵³

An after the event insurance policy covers the opponent’s costs as well as the insured’s disbursements including the ATE Insurance premium. The policy can also in certain circumstances extend to cover the insured’s solicitor’s own legal costs where the Solicitor is not acting under a conditional fee agreement or a similar agreement. The standard cover is for costs incurred after the inception date of the policy up to conclusion of the legal action, however (subject to negotiation) the policy may also cover costs already incurred prior to the policy being taken out.⁵⁴

92. In its approach to this review the Commission realises that the courts in the Cayman Islands have in several cases given sanction to the use of both conditional fee and contingency fee agreements. In our research we found that most jurisdictions only permitted contingency fee agreements after the enactment of legislation although Professor Zander⁵⁵ noted the practice in the UK before legislation of “speccing” i.e. solicitors took on cases on the basis that they would only seek to recover costs from the other side if the case was won and not charge the client if the case was lost. But, according to Professor Zander, “it was prohibited and such understandings could not be openly expressed.”

⁵¹ Volume 60 Halsbury’s

⁵² See <http://www.bobbetts.co.uk/cms/article/nwnfhowlegalexpensessinsurancework.html>

⁵³ Ante note 37

⁵⁴ Sourced from <http://www.universallegal.co.uk/after-the-event-insurance-definition.html>

⁵⁵ “Will the revolution in the funding of civil litigation in England eventually lead to contingency fees?”

93. The Commission found mention of “common law contingency fee agreements” which were contingency fee agreements used in South Africa prior to and after the enactment of legislation. In a South African case, the South African Association of Personal Injury Lawyers⁵⁶ challenged the constitutionality of the Contingency Fee Act. The Association contended, inter alia, that the Act did not override the common law. Its primary argument was that the legislature could never have intended the Act to be exhaustive and that the common law right of practitioners to conclude contingency fee agreements is untrammelled. It therefore argued that legal practitioners can conclude enforceable contingency fee agreements with their clients without complying with the requirements of the Act, provided they observe their ethical duties.

94. The High Court rejected such arguments and rejected the notion of “common law contingency fee agreements”. The court noted that-

“So-called common law contingency agreements are thus unlawful for two reasons. First, they are unlawful under the Act. The Act covers the field and applies to all contingency fee agreements. It requires all contingency fee agreements to comply with the limitations and requirements laid down by sections 2(2) to 5 of the Act. Therefore, as held by this Court in *De La Guerre*⁵⁷ any contingency fee agreement not in compliance with the Act is invalid. Second, a contingency fee agreement which does not comply with the Act also falls outside the scope of the exception in s 2(1) of the Act. *Hence, any contingency fee agreement which is not permitted by s 2(1) of the Act, will fall to be dealt with under the common law, which expressly prohibits such agreements and renders them invalid.*”

95. The Association contended alternatively that the Act is unconstitutional on the grounds that it discriminates against lawyers and their clients in breach of section 9 of the Constitution. This was rejected by the court as being without merit.

96. Justice Chadwick in the *Latoya Barrett* case questioned the judicial recognition of such agreements when he noted the judgement of the Chief Justice in *Quayam and others*-

“...while recognising that there is much force in the view that the Chief Justice should have resisted the temptation to treat the question which was before him as one which could and should be answered by judicial development of the common law in this jurisdiction (see paragraph 41 of his judgment) rather than by legislative intervention, I am not persuaded that it is appropriate to decide whether

⁵⁶ South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (32894/12) [2013] ZAGPPHC 34; 2013 (2) SA 583 (GNP); [2013] 2 All SA 96 (GNP) (13 February 2013)

⁵⁷ De la Guerre v Ronald Bobroff & Partners Inc and Others (GNP) (unreported case no 22645/2011, 13-2-2013) (Fabricius J)

or not he was entitled to take the course that he did. I prefer to leave open both the question whether he was entitled to take that course and the question whether (if so) the conclusion that he reached on the substantive issue (whether or not public policy requires that conditional fee agreements be struck down) should be upheld.”.

97. The arguments for and against such agreements have been set out in this and many other papers but the reality in the Cayman Islands is that the agreements have been in use here for some time. The Commission agrees with Lord Justice Jackson’s view that there is no compelling reason why the clock should be turned back in this area of the law. Provided that there are sufficient legislative safeguards, including a mechanism for review of such agreements, should there be any objection to legislative regulation?

98. In providing legislative intervention as requested by the courts the matters which the Commission believes should therefore be considered at this time should include the following-

- (a) in introducing legislation, what are the measures which should be provided to protect the interests of clients?
- (b) should the Cayman Islands follow the path of the UK and Canada and introduce the US type contingency fee agreements?
- (c) should third party funding form part of this reform?
- (d) should the court be given oversight of these agreements or could there be a system of review by legal associations similar to South Africa?
- (e) how should success fees in conditional fee agreements be regulated?
- (f) what are the types of action or proceedings to which such agreements should be applicable?
- (g) should there be cooling-off periods provided during which a client can cancel the contract?

99. For the purposes of this review a draft Private Funding of Legal Services Bill was drafted and is set out in the Appendix to this paper. The main precedents used in the preparation of the Bill were the Ontario Solicitors Act, the UK Court and Legal Services Act and the Contingency Fee Act of South Africa.

100. The Bill provides for contingency fee agreements which comprise the US style agreement as well as the conditional fee style agreement with the success fee. Also provided for is third party funding. It is proposed under the Bill that the Grand Court will be able to review such agreements upon application by the attorney and the client.

101. The Bill provides in clause 5 for the form and content of an agreement. In accordance with that clause, all such agreements must be in writing, be signed by the client or his representative, such as a guardian or trustee where that is applicable and by the relevant attorney-at-law and must state the following-

- (a) the proceedings to which the agreement relates;

- (b) that before the agreement was entered into, the client-
 - (i) was advised of any other ways of financing the litigation and of their respective implications;
 - (ii) was informed of the normal rule that in the event of the client being unsuccessful in the proceedings, the client may be liable to pay the taxed party and party costs of the client's opponent in the proceedings; and
 - (iii) understood the meaning and purport of the agreement;
- (c) what will be regarded by the parties to the agreement as constituting success or partial success;
- (d) the circumstances in which the fees and disbursements of the attorney-at-law relating to the matter are payable;
- (e) the amount which will be due, and the consequences which will follow, in the event of the partial success in the proceedings, and in the event of the premature termination for any reason of the agreement;
- (f) either the amounts payable or the method to be used in calculating the amounts payable;
- (g) the manner in which disbursements made or incurred by the attorney-at-law on behalf of the client shall be dealt with;
- (h) subject to subsection (5), that the client will have a period of fourteen days, calculated from the date of the agreement, during which the client will have the right to withdraw from the agreement by giving notice to the attorney-at-law in writing; and
- (i) the manner in which any amendment or other agreements ancillary to that agreement will be dealt with.

102. The Bill would also abolish the torts and offences of maintenance and champerty⁵⁸ using the approach taken in several jurisdictions. While the offences and torts would be abolished the Bill provides that the abolition of criminal and civil liability under this legislation for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal⁵⁹.

103. The Commission invites comments on the issues highlighted in this paper, on the provisions of the Bill and on any other matter relating to the funding of litigation which may be able to improve access to justice in the Cayman Islands.

Tuesday, December 29, 2015

⁵⁸ Embracery would remain an offence

⁵⁹ Clause 20(2)

APPENDIX