

## **Media Standards Trust submission to consultation on proposals of Lord Justice Jackson for reform of legal costs**

### **Summary**

This submission focuses on Conditional Fee Agreements, particularly in respect to reducing the cost of libel and privacy cases. Media is our area of expertise so we restrict our comments to media law (though we recognise this is only a small part of the CFA process).

It is clear that some people have abused Conditional Fee Agreements since they were introduced in 1995. A footballer has, reportedly, commissioned three silks on the basis of a CFA. Schillings represented the model Naomi Campbell on the basis of a CFA. There are numerous other examples.

The process of CFA reform has already begun. The European Court has ruled that the 100% success fee is an abuse of human rights (in *MGN Ltd v United Kingdom* - 39401/04 [2011] ECHR 66, 18 January 2011). This process should continue.

However, it is important that we remember that CFAs were set up for a purpose – to give people who otherwise could not afford legal help access to justice. No legal aid is available to libel claimants.

We believe the reforms, as currently proposed, would effectively end CFAs for all but a tiny few. As a consequence, many people who have suffered a serious injustice would be unable to seek fair redress through the courts. These reforms could lead us back to the days when the law was restricted to the rich and powerful. This is not where we should be going.

We support the reform of CFAs as proposed by Razi Mireskandari, namely that there be an automatic costs cap, that hourly rates for fee earners should be agreed across the board, and that the CFA success fee should be staged and rise to a maximum of 50% of base costs if the case goes to trial (for proposed reforms see Appendix I in this submission).

### **Submission**

As currently set out, we believe the proposals would effectively end CFAs because lawyers would not be motivated to take the cases.

The proposals as they stand suggest that success fees be limited to 25%, and that this be recoverable from the damages awarded to a client. The proposals also recommend that the ATE premium be taken from damages.

Yet the damages in most libel cases (those settled as well as those that go to trial) are normally well under £100,000. If one takes the high figure of £100,000 then the maximum legal fees for a case that could last anything from 6 months to well over a year would be £25,000. If the damages are significantly lower - and they are usually in the region of £5,000 to £25,000 thanks to the Offer of Amends scheme - then the recoverable fees would be between £1,250 and £6,250.

Few legal firms would be prepared to take such cases on. Not only would this not come close to

covering their professional fees, but they would fail to get even this fee if they lost the case. The risk of taking on a CFA would not, therefore, be worth it (unless they were doing the case entirely pro bono).

This position has been made clear by a number of prominent lawyers:

“If Lord Justice Jackson’s proposals are implemented, no sensible claimant is ever going to be in a position to bring a defamation action” Razi Mireskandari (Simons, Muirhead and Burton), speaking at Gray’s Inn public debate in January 2011

“[B]y seeking to remove or lower the amount of recoverable success fees the effect will only be to the detriment of those who cannot afford to litigate under normal circumstances (the majority of individuals), whether in claims for privacy, defamation, personal injury or otherwise, as there will be less lawyers who will be willing, or can afford to act for these individuals which cannot be right” Tim Lowles, Collyer Bristow (on INFORRM, 20-01-11)

In libel cases, many people are not seeking damages. They are looking for an apology and/or correction. Therefore associating legal fees with damages is not only unfeasible but goes against the nature and purpose of defamation damages.

The fall-back recommendations in Lord Justice Jackson’s proposals appear to recognise this:

“If, contrary to my recommendations, additional liabilities continue to be recoverable and the costs shifting regime remains as now, then my fallback recommendations are as in chapters 9 and 10 above. In other words there should be fixed and staged success fees, staged ATE insurance premiums and so forth.”

Without CFAs people of average or modest means will not be able to gain access to justice. This includes both those who are seeking protection for freedom of speech as well as those seeking to correct defamatory reporting.

There is a myth that CFAs in media cases are limited to those acting against publishers. In fact, many of those who get help from CFAs are looking for protection from being sued themselves.

Some of those who successfully sought protection for freedom of speech through a CFA include:

**Heather Brooke** - when Speaker Michael Martin appealed against an order to disclose MPs expenses claims in 2008, Heather Brooke challenged his appeal with the help of a CFA.

**Hardeep Singh** - his Holiness Sant Baba Jeet Singh ji Maharaj eventually abandoned his case in 2011 against the Sikh Times and one of its journalists, Hardeep Singh, regarding an article published by the Sikh Times in 2007. Singh pursued his case thanks to a CFA.

**Peter Wilmshurst** – the scientist is being sued by the American pharmaceutical firm NMT after his criticisms of its research at a US cardiology conference in 2007 was quoted by a journalist. Wilmshurst has been defending himself on the basis of a CFA.

**Simon Singh** - the author was sued (unsuccessfully) by the British Chiropractic Association over

criticisms he made about scientific claims made by the BCA in 2008. He too was able to fight his case thanks to a CFA.

**Henrik Thomson** – the Danish radiologist sued by GE Healthcare for comments made about a drug made about the firm at a conference in 2007 is being defended on the basis of a CFA.

Other people who are not wealthy but have successfully sought redress through the courts having been inaccurately presented in the press include:

**Robert Murat**, grossly defamed after the disappearance of Madeleine McCann, won significant damages from almost a dozen news outlets. Murat was supported by a CFA.

**Parameswaran Subramanyam** – successfully sued the Daily Mail and The Sun in 2010 after both papers falsely accused the Tamil protestor of breaking his hunger strike in Parliament Square to eat burgers. Before he found help on a CFA and won his case Mr Subramanyam was ostracised by the Tamil community and came close to suicide.

**Christopher Jefferies** – ‘monstered’ by the press after he was arrested for questioning by the police in the Joanna Yeates murder trial. Jefferies was released after two days without charge. He is now considering legal action which he can do on the basis of a CFA. Without which it is difficult to see how Jefferies could seek fair redress.

**Sylvia Henry** – a social worker who was the social worker wrongly accused of being negligent in the Baby P case, and, as a consequence, was banned from carrying out child protection work. Without a CFA she could not have challenged the press’ accusations.

**Hanif Malik** - Leeds community leader Hanif Malik successfully challenged, on the basis of a CFA, claims that he was responsible for fraudulently and improperly diverting money provided by Children in Need for educating disadvantaged children to Islamic extremists.

**Zoe Margolis** – the Independent on Sunday paid damages to writer Margolis in 2010 after the paper inaccurately headlined an article by her, ‘I was a hooker who became an agony aunt’. Margolis had the benefit of a CFA.

**Reza Pankhurst** – won a libel action on a CFA in 2010 when a newspaper falsely claimed he was involved in a criminal conspiracy involving the training, preparation and encouragement of a person who attempted a suicide bombing in Israel.

**Abdul Patel** – The Sun newspaper apologised after reporting that Mr Patel was an evil terrorist who had been jailed for his part in a transatlantic jet terror plot. Mr Patel had never, as the paper reported, had any involvement with terrorism acts. He was defended on a CFA.

**Kalam family** – two brothers, Abul Koyair and Mohammed Abdulkahar, from Forest Gate were falsely accused of involvement in terrorism in 2006. They fought and won their case on a CFA.

**Atika Sidyot** – in 2006 the press reported Sidyot had been arrested in connection with the alleged liquid bombs plot. She successfully challenged the reports with the help of a CFA.

**Belinda Brewin** - in 2005, Brewin won undisclosed libel damages from The Sun after it printed false allegations that she helped the two murderers to escape. She was supported by a CFA.

**Elaine Chase:** a paediatric community nurse falsely accused by The Sun (on the front page and inside) of hastening the deaths of 18 terminally ill children by over-administering morphine. Chase fought and won her case on a CFA.

There are many more examples.

The Media Standards Trust supports reform of libel law. The Trust supports reform of legal costs. However, we support reform that maintains access to justice. If the proposals go through unchanged we do not think such access will be maintained.

### **Appendix: Razi Mireskandari recommendations for reform of CFAs**

1. There be an automatic costs cap in place of £60K, for each day of trial (so base costs for an action leading to one day trial would be £60K, to a three day trial £180K). Costs above this figure to be disallowed unless the Court allows a higher figure upon application by the relevant party.
2. Hourly rates for fee earners to be agreed across the board at no more than £375 for a senior partner with appropriate hourly rates for other fee earners.
3. The CFA success fee, which would be recoverable inter parties, to be a maximum of 50% of base costs and then only if the case goes to trial. Before that stage only recoverable at:
  - (i) 40% if the case settles earlier than 45 days before trial;
  - (ii) 30% if the case settles earlier than the first date ordered for exchange of lists of documents.
  - (iii) 20% once proceedings have been issued.
  - (iv) 10% if the claim settles pre-action.
4. No success fee recoverable for costs assessments
5. The same staged fees to apply to counsel's success fees.
6. ATE insurance premium recoverable inter parties but staged as in 3 (i) – (iv) above with an additional initial stage of 21 days after being first notified during which time the premium is limited to £750.
7. Any party can elect to limit its exposure to an ATE premium of £750 by irrevocably agreeing not to enforce any costs order in its favour in that 21 day period.
8. The costs cap in 1 above, which limits the cover required, and increased competition in the ATE market (which needs to be encouraged) will reduce ATE premiums (as has happened in personal injury cases).
9. In media cases the Sir Charles Gray/Alastair Brett Early Resolution Scheme (re meaning) should be adopted.