Litigation Funding in England and Wales: Certain Observations

1. Preface

The marked retreat of state funding for civil disputes in England and Wales allied with the (generally) increased costs of going to Court has meant that new ways of providing finance to a client with limited resources - but an ostensibly genuine and worthwhile claim – is essential. This Article sets out the broad principles applicable to **litigation funding.** It also makes reference to what are viewed as interesting and helpful developments in English law relating thereto. Some Definitions first of all: the following paragraphs nos. (2-6) refer.

2. Maintenance

Maintenance is the common law English doctrine which aims to preclude frivolous or mischievous litigation. "Maintenance" is the intermeddling of a disinterested party expressly to encourage a claim in the Courts. It is "*a taking in hand, a bearing up or upholding of quarrels or sides, to the disturbance of the common right*".

3. Champerty

This is an unlawful agreement in which a person – with no previous interest in a lawsuit – provides financial support with the motive to share in the property, award or proceeds at the end of the day should the claim succeed. There is now an exception to this time honoured precept: it takes the form of litigation funding.

4. Litigation Funding

The shorthand phrase "no win, no fee" is often employed for a client who is the beneficiary of a litigation funding arrangement. This is where a third party – with no connection with the claim – agrees to fund all or part of the expense of it in return for a financial reward payable from the proceeds if the funded litigant is successful.

5. CFA

The contract made between the party (C) who has the benefit of litigation funding and the organisation providing the money for the case to be run, the funder (F), is known as a Conditional Fee Agreement (CFA). It is this contract which governs the relationship between C and F. Before 1st April 2013 many such agreements contained a right on the part of the funder to require the losing party to pay to the successful party – in addition to any costs contribution – a Success Fee which solicitors might charge under these arrangements.

6. The Success Fee

Some Success Fees were calculated at 100% of the costs incurred (eg say legal costs excluding vat and other expenses came to £50,000; with a 100% Success Fee the bill might double by the addition of a further: £50,000). This cast an unpalatable dimension upon commercial disputes. The non-funded party would naturally be aware of the possibility of having to pay its opponent's cost if it lost. Nevertheless, the prospect of having to pay double (in the event of a 100% Success Fee) was

daunting, to say the least. Such concerns might reluctantly occasion a Defendant, with the makings of a sound Defence, to prefer making (possibly unwarranted) commercial concessions to avoid a large black financial hole in its coffers. Moreover the end of the litigation might not see an end to the matter. There remained the possibility of costly and time-consuming satellite litigation after. Such disputes arose because of arguments over whether a winning party was properly entitled to its Success Fee and even if so, the reasonable or proportionate amount of it. These difficulties prompted a marked change in outlook with effect from 1st April 2013.

7. Post 1st April 2013

The landscape is now quite different. Any CFA taken out from on or after 1st April 2013 (with one or two exceptions) **prohibits the recovery** of any Success Fee from the opposing party. These developments were given force under Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which came into force on 1st April 2013.

8. After the Event Insurance

A litigation funded party (C) still remains at risk as to costs if their case is lost. To provide protection to C an insurance policy is normally taken out. It covers the risk that the funded party may lose their case and be obliged to pay a contribution towards the costs of their successful opponent. These are known as "*adverse costs*". The policy which covers this risk is known as a policy of "*after the event insurance*". The premium payable to the insurer normally forms part of the funder's initial outlay (ie it comes from the money made available to C to fund their case).

9. Damages Based Agreements

Mention should properly be made of what are termed "*Damages Based Agreements*". Such an agreement (a DBA) is a contingency fee arrangement; under it solicitors' fees are calculated by reference to the damages awarded to the successful funded party – and not by reference to the actual time spent and the cost of the work carried out.

10. Disclosure

As a general rule and since 1st April 2013 the funded party (C) is exempt from the requirement to disclose to their opponent to their arrangements with both F and any adverse costs insurer. However the view taken is that it constitutes both courtesy and good (if not best) practice, when acting for a litigation funded party, to notify one's opponent of the existence of a CFA. There may be some commercial advantage to a funded party if their opponent is aware of the ostensible benefit of the CFA and that they are, in theory, immune from costs if their case should go to Court owing to the existence of the adverse risks policy. That is the respectful view of the author.

11. Success Fees today

Under the new regime post 1st April 2013 it is still open to a solicitor to agree to be paid a Success Fee under the terms of a CFA. The litigation funder may also require payment to it of a Success Fee as part of its funding terms. However all Success Fees - whether payable to the funded party's solicitors or to the litigation funders, or both - must be met from their damages providing that they are

successful in obtaining a recovery (be that through a settlement or Court Judgment). It is respectfully submitted that the cautious lawyer - prior to being privy to such arrangements - will do well to make an assessment of whether such Success Fees bear a proportionate and justifiable relationship to the perceived complexities of the case, the quantum of the sums involved and any novel areas of argument or law.

12. Success Fee: proportionality

The reported case of *Herbert v. HH Law* is viewed as a helpful authority on the approach to the quantum of a Success Fee. The client Mrs Herbert (H) had agreed a CFA with her solicitors HH Law. She was the Claimant in a personal injury claim. Legal proceedings were issued. Her claim subsequently settled for £3,400.

H then chose to challenge her solicitors' Success Fee of £829.21. She requested the Court to conduct an assessment of her solicitors' bill – including their Success Fee.

H's main argument was that the Success Fee had been set by a fixed percentage (100%) when the realities of Mrs Herbert's case justified a much more modest amount.

In response her solicitors contended that (post-LASPO) their client's protection lay in having a 25% cap on fees overall.

The question of whether Mrs Herbert's solicitors could recover a Success Fee - and if so, in what sum - went as far as the Court of Appeal.

In summary the following guidance may be taken from the Court of Appeal's Judgment:

(1) To be effective a client must provide **informed consent** to the quantum of a Success Fee. In other words the client must be given a full and fair explanation of the pros and cons of their claims so that they may attempt a reasonably reliable assessment as to whether the Success Fee is reasonable and should come from the likely compensation payable, if they are successful.

(2) The burden lies upon the solicitor to establish that informed consent was given.

(3) the Master of the Rolls, giving the lead judgment in *Herbert*, stated that the **amount of the Success Fee** should be related to the perception of **litigation risk**.

As a consequence the solicitors' Success Fee in this case was reduced from 100% to 15%.

13. Publication and Privacy Proceedings

The prohibition on recovery of Success Fees from one's defeated opponent (even post 1st April 2013) initially did not apply to **publication and privacy proceedings**. These comprised:

(a) defamation,

(b) malicious falsehood,

(c) breach of confidence involving publication to the general public,

(d) misuse of private information and

(e) harassment, where the Defendant was a news publisher.

This exemption is no more: please see paragraph 14 which follows.

14. Privacy and Defamation proceedings : abolition of the Success Fee

Following the Judgment of the European Court of Human Rights in *MGN v. United Kingdom (2011) 39401/04* the European Court found that a costs regime which allowed the recovery of a 100% Success Fee from a media Defendant in privacy proceedings (brought by the model Naomi Campbell) had infringed the newspaper's rights to freedom of expression under Article 10 of the European Convention on Human Rights.

On the facts Ms Campbell's solicitors - in their earlier appeal to the House of Lords and before going to Europe - had acted under a CFA which provided that – if her Appeal succeeded:

(1) her solicitors and counsel should be entitled to their basic costs (ie the actual costs of bringing her case to the House of Lords) plus

(2) a Success Fee of 95% would be paid to her solicitors (ie 95% of their base costs) and

(3) Ms Campbell's counsel would receive a 100% Success Fee on top of their basic charges.

With effect from Saturday 6th April 2019 the right to charge Success Fees in privacy and defamation claims has been abolished.

15. General Observations

This Article is not intended as either exhaustive or all–embracing. It comprises an overview of certain essentials and main considerations relating to a CFA.

Of further note are the following:

(1) **Risk Assessment** : Before a litigation funder may properly consider granting the financial benefit of a CFA to a party, an opinion upon the strengths and weaknesses of that party's case (and the likely merits and de-merits of their opponent's defence) will normally be required. This usually takes the form of a written Opinion from a barrister versed in the area of law to which the party's claims relate.

(2) **Pre-Funded Costs** : There will be work needed to prepare the ground for both a reasonably cogent opinion from counsel and enable the litigation funder (and any adverse risk cost insurer) to examine the strengths and weaknesses of the requisite dispute. This may well entail not inconsiderable costs beforehand. The following are examples of work which is likely to be required:

(a) Proofs of evidence will usually need to be taken from the party who requires the litigation funding and possibly material witnesses also.

(b) A core bundle of relevant documents will need to be collated and perused. This exercise is of utmost importance given the need to ensure nothing important (or upon which matters of moment may turn) is omitted.

(c) A sensible attempt needs to be made to assess the likely quantum. This in its turn may present with complexities, particularly if the matter is one on which expert opinion may need to be commissioned long term.

(d) If the area of law is complex or a point of novelty should present itself, then some detailed legal research may be needed at the outset.

(e) All of this will be needed in order to mount a competent and candid application for a CFA to be considered and for the insurer to look at risk and terms of premium. It needs to be borne in mind that an insurance policy is one of *uberrimae fideii* (of utmost good faith) and that accordingly no professional or evidential stone must be left unturned if it is likely to affect judgement, risk and decision. The costs of that work may prove substantial and will need to be funded absent of a CFA. Moreover, the client cannot possess the certitude or confidence in the question as to whether their application is likely to meet with success and, even if granted, whether the terms on offer will prove commercially attractive.

(3) **Third parties** : Even if a CFA is granted, care must be taken to ensure beforehand that any third parties likely to be involved in the case (such as counsel or experts) will be willing also on a CFA – funded basis. Put shortly, will those third parties be willing to accept the risk that should the funded party not succeed they forego their rights to recover any fees at all? Certain professionals may insist that, whatever the outcome of the case, their fees are paid and as the claim progresses.

(4) **Insurance Premium** : The premium payable on the adverse risks policy will need to be met. Usually the litigation funder may be expected to do this. However it cannot be guaranteed.

(5) **Initial Risk Assessment** : A cautious and ruthless assessment will need to be made at the outset. It will be essential to examine the likely strengths of the case, the potential weaknesses therein, the likely parameters of compensation payable, and the overall costs that the case may involve (on both sides to and including a notional trial). It will be essential to arrive at an immediate assessment as to whether or not any Judgment debt is likely to prove recoverable. Such elemental considerations place a premium upon cold, cleared-eyed, detailed and objective analyses.

(6) **Commercial** : There remains an essential commercial dimension. Forethought must be given as to the timing, prospects and likely terms of compromise. Strategies need to be developed to these ends. The possibility of settlement (and likely returns) must be weighed against the costs and risks of continuing (even with the ostensible benefit of a CFA) all the way to trial.

(7) **Costs Budget** : The litigation funder will ordinarily set a Costs Budget. Care must be taken to

work well within. There will be a finite fund available. It may subsequently be open to apply to the funder for an increase in the allocated Budget to provide for unexpected eventualities. However, an increase cannot be guaranteed. Certain parts of the Budget may, if unexpended, be reallocated to immediate or other more pressing areas. Such matters may come at a price: the funder insist upon amendments to its terms to increase the amount of the Success Fee agreed payable or impose greater rates of interest upon the amounts loaned under the CFA.

(8) **Negotiations** : Although armed with the benefit of a CFA the client is unlikely to have the final say so on the outcome of any negotiations and offers to settle. Both the funder and the adverse costs insurer will be at risk. As a consequence they will have retained in their agreements the rights ultimately to call the shots.

(9) **Monitoring and Reporting** : The litigation funder and insurer will need to receive regular reports on progress, and will have to be notified of any unexpected matters, questions or developments arising which might affect perceptions of merits, quantum or outcome. Any offers put will need to be notified promptly to those whose finances have been laid out to support the litigation funder. Accordingly, the funder and insurer can both be expected to have influential rôles in negotiations and upon the question of any settlement or the means of obtaining the same (for instance through without prejudice negotiations, offers or mediation).

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