Preliminary Paper 43

SUBSIDISING LITIGATION

A discussion paper

The Law Commission welcomes comments on this paper and seeks responses to the questions raised.

These should be forwarded to:
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Preface

FOR SOME TIME the Law Commission has had on its work programme the broad topic of Abuse of Process. Some work has been done, but the project has tended to lose its place in the queue in favour of more pressing concerns. Our view of the matter as not urgent was partly because of an unusually high number of recent appellate decisions in England and New Zealand which seemed to be resolving some of the uncertainties and getting rid of some of the anomalies that might be thought to justify legislative intervention, and partly because of the unlikelihood of legislative time being found in the foreseeable future for the spring cleaning of a corner the law that is visited relatively infrequently.

On 15 October 2000, however, we were asked by the Ministry of Justice if we could provide an early report on that part of the topic that related to maintenance, champerty and contingency fee arrangements. This request was made because of the relevance of these matters to two reviews on which the Ministry is currently engaged, one of the Law Practitioners Act 1982 and the other of the legal aid regime. It is in conformity with this request that we have hived off as the subject of separate attention the subsidisation of litigation.

The controversial issue is of course whether, and to what extent, there should be permitted the charging of contingency fees by lawyers (and by non-lawyers permitted to conduct litigation for reward, as they are before the Taxation Review Authority and in employment cases). Proper attention to this topic requires the fullest possible consultation and it is particularly in order to ascertain views on a question in respect of which opinions may reasonably differ that this discussion paper is published.

We are conscious that we are publishing this paper in a month when end-of-year congestion and vacation absences make it difficult for those to whom we look for assistance to provide the comment that we need. Even so, in an effort to meet the Ministry's timetable we request that submissions reach us by 28 February 2001. This should enable the completion of a final report in March 2001 and its publication in April. By that time we are told although a bill setting out new measures governing the legal profession is likely to have been introduced into Parliament, it will still be making its way through the parliamentary process so that its ultimate form will not have been finally determined.

Former researchers Nicholas Russell and Megan Leaf did work on this project. The researcher currently engaged is Michael Josling. The Commissioner in charge of the carriage of the project is DF Dugdale. In preparing this paper we were assisted by a report of an Auckland District Law Society working group convened by Stephen Bryers.

Subsidising Litigation

TERMINOLOGY

1 WHERE A PAYS OR CONTRIBUTES to the cost to B of the institution of or continued prosecution of or resistance to civil legal proceedings to which B is a party the technical name for the wrong that such action by A may constitute is *maintenance*. If B is the claimant and the arrangement is that as a *quid pro quo* for A's support A is entitled to share in the fruits of B's claim the technical name for this particular variety of maintenance, "a particularly obnoxious form of it" according to Lord Denning,[1] is *champerty*. Of great practical importance is the particular form of champerty that can be committed where A is a lawyer (or as we will see a para-lawyer) and performs legal work on the basis that his remuneration entitlement is dependent on the owtcome of the litigation. In this paper we will refer to all such arrangements as ones for *contingency fees*, but it will need to be remembered that this is not a precise legal term, that the nomenclature is not settled[2] and that as our discussion proceeds we will need to distinguish among various classes of contingency arrangements.

HISTORY

2 In late medieval England unruly nobles whom judges were reluctant to defy frequently employed as a method of oppressing the vulnerable the systematic promotion of lawsuits, "suits fomented and sustained by unscrupulous men of power" as Lord Mustill has described them.[3] Even after the stronger central government of the Tudors had brought the barons to heel the procuring of litigation against an enemy continued to be a popular and effective method of inflicting harm. It was to counter these evils that there were developed maintenance and its subset champerty as both crimes and as torts (that is as

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1 *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629, 654.

2 See the observations of Schiemann LJ in *Awwad v Geraghty & Co* [2000] 1 All ER 608, 610. There are three categories of reward for success: (1) where the lawyer will recover some of the client's winnings; (2) where the lawyer will recover his normal fees plus a success uplift; (3) where the lawyer will only recover his normal fees. They used all to be described as contingent fees but, in what Judge Cook in his book on *Costs* (3rd edn, 1998) refers to as a triumph of semantics, situations (2) and (3) have in recent years been given the name of conditional fees whereas situation (1) is still described as a contingent fee. I shall keep that nomenclature for situation (1). The present case is concerned with situation (3), which I shall call a conditional normal fee case to distinguish it from situation (2), which I shall call the conditional uplift case.

3 *Giles v Thompson* [1994] AC 142, 153.

grounds for a civil claim).[4] With changing times these remedies became less and less resorted to.

> While both remained crimes and independent torts until abolished by the Criminal Law Act 1967, their domain has steadily shrunk over the centuries. Conduct which would once have been objectionable would not now raise an eyebrow. With the growth over time of developed legal institutions and a specialised legal profession, the requirements of public policy in this field have been radically transformed.[5]

The principal modern significance of the old rules is in the context of contingency fees and of the rule prohibiting the assignment of a bare cause of action, that is of a right to sue.[6]

WHEN SUBSIDISATION IS JUSTIFIED

3 It is only *unjustified* subsidisation that constitutes maintenance and champerty.

> Maintenance is directed against wanton and officious inter-meddling with the disputes of others in which the [maintainer] has no interest whatever and where the assistance he renders to one or the other party is without justification or excuse.[7]

The definition by the courts of the circumstances in which public policy requires subsidisation to be classified as unjustifiable has altered to reflect changing social realities:

> My Lords, it is clear, when one looks at the cases of maintenance in this century and indeed towards the end of the last that the courts have adopted an infinitely more liberal attitude towards the supporting of litigation by a third party than had previously been the case.[8]

Justification may be found in a genuine commercial interest.

> Thus persons engaged in a particular trade or profession or linked by some proprietary or other legitimate common bond may lawfully associate themselves with a view to protecting, if necessary by litigation, the interests of each in the common field at the expense of all. For example, it is perfectly proper for manufacturers to combine in defending an infringement action by a patentee against one of their number, for a mutual protection society of fishery owners to support proceedings by some of its members against a factory accused of polluting a river, or for an employer to maintain an employee who had been libelled in relation to his duties. Likewise, insurance and indemnity contracts may provide a sufficient business interest. Thus, there is no objection to a manufacturer securing business from customers of a rival on terms that he would indemnify them in respect of liability arising from a transfer of their custom, or to a workers' compensation insurer [instigating] proceedings by an injured worker against a third party.[9]

Or the justification may be a charitable motive. The facts that the rule is founded on public policy and that public policy can change with the passage of time and may not be identical in every jurisdiction are neatly illustrated by the cases

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4 PH Winfield "The History of Maintenance and Champerty" (1919) 35 LQR 50; and see note (1919) 35 LQR 233.

5 *Giles v Thompson* [1993] 3 All ER 321, 346 per Sir Thomas Bingham MR.

6 *Giles v Thompson* [1994] AC 142, 153.

7 *British Cash & Parcel Conveyors v Lamson Store Service Co Ltd* [1908] 1 KB 1006, 1014 per Fletcher Moulton LJ.

8 *Trendtex Trading Corp v Credit Suisse* [1982] AC 679, 702 per Lord Roskill.

9 JG Fleming *The Law of Torts* (9th edn, 1998) (LBC Information Services, North Ryde, New South Wales, Australia) 692.

in which a lawyer undertakes work on the basis that the lawyer will charge a fee (but only a normal fee) if the claim succeeds and not otherwise. Such an arrangement (called acting on a speculative basis) has long been permitted in Scotland.[10] In 1935 in the New Zealand case of *Sievewright v Ward & Others* Ostler J regarded such an arrangement as "consistent with the highest professional honour".[11] A similar conclusion was reached 25 years later in Australia.[12] But recently in England (at a time when the law permitted certain classes of contingency fee arrangements into which the transaction under consideration did not fall) the Court of Appeal classified such an agreement as champertous.[13]

ENGLISH LEGISLATION

4 In 1966 the Law Commission for England and Wales reported that maintenance and champerty as crimes were a dead letter.[14] As to their efficacy as torts, the decision of the House of Lords in *Neville v London Express Newspaper Ltd*[15] was that while an *unsuccessful* defendant had a right of action against one who had maintained the plaintiff's action it was necessary to prove special damage and that special damage did not include costs.

> It cannot be regarded as damage sufficient to maintain an action that the plaintiff [*sc* in a claim against a maintainer] has had to discharge his legal obligations or that he has incurred expense in endeavouring to evade them.[16]

As to a *successful* defendant the Commission noted that:

> In the case of *Wm. Hill (Park Lane) v Sunday Pictorial* ("Times" newspaper April 15th 1961) it was decided that where the maintained action had *failed*, a claim for damages for maintenance also failed, unless it could be shown that the maintained action would not have been brought or continued without the assistance of the maintainer.[17]

The Commission concluded that:

> Obviously the factor of damage is almost *impossible* of proof. In the light of the cases on lawful justification and proof of damage, our conclusion is that the action for damages for maintenance is today no more than an empty shell.[18]

The Commission's recommendation that maintenance and champerty be abolished as crimes and torts was adopted by the Criminal Law Act 1967[19] but, as also recommended by the Commission, that statute carefully preserved the rule that maintenance could render unenforceable a contract between maintainer and maintained. The provision reads:

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10 *X Insurance Co v A and B* 1936 SC 239.

11 [1935] NZLR 43, 48.

12 *Clyne v New South Wales Bar Association* (1960) 104 C LR 186.

13 *Awwad v Geraghty & Co* [2000] 1 All ER 608 not following *Thai Trading Co (a firm) v Taylor* [1998] QB 781.

14 The Law Commission for England and Wales *Proposals for Reform of the Law Relating to Maintenance and Champerty* Law Com No 7 (London HMSO 1966) para 7.

15 [1919] 368.

16 Per Lord Finlay LC, 380; see the note by Winfield, above n 4, (1919) 35 LQR 233.

17 Paragraph 11.

18 Above n 17.

19 Sections 13(1) and 14(1).

> 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.[20]

So in a jurisdiction that lacks any equivalent to New Zealand's Illegal Contracts Act 1970 section 7 a maintainer remains debarred from enforcing a champertous agreement.

5 Twenty or so years later in a reversal of policy made with the acknowledged intention of providing greater access to justice while avoiding the cost to the public purse of widening eligibility for legal aid[21] the United Kingdom legislature enacted the Courts and Legal Services Act 1990 section 58. This provision was by the Access to Justice Act 1999 section 27(1) replaced by new sections 58 and 58A. These sections came into force on 1 April 2000 and are set out in Appendix A. The sections permit written conditional fee agreements (that is agreements providing that the provider of the legal services will be paid the provider's fees and expenses, including an increment based on success, only in specified circumstances) in any proceedings whether in court or not,[22] subject to compliance with certain requirements contained in the sections, or in subordinate legislation the promulgation of which is to be preceded by specified consultation. These sections do not apply to family and criminal proceedings. There is a requirement of disclosure as a percentage of a normal fee of the amount by which a normal fee is in terms of the agreement to be increased by reason of the fact that the payment obligation is conditional, and fixing the upper limit of such a percentage (currently 100 per cent)[23] as one to be specified by subordinate legislation. Remuneration on the basis of a percentage of the recovered amount is not permitted.

> There was a clear consensus that it would not be right in principle, and would be likely to have a number of undesirable side effects, for a lawyer to be permitted to undertake a case in return for some percentage of whatever damages might be received. [24]

The current Conditional Fee Agreements Regulations[25] are reproduced in Appendix B.

AUSTRALIAN LEGISLATION

6 In Victoria, maintenance and champerty were abolished as torts by the Abolition of Obsolete Offences Act 1969, but abolition was accompanied by a provision copied from the United Kingdom Criminal Law Act 1967 section 14(2).[26] The Legal Practice Act 1996 permits on certain terms agreements with legal

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[20] Section 14(2).

[21] Green Paper *Contingency Fees* (HMSO 1988) paras 1.5, 3.12.

[22] So giving statutory support to the effect of the decision in *Bevan Ashford (a firm) v Geoff Yeandle Contractors Ltd (in liq)* [1999] Ch 239 which while holding that the section in its original form did not apply to arbitration, nevertheless held that an agreement relating to arbitration which if it had related to an action in court would have been permitted by the section, would not be classified as champertous because public policy did not so require.

[23] The Conditional Fee Agreements Order 2000 (SI 2000 No 823).

[24] White Paper *Legal Services: A Framework for the Future* (HMSO 1989) para 14.2.

[25] The Conditional Fee Agreements Regulations 2000 (SI 2000 No 692).

[26] See the account in *Roux v Australian Broadcasting Commission* [1992] 2 VR 577, 605. Section 14(2) is set out in para 4.

practitioners called conditional costs agreements permitting liability for some or all costs to be contingent on success. A success uplift not exceeding 25 per cent of the costs otherwise payable is permitted. Fees calculated as a percentage of the recovered amount are not permitted. Conditional costs agreements are not permitted in Family Law Act cases. The relevant sections of the statute are set out in Appendix C. References in section 103 to "the Tribunal" are to the Legal Professional Tribunal, a body made up of a "chairperson" who must be a judge or former judge, plus lawyer and lay members and having various disciplinary and other functions.

7 The legislative history in New South Wales is similar. The torts were abolished by the Maintenance, Champerty and Barratry Abolition Act 1993. Section 6 of that statute is copied from the United Kingdom Criminal Law Act 1967 section 14(2). There is a similar provision for conditional costs agreements as in Victoria, but there is provision for regulations providing for variation of the maximum success uplift percentage "Different percentages may be prescribed for different circumstances".[27] There have to date been no such regulations.

8 In South Australia the torts were abolished in 1993. There is a similar reservation relating to illegal contracts and a further reservation of "any rule of law relating to misconduct on the part of a legal practitioner who is party to or concerned in a champertous contract or arrangement".[28] It is not clear whether the tort is to that extent preserved. The Legal Practitioners Act section 42(6)(c) permits contingency fees subject to any limitations imposed by The Law Society of South Australia and to the power of the Supreme Court to rescind or vary a contingency fee agreement "if it considers that any term of the agreement is not fair and reasonable" (section 42(7)). A copy of Rule 8.10 and Attachment 1 to The Law Society of South Australia's Professional Conduct Rules is annexed as Appendix D.

THE PRESENT NEW ZEALAND LAW – CRIMINAL LIABILITY

9 There are in New Zealand no statutory provisions corresponding to the common law offences of maintenance and champerty. Since the criminal law was consolidated by statute in 1893 the sole source of New Zealand criminal law has been statutory.[29]

THE PRESENT NEW ZEALAND LAW – TORT

10 Apart from differences between the two jurisdictions as to the circumstances in which public policy justifies subsidisation,[30] the New Zealand law as to maintenance and champerty as torts is probably identical to that of England before the various statutory changes referred to in paragraph 4. So a no win no

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27 Legal Profession Act 1987 s 187(4).

28 Criminal Law Consolidation Act 1935 Schedule 11 para 3(2)(c).

29 The relevant provision in the current statute, the Crimes Act 1961 s 9, provides that "No one shall be convicted of any offence at common law or of any offence against any Act of the Parliament of England or the Parliament of Great Britain or the Parliament of the United Kingdom …".

30 Discussed in para 3.

fee arrangement where on success only a normal fee was payable might be able to be justified as charitable, but any other contract between a supplier and a litigant making the supplier's entitlement contingent on success, particularly one involving a success uplift, whether or not calculated as a proportion of the amount recovered, is champertous. There is much to be said for Professor Todd's view that little would be lost by abolishing maintenance and champerty as torts in New Zealand.[31] There has been no reported New Zealand case in which a claim in tort has succeeded[32] and with the abolition of the tort in England and in New South Wales, Victoria and South Australia, there is no longer available the assistance of precedents from those sources.

11 On the other hand it is less clear to us than it was to the Law Commission that "the factor of damage is almost *impossible* of proof". One would have thought that a successful defendant in a maintained action could recover as special damage from the maintainer costs awarded against the plaintiff that proved irrecoverable from the plaintiff, and the difference between party-and-party and solicitor-client costs. Although in New Zealand such a claim could be determined under the powers of the courts to award costs against a non-party and to award full costs,[33] this procedure works effectively only where the maintainer is readily ascertainable. It does not work if the maintainer keeps out of sight and it is necessary for the party seeking to pursue the maintainer to invoke such procedural processes as discovery. There are also other situations in which damage can be proved. Abolitionists should ponder the Queensland case of *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd* [34] in which the opponent (Scott Constructions) of maintained plaintiffs recovered against the maintainer as special damages the increased cost of alternative finance necessitated by Scott Constructions' banker withdrawing accommodation by reason of the existence of the maintained litigation. In that case it was established that the maintainer's purpose was to procure the winding-up of Scott Constructions in order to dispose of a different claim against the maintainer by Scott Constructions, presumably on the basis that there are more ways of killing a claim than battling it out in Court.

12 A third possibility is that the torts of maintenance and champerty should be codified, but if this were to be done it would be a challenge to the draftsman to employ a language that on the one hand made it unnecessary to refer to the

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[31] S Todd et al *The Law of Torts in New Zealand* (2nd edn, 1997) (Brooker's Limited, Wellington) 1004. The fact that a plaintiff is maintained does not of itself warrant proceedings being stayed under the inherent power as an abuse of process (*Abraham v Thompson* [1997] 4 All ER 362; *Roux v Australian Broadcasting Commission* above n 26, 608).

[32] Although there have been reported cases where the issue of illegality (discussed in para 13) has arisen in disputes between maintainer and maintained (*Mills v Rogers* (1899) 18 NZLR 291) and where a tort claim has been unsuccessful (*Sievewright v Ward & Others* [1935] NZLR 43; *Rawlinson v Purnell Jenkison & Roscoe* (1997) 15 FRNZ 678).

[33] As to full costs, High Court Rules R 48C(4)(f); as to costs against a non-party *Carborundum Abrasives Ltd v Bank of New Zealand* [1992] 3 NZLR 757 and *Brooklands Motor Co Ltd (in receivership) v Bridge Wholesale Acceptance Corp (Australia) Ltd* (1994) 8 PRNZ 197. The District Court has a corresponding jurisdiction (*Tracey International NZ Ltd v Mark Winter Waikato Ltd* (unreported) Judgment 24.3.1999 Hammond J High Court, Hamilton A166/98). The best discussion of costs against a non-party in both jurisdictions is in *Brooker's District Court Procedures* (Brooker's Limited, Wellington) para DR 54.08. The historical position is discussed at length in *Knight v FP Special Assets* (1992) 174 CLR 178.

[34] [1984] 2 QdR 413.

ancient cases, and on the other hand preserved the flexibility in relation to justifiability which has been such a feature of the modern development of the tort. The first issue on which comment is invited is as to whether the torts of maintenance and champerty should be abolished, codified or left untouched.

THE PRESENT NEW ZEALAND LAW – CONTRACT

13 Assuming the abolition of maintenance and champerty as torts concerned with claims against the maintainer by the maintained party's opponent, it would be irresponsible for the reforming measure to fail to regulate the position as between maintainer and maintained. There ought to be put beyond doubt the answer to the question whether it remains the rule that agreements for maintenance and champerty are illegal and void on the basis of breach of public policy. If the answer is yes (which we believe that in the absence of express provision to the contrary it clearly would be) the questions that then arise are whether the law should be changed to permit some contingency fee arrangements and if yes, what types of arrangement and in what circumstances. All these questions involve consideration of the policy issues to which in the next part of this report we turn. In this paragraph we have not overlooked the power conferred on courts by the Illegal Contracts Act 1970 section 7 to validate illegal contracts, but such a discretionary power is it seems to us no substitute for a definite rule.

CONTINGENCY FEES: FOR AND AGAINST

14 Some (perhaps excessively obvious) points need to be made by way of a preface to a more detailed consideration of the pros and the cons of contingency fees. We do not imagine that anything set out in this paragraph is controversial.

- In comparing New Zealand with other jurisdictions certain differences need to be kept clearly in mind. In the United States of America the great bulk of litigation pursued on a contingency basis is for damages for personal injury, a class of litigation excluded in New Zealand of course by the Accident Compensation legislation. Such claims still exist in the United Kingdom and Australia also.
- A further difference between New Zealand and the United States of America is the absence in that republic of the almost automatic practice of awarding costs against unsuccessful claimants usual in Commonwealth countries. So the plaintiff litigating on the basis of being liable to the plaintiff's lawyer only if the claim succeeds risks nothing. There is moreover no New Zealand counterpart to the extensive American use of juries for civil claims and such phenomena as anti-trust law provisions for trebling damages, the wide availability of punitive damages and of class actions and the statutory provision for attorneys' fees in certain classes of litigation.[35]
- Eligibility for legal aid is currently set so low (so low as to exclude even some social welfare beneficiaries) that those who are neither rich nor very poor are in practice denied access to legal services. But it may be doubted whether contingency fees could ever replace legal aid totally or even

[35] It is because of these fundamental differences (as well as the obvious practical difficulties impeding comprehensive research; each of the 50 states has its own rules) that the present paper does not offer any comparative material from the United States of America. There are references to relevant American academic writing in Kate Tokeley "Taking a chance: a proposal for contingency fees" (1998) 28 VUWLR 13.

substantially. About 85 per cent of civil legal aid expenditure is for Family Court work.[36] Under a contingency fee arrangement a lawyer provides services and possibly pays various out-of-pocket amounts on the basis of the chance that the claim will yield sufficient fruit to enable recouping of those costs. Lawyers like everyone else prefer to bet on what they believe to be certainties or near certainties. So while a contingency fee regime helps those who are likely to recover something, for example those claiming capital assets on marriage breakdown or (in other jurisdictions) those who have suffered personal injuries (where the success rate is in practice high) such a regime is of no use at all to defendants or to those plaintiffs whose chances of recovery are nearer to 50/50, or to those plaintiffs who want to litigate matters that will not yield any cash return at all, such as custody cases, access cases, domestic violence cases and habeas corpus applications.

- Total reliance cannot be placed on professional disciplinary rules to curb abuses were a contingency regime to be introduced, partly because of problems that Law Societies have in policing, but also because it is not only lawyers who might provide assistance on a champertous basis. Probably (there are no available statistics) most personal grievance claims under the Employment legislation are conducted by non-lawyer agents to whom the legislation gives rights of audience and who are remunerated on a contingency basis.
- An unsuccessful plaintiff suing with the aid of a contingency fee arrangement is likely to incur a substantial costs liability to the successful defendant. In the United Kingdom it is possible to insure against such risk, but it is not clear that such cover would be available in New Zealand where the average rate of success compared with the United Kingdom underwriting experience would be substantially affected by the exclusion of personal injury claims.
- Even without contingency arrangements recovery is likely in practice to be reflected in the level of charging.[37]

15 What then are the arguments? In this paragraph we essay strong, even provocative, statements on each side of the dispute. We should make it clear that none of the propositions set out below represents the concluded or even the tentative view of the Law Commission. Our purpose in this paper is simply to endeavour to assist submitters in their decision-making by setting out contentions pro and con.

- Contingency fee arrangements enable litigation that would not otherwise proceed. Opinions differ as to whether this is good or bad. On one view such increase in litigation provides access to justice to those to whom it might otherwise be denied. The liability of a plaintiff to pay costs to a successful defendant will remain and be a sufficient deterrent to baseless claims. The opposing belief is that it is naive to regard encouraging legal claims as necessarily in the public interest. The cost in terms of money and executive time of a legal claim to a defendant is such that a defendant despite the availability of a good defence often finds that it makes economic sense to buy off the claimant to be rid of the matter. So to allow contingency fees is

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[36] If expenditure on Waitangi Tribunal claims is treated as part of total civil legal aid expenditure the Family Court proportion reduces to 78 per cent.

[37] The New Zealand Law Society's Conveyancing Practice Guidelines define the "Principles of Charging" (which apply to litigation as well as conveyancing) as including as a relevant factor to be taken into account "the importance of the matter to the client and the results achieved".

to facilitate something akin to extortion by the institution of low merit claims against deep pocket clients. In the words of a Scottish judge, it can be that "the raising of the action was done deliberately for the purpose of concussing the defendant into settling".[38] Proponents of each opposing view would seek support from the experience of personal grievance claims against employers and ex-employers (which is the only class of case in which, in apparent defiance of the law, contingency fee arrangements are common in New Zealand today).

- An advocate's responsibility is to provide a client with disinterested advice, "a clear eye and an unbiased judgment" as Buckley LJ put it.[39] If the advocate's remuneration depends on the outcome of a claim, the advocate is no longer disinterested. This reasoning as a matter of logic applies even where the contingency arrangement does not involve any more than normal fees, in other words where there is no arrangement for a fee higher than normal in the event of success.[40]
- This problem it is said is particularly acute where the lawyer has to advise whether to settle a claim by accepting a proffered bird in the hand. The certainty of remuneration without further effort may well be permitted to override the possible benefit to the client of battling the matter out. There is a possibility of a clear conflict of interest if the lawyer (whose obligation is a fiduciary one) and the client disagree.
- The contrary view is that realism requires a rather more down-to-earth and less precious approach. Practising lawyers even in the absence of a contingency fee regime regularly confront and successfully surmount difficulties arising from conflicts between self-interest and the interest of the client, not least in the very context of advising on the acceptance or rejection of settlement proposals. Fashionable counsel may prefer to settle a potential *cause célèbre* rather than be publicly seen to lose it and must withstand any temptation to permit that preference to outweigh duty to the client. The judgment of any lawyer runs the risk of being influenced by the unlikelihood of further work from a substantial client if the lawyer advises rejection of a settlement offer and the matter is then fought and lost. "The solicitor who acts for a multinational company in a heavy commercial action knows that if he loses the case his client may take his business elsewhere".[41] (If the lawyer advises acceptance of the settlement and that advice is accepted no one ever knows what would have happened had the matter been fought.) Any lawyer in recommending settlement must take care not to be influenced by the fact that settlement will free the lawyer to do something else. One result of large city firms pricing themselves out of the market for small knock-about cases in the District Court, is that many who call themselves litigation lawyers in fact have very little experience on their feet in court with a consequent shyness about getting involved in court appearances. This can lead to an over-readiness to settle which must in the client's interests be overcome.
- A conflict between duty and interest is common enough in other commercial contexts. Consider for example a commission agent entitled to a commission calculated as a percentage of the price urging a seller to accept a particular

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38 *X Insurance Co v A and B* 1935 SC 225, 251 per Lord Fleming.

39 *Wallersteiner v Moir (No 2)* [1975] QB 373, 402.

40 As to this see *Awwad v Geraghty & Co*, above n 2, 623 per Schiemann LJ.

41 *Thai Trading Co (a firm) v Taylor* [1998] QB 775, 790 (CA) per Millett LJ.

offer, $x, rather than hold out for $x+$y. From the seller's point of view the additional $y that the seller hopes to get may be important. From the agent's point of view on the other hand the percentage of $y that the agent will get if the higher price is achieved may be not such a large amount as to make it sensible to risk losing the sale. This is an everyday situation in real estate transactions.

- There are situations in which an advocate's duty to the court and to the administration of justice overrides the advocate's duty to the advocate's client. The advocate must for example abide by certain ethical rules difficult in practice to police. The temptation to breach such rules is greater if the lawyer has a financial interest in the outcome.

  > The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses.[42]
  >
  > The lawyer's direct interest in the outcome might lead him to indulge in undesirable practices designed to enhance his client's chances, such as coaching witnesses, withholding inconvenient evidence or failing to cite legal authorities which damage his client's case.[43]

  But there are many callings in which persons can be led into misbehaviour (insider trading for example) by hope of gain. There is no reason to believe that lawyers have a greater propensity to stray from the straight and narrow path than those in other walks of life.
- Contingency fees shift certain financial risks from litigant to lawyer. The lawyer is likely to increase the lawyer's fees to balance the assumption of such risks.

  > The lawyer is able to spread those risks over a number of cases and is therefore in a better position to bear them.[44]

  On this premise, one economic consequence of a regime of contingency charging is that the lawyer's other clients are subsidising the contingency fee clients. The New Zealand legal profession abandoned the belief that cross-subsidisation was a legitimate method of charging when it accepted that a swings-and-roundabout approach was not a sufficient justification for the now long abandoned regime of scale charging for conveyancing. On the other hand such an argument carried to its logical extreme would mean the outlawing of all *pro bono* work, and in any event the proportion of work done on a contingency basis is likely to be so slight that the feared economic consequences are unlikely.

16 Assuming a legislative scheme broadly along the lines of the English and Australian statutes, one formulation of the issues on which we invite comment arising out of this part of our paper is as follows:

(a) Should any legislation spell out that agreements amounting to maintenance or champerty are contrary to public policy and so illegal with the consequences provided by the Illegal Contracts Act 1970?

(b) Are there any classes of champertous arrangement that should be an exception to that rule?

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42 In *re Trepca Mines Ltd (No 2)* [1963] Ch 199, 220 per Lord Denning.

43 Green Paper *Contingency Fees* (HMSO 1989) para 3.

44 Above n 43, para 3.15.

(c) If yes, should there be excepted from the general illegality rule agreements under which the client's liability for fees is dependent on success (a term to be defined in the agreement) and under which:
- normal fees only will be payable; or
- normal fees with a success uplift will be payable; or
- the provider of the legal services is entitled to some fraction of the recovered amount?

(d) If remuneration is based on a share of the recovered amount should that entitlement be capped?

(e) If a success uplift not calculated as a share of the recovered amount is to be permitted, should it to be capped in any and if so in what way?

(f) What should be provided to the client by way of disclosure of the amount by which the agreed fee exceeds a normal fee?

(g) Should any classes of litigation be excluded from what is proposed?

(h) Should detailed regulation of such agreements be laid down:
- by the statute;
- by the Attorney-General or Minister of Justice, in which event should there be a statutory obligation to consult and if so whom;
- by the New Zealand Law Society;
- by some other person or body?

(i) Should a form of agreement between the provider of the services and the client be prescribed and if no, should there be a requirement of writing and should there be disclosure requirements other than as already mentioned in (f)?

(j) Should there be a cooling off provision?

(k) Should there be a power to vary or overrule such agreements and if yes, in whom should such power be vested?

(l) Should such an agreement be required to contain a machinery to resolve disagreements between lawyer and client in relation to settlement proposals?

(m) Assuming a case to be made out for permitting some sorts of contingency fee arrangements subject to some sorts of safeguards, does the likely number of such arrangements warrant the law change that would be required?

ASSIGNMENT OF RIGHT TO SUE

17 In paragraph 2 we noted that the principal modern significance of the torts of maintenance and champerty is in the contexts of contingency fees and of the rule prohibiting the assignment of a bare cause of action (by a bare cause of action we mean a simple right to sue, that of a person seeking exemplary damages for sexual abuse for example). It would be an easy way around the rules against maintenance if a maintainer instead of funding an action by A against B were permitted to take an assignment of A's right of action and sue B in the maintainer's own name. So the common-law declines to recognise an assignment of a bare cause of action (a term which does not include a liquidated debt) if the assignment savours of maintenance or champerty. But it is quite clear that:

> If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit, [there is] no reason

> why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.[45]

The commercial interest must be an interest other than the mere acquisition of the right of action in question. "That no doubt is the interest of any assignee."[46] There is however no objection to the assignment of the fruits of an action on terms that do not give the assignee any right to interfere with the way in which the action is conducted. The reasoning is that as a consequence of the absence of any right of interference there is (bearing in mind the historical *raison d'être* of such torts) no element of maintenance or champerty.[47]

DIFFICULTIES IN INSOLVENCY SITUATIONS

18 The rule denying effect to the assignment of a bare right of action can cause difficulties in insolvency situations. A right to sue (except in respect of claims of a personal nature) will either be part of the bankrupt's property that passes to the assignee,[48] or part of the company's property in respect of which a liquidator has rights and obligations. But commonly the assignee or liquidator lacks the funds to prosecute the claim, and wishes to sell it. In the case of claims existing at the commencement of the bankruptcy or liquidation the problem has been solved by judicial sleight of hand. In *Seear v Lawson*[49] (a case of bankruptcy) and *Re Parkgate Waggon Works Co*[50] (a liquidation) it was held that the statutorily conferred power of sale of the cause of action overrode the general prohibition.[51] As Robert Walker J has put it:

> What has happened is that since 1880 the court has repeatedly held, and Parliament in successive reviews of the insolvency legislation must be taken to have accepted, that the statutory powers of sale conferred on liquidators and trustees in bankruptcy may be validly exercised without any breach of the rules of public policy covering maintenance and champerty.[52]

The same view has been expressed in Australia:

> This view was debatable when it originated, and susceptible of more detailed consideration and exposition; conferral of a power to do something does not necessarily overcome all problems of the legality of agreeing to perform it, and supposed illegality would usually require detailed consideration of the intended effect of the statutory authorisation. However it has become well established that dispositions of rights of action under powers in statutes dealing with bankruptcy and liquidation are effective.[53]

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45 *Trendtex Trading Corporation v Credit Suisse* above n 8, 703.

46 *Monk v ANZ Banking Group* (1994) 34 NSWLR 148, 153.

47 *Glegg v Bromley* [1912] 3 KB 474, 484.

48 Insolvency Act 1967 s 42(2)(b).

49 (1880) 15 Ch D 426 (CA).

50 (1881) 17 Ch D 234 (CA).

51 The current relevant New Zealand statutory provisions are the Insolvency Act 1967 s 72 and the Companies Act 1993 6th Schedule.

52 *Re Oasis Merchandising Services Ltd* [1995] 2 BCLC 493, 504–505 (HC).

53 *Re William Felton & Co Ltd* (1998) 16 ACLC 1294, 1297–1298 per Bryson J. The line of cases was followed in New Zealand in *Stone v Angus* [1994] 2 NZLR 2025 and treated as correct by the House of Lords in *Stein v Blake* [1996] AC 243, 257.

It is clear on the authorities that an assignee or liquidator can sell a right of action on terms that entitle the assignor to a share of the ultimate fruits of the litigation.[54]

19 But it is necessary to note a distinction between on the one hand claims existing at the commencement of the bankruptcy or liquidation enforceable by ordinary action to which the rules set out in the previous paragraph apply, and on the other claims enforceable by the exercise of the liquidator or assignee's statutory powers which are outside those rules. The judgment in the case of *In Re Oasis Merchandising Services*[55] refers to:

> … the distinction which we would draw between the property of the company at the commencement of the litigation (and property representing the same) and property which is subsequently acquired by the liquidator through the exercise of rights conferred on him alone by statute and which is to be held on the statutory trusts for distribution by the liquidator.[56]

and approves the judgment of Knox J in *In re Ayala Holdings Ltd (No 2)* which describes

> … the fundamental distinction between assets of a company and rights conferred upon a liquidator in relation to the conduct of the litigation. The former are assignable by sale under paragraph 6 Schedule 4, the latter are not because they are an incident of the office of liquidator.[57] [58]

There would seem to be sound policy reasons to permit, perhaps with the approval of the High Court, the funding of claims in the *Oasis* category on terms that would otherwise be champertous, provided that the liquidator or assignee kept control of powers that by the legislation are vested in the liquidator or assignee, not in some financier. Such arrangements are possible in Australia as an accidental consequence of the terms of its uniform legislation, and an examination of the reported cases from that jurisdiction gives an indication of the arrangements commercially available.[59] So the final issue on which comment is invited is whether as part of the current review of the insolvency legislation such champertous arrangements should be authorised and if so on what terms.

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[54] *Guy v Churchill* (1888) 40 Ch D 481; *Ramsey v Hartley* [1977] 1 WLR 686; *In Re Oasis Merchandising Services Ltd* [1998] Ch 170, 179; *Norglen Ltd v Reeds Rains Prudential Ltd* [1999] 2 AC 1, 11.

[55] *In Re Oasis Merchandising Services* [1998] CH 170 (CA).

[56] Above n 55, 182.

[57] [1996] 1 BCLC 467, 483, approved in the *Oasis* judgment, above n 55, 183.

[58] In *Re Nautilus Developments Ltd* [2000] 2 NZLR 505 (HC) it was held that an application brought under the Companies Act 1993 section 301 because it was in respect of causes of action vested in the company at the time of liquidation was therefore in the category of cases dealing with rights to sue extant before liquidation, section 301 being no more than procedural. It is not clear that this case correctly applied the *Oasis* test because while it is correct that s 301 simply provides a procedure (*Arataki Properties Ltd v Craig* [1986] 2 NZLR 294 (CA)) and that that procedure is not available to the liquidator alone and that an ordinary suit might have been brought by the company itself, nevertheless the liquidator's application under s 301 sought a discretionary remedy and was one that can be brought by a liquidator only in exercise of rights conferred on a liquidator by statute.

[59] *Movitor Pty Ltd v Simms* (1996) 136 ALR 643; *Re Tosich Construction Pty Ltd, ex parte Wily* (1997) 143 ALR 18.

APPENDIX A

Courts and Legal Services Act 1990 (United Kingdom) sections 58 and 58A (as substituted by the Access to Justice Act 1999 section 27)

58 Conditional fee agreements

(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this 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.

(2) For the purposes of this section and section 58A–
  (a) a conditional fee agreement is 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; and
  (b) a conditional fee agreement provides 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.

(3) The following conditions are applicable to every conditional fee agreement–
  (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.

(4) The following further conditions are applicable to a conditional fee agreement which 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.

(5) 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) shall not make it unenforceable.

58A Conditional fee agreements: supplementary

(1) The proceedings which cannot be the subject of an enforceable conditional fee agreement are–
  (a) criminal proceedings; and
  (b) family proceedings, apart from proceedings under section 82 of the Environmental Protection Act 1990.

(2) In subsection (1) "family proceedings" means proceedings under any one or more of the following–
  (a) the Matrimonial Causes Act 1973;
  (b) the Adoption Act 1976;
  (c) the Domestic Proceedings and Magistrates' Courts Act 1978;
  (d) Part III of the Matrimonial and Family Proceedings Act 1984;
  (e) Parts I, II and IV of the Children Act 1989;
  (f) Part IV of the Family Law Act 1996; and
  (g) the inherent jurisdiction of the High Court in relation to children.

(3) The requirements which the Lord Chancellor may prescribe under section 58(3)(c)–
  (a) include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made; and
  (b) may be different for different descriptions of conditional fee agreements (and, in particular, may be different for those which provide for a success fee and those which do not).

(4) In section 58 and this section (and in the definitions of "advocacy services" and "litigation services" as they apply for their purposes) "proceedings" includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.

(5) Before making an order under section 58(4), the Lord Chancellor shall consult–
  (a) the designated judges;
  (b) the General Council of the Bar;
  (c) the Law Society; and
  (d) such other bodies as he considers appropriate.

(6) 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.

(7) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a conditional fee agreement (including one which provides for a success fee).

APPENDIX B

The Conditional Fee Agreements Regulations 2000 2000 No. 692

LEGAL SERVICES, ENGLAND AND WALES

THE CONDITIONAL FEE AGREEMENTS REGULATIONS 2000

Made	*9th March 2000*
Laid before Parliament	*10th March 2000*
Coming into force	*1st April 2000*

The Lord Chancellor, in exercise of the powers conferred on him by sections 58(3)(c), 58A(3) and 119 of the Courts and Legal Services Act 1990 and all other powers enabling him hereby makes the following Regulations:

Citation, commencement and interpretation

1. – (1) These Regulations may be cited as the Conditional Fee Agreements Regulations 2000.

(2) These Regulations come into force on 1st April 2000.

(3) In these Regulations–

"client" includes, except where the context otherwise requires, a person who–

(a) has instructed the legal representative to provide the advocacy or litigation services to which the conditional fee agreement relates, or

(b) is liable to pay the legal representative's fees in respect of those services; and

"legal representative" means the person providing the advocacy or litigation services to which the conditional fee agreement relates.

Requirements for contents of conditional fee agreements: general

2. – (1) A conditional fee agreement must specify–

(a) the particular proceedings or parts of them to which it relates (including whether it relates to any appeal, counterclaim or proceedings to enforce a judgement or order),

(b) the circumstances in which the legal representative's fees and expenses, or part of them, are payable,
(c) what payment, if any, is due–
(i) if those circumstances only partly occur,
(ii) irrespective of whether those circumstances occur, and
(iii) on the termination of the agreement for any reason, and
(d) the amounts which are payable in all the circumstances and cases specified or the method to be used to calculate them and, in particular, whether the amounts are limited by reference to the damages which may be recovered on behalf of the client.

(2) A conditional fee agreement to which Regulation 4 applies must contain a statement that the requirements of that Regulation which apply in the case of that agreement have been complied with.

Requirements for contents of conditional fee agreements providing for success fees

3. – (1) A conditional fee agreement which provides for a success fee–
(a) must briefly specify the reasons for setting the percentage increase at the level stated in the agreement, and
(b) must specify how much of the percentage increase, if any, relates to the cost to the legal representative of the postponement of the payment of his fees and expenses.

(2) If the agreement relates to court proceedings, it must provide that where the percentage increase becomes payable as a result of those proceedings, then–
(a) if–
(i) any fees subject to the increase are assessed, and
(ii) the legal representative or the client is required by the court to disclose to the court or any other person the reasons for setting the percentage increase at the level stated in the agreement,
he may do so,
(b) if–
(i) any such fees are assessed, and
(ii) any amount in respect of the percentage increase is disallowed on the assessment on the ground that the level at which the increase was set was unreasonable in view of facts which were or should have been known to the legal representative at the time it was set,
that amount ceases to be payable under the agreement, unless the court is satisfied that it should continue to be so payable, and
(c) if–
(i) sub-paragraph (b) does not apply, and
(ii) the legal representative agrees with any person liable as a result of the proceedings to pay fees subject to the percentage increase that a lower amount than the amount payable in accordance with the conditional fee agreement is to be paid instead,
the amount payable under the conditional fee agreement in respect of those fees shall be reduced accordingly, unless the court is satisfied that the full amount should continue to be payable under it.

(3) In this Regulation "percentage increase" means the percentage by which the amount of the fees which would be payable if the agreement were not a conditional fee agreement is to be increased under the agreement.

Information to be given before conditional fee agreements made

4. – (1) Before a conditional fee agreement is made the legal representative must–

(a) inform the client about the following matters, and

(b) if the client requires any further explanation, advice or other information about any of those matters, provide such further explanation, advice or other information about them as the client may reasonably require.

(2) Those matters are–

(a) the circumstances in which the client may be liable to pay the costs of the legal representative in accordance with the agreement,

(b) the circumstances in which the client may seek assessment of the fees and expenses of the legal representative and the procedure for doing so,

(c) whether the legal representative considers that the client's risk of incurring liability for costs in respect of the proceedings to which agreement relates is insured against under an existing contract of insurance,

(d) whether other methods of financing those costs are available, and, if so, how they apply to the client and the proceedings in question,

(e) whether the legal representative considers that any particular method or methods of financing any or all of those costs is appropriate and, if he considers that a contract of insurance is appropriate or recommends a particular such contract–

(i) his reasons for doing so, and

(ii) whether he has an interest in doing so.

(3) Before a conditional fee agreement is made the legal representative must explain its effect to the client.

(4) In the case of an agreement where–

(a) the legal representative is a body to which section 30 of the Access to Justice Act 1999 (recovery where body undertakes to meet costs liabilities) applies, and

(b) there are no circumstances in which the client may be liable to pay any costs in respect of the proceedings,

paragraph (1) does not apply.

(5) Information required to be given under paragraph (1) about the matters in paragraph (2)(a) to (d) must be given orally (whether or not it is also given in writing), but information required to be so given about the matters in paragraph (2)(e) and the explanation required by paragraph (3) must be given both orally and in writing.

(6) This Regulation does not apply in the case of an agreement between a legal representative and an additional legal representative.

Form of agreement

5.– (1) A conditional fee agreement must be signed by the client and the legal representative.

(2) This Regulation does not apply in the case of an agreement between a legal representative and an additional legal representative.

Amendment of agreement

6.– Where an agreement is amended to cover further proceedings or parts of them–

(a) Regulations 2, 3 and 5 apply to the amended agreement as if it were a fresh agreement made at the time of the amendment, and

(b) the obligations under Regulation 4 apply in relation to the amendments in so far as they affect the matters mentioned in that Regulation.

Revocation of 1995 Regulations

7.– The Conditional Fee Agreements Regulations 1995 are revoked.

Irvine of Lairg, C

9th March 2000

EXPLANATORY NOTE

(This note is not part of the Regulations)

Section 58(1) of the Courts and Legal Services Act 1990 provides that a conditional fee agreement is not unenforceable if it satisfies certain conditions. These include conditions to be specified in Regulations under section 58(3) of that Act. Regulations 2 and 3 specify those conditions. Regulation 2 applies to all conditional fee agreements. Regulation 3 sets out further requirements applying only to agreements which provide for success fees.

Section 58A(3) enables the conditions which may be prescribed for conditional fee agreements to include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made. Regulation 4 imposes such a requirement and specifies what information is to be given. It does not apply where the agreement is between legal representatives.

Regulation 5 requires that agreements other than those between legal representatives must be signed by the client and the legal representative.

Regulation 6 provides for similar requirements to apply as respects amendments of agreements.

These Regulations replace the Conditional Fee Agreements Regulations 1995, which are revoked.

APPENDIX C

Legal Practice Act 1996 (Victoria) sections 96–99 and 101–103

96. Making costs agreements

(1) A costs agreement may be made–
  (a) between a client and a legal practitioner or firm retained by the client; or
  (b) between a client and a legal practitioner or firm retained on behalf of the client by another legal practitioner or firm; or
  (c) between a legal practitioner or firm and another legal practitioner or firm that retained that practitioner or firm on behalf of a client.

(2) A costs agreement must be written or evidenced in writing.

(3) A costs agreement may consist of a written offer that is accepted in writing or by other conduct.

97. Costs agreements may be conditional on success

(1) A costs agreement may provide that the payment of some or all of the legal costs is contingent on the successful outcome of the matter to which those costs relate.

(2) An agreement referred to in sub-section (1) is called a **"conditional costs agreement"**.

(3) A conditional costs agreement may relate to proceedings in any court or tribunal, except criminal proceedings or proceedings under the Family Law Act 1975 of the Commonwealth.

(4) A conditional costs agreement–
  (a) must set out the circumstances that constitute a successful outcome of the matter; and
  (b) may exclude disbursements from the legal costs that are payable only on the successful outcome of the matter.

(5) A legal practitioner or firm must not enter into a conditional costs agreement unless the practitioner or a partner of the firm has a reasonable belief that a successful outcome of the matter is reasonably likely.

98. Uplifted fees are allowed

(1) A conditional costs agreement may provide for the payment of a premium on the legal costs otherwise payable under the agreement on the successful outcome of the matter in respect of which the agreement is made.

(2) The premium must be a specified percentage of the legal costs otherwise payable, and must be separately identified in the agreement.

(3) A legal practitioner or firm must not enter into a conditional costs agreement under which a premium, other than a specified percentage not exceeding 25% of the costs otherwise payable, is payable on the successful outcome of any matter involving litigation.

Penalty: 100 penalty units.

99. Contingency fees are prohibited

(1) A legal practitioner or firm must not enter into a costs agreement under which the amount payable to the legal practitioner or firm under the agreement, or any part of that amount, is calculated by reference to the amount of the award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.

Penalty: 100 penalty units.

(2) Sub-section (1) does not apply to the extent that the costs agreement adopts an applicable scale of costs of a court or tribunal.

101. Effect of costs agreement

(1) Subject to this Division and Division 4, a costs agreement may be enforced in the same way as any other contract.

(2) To the extent that it provides for legal costs to be paid according to a practitioner remuneration order or scale of costs of a court or tribunal, a costs agreement is subject to assessment under Division 5.

(3) The procedure in Division 1 of Part 5 may be used to resolve a dispute over an amount claimed to be payable to a legal practitioner or firm under a costs agreement unless the practitioner or firm has commenced proceedings for recovery of the disputed amount.

102. Certain costs agreements are void

(1) A costs agreement that contravenes any provision of this Division is void.

(2) Subject to sub-section (3), legal costs under a void costs agreement are recoverable as set out in section 93(b) and (c).

(3) A legal practitioner or firm that has entered into a costs agreement in contravention of section 97(5), 98(3) or 99 is not entitled to recover any amount in respect of the provision of legal services in the matter to which the costs agreement related and must repay any amount received in respect of those services to the person from whom it was received.

(4) If a legal practitioner or firm does not repay an amount required by sub-section (3) to be repaid, the person entitled to be repaid may recover the amount from the practitioner or firm as a debt in a court of competent jurisdiction.

103. Cancellation of costs agreement

(1) On application by a client, the Tribunal, constituted by the registrar or deputy registrar, may order that a costs agreement be cancelled if satisfied–

(a) that the client was induced to enter into the agreement by the fraud or misrepresentation of the legal practitioner or firm; or

(b) that the legal practitioner or firm has been guilty of misconduct or unsatisfactory conduct in relation to the provision of legal services to which the agreement relates; or

(c) that the agreement is not fair and reasonable.

(2) The Tribunal may adjourn the hearing of an application under this section pending the completion of any investigation or charge in relation to the conduct of the legal practitioner or firm.

(3) If the Tribunal orders that a costs agreement be cancelled, it may make such order as it thinks fit in relation to the payment of legal costs the subject of the cancelled agreement, taking into account the seriousness of the conduct of the legal practitioner or firm.

(4) The Tribunal may order the payment of the costs of and incidental to a hearing under this section and, for that purpose, sections 162 and 164 apply accordingly.

APPENDIX D

The Law Society of South Australia Professional Conduct Rules Rule 8.10 and Attachment 1

8.10. Provided that the practitioner complies with the provisions of sub-paragraphs (a) and (b) hereof, a practitioner, in any matters other than criminal and matrimonial matters, either at the commencement of a practitioner's retainer from the client or after initial investigation of the matter, may agree that in the event of the action being unsuccessful the practitioner either will not charge the client or will charge only the disbursements or some defined amount or proportion of disbursements and that in consideration therefore, in the event that the client's action is successful, the practitioner would be entitled to charge a solicitor-client fee which constitutes up to double the fees to which the practitioner would otherwise be entitled if those fees were charged according to the scale contained in the Sixth Schedule to the Rules of the Supreme Court.

CONTINGENCY FEE

(a) (i) a practitioner shall only enter into a contingency fee agreement where in his or her professional judgment the client's claim has some prospect of success but that the risk of the claim failing and of the client having to meet his or her own costs is significant;

(ii) the practitioner should prior to the signing of the contingency fee agreement inform the client of the client's right to obtain independent legal advice and of the right to have the contingency fee agreement reviewed by the Supreme Court pursuant to Section 42(7) of the Legal Practitioners Act and of the right to have the fees charged reviewed by the Conduct Board under [S]ection 77A of the Legal Practitioners Act and the agreement should specifically record this.

(b) Any contingency fee agreement:

IN WRITING

(i) must be in writing and in plain English and set out clearly the terms of the agreement, and be signed by the client;

FORMAT

(ii) should generally be in the form of Attachment 1 to these Rules and contain at least the terms contained in that agreement;

COOLING OFF

(iii) must contain the provision that the client shall have a cooling off period of five clear business days from the signing of the contract during which he or she may, by giving notice in writing to the practitioner, terminate the contingency fee agreement.

THE LAW SOCIETY OF SOUTH AUSTRALIA

SAMPLE STANDARD CONTINGENCY FEE AGREEMENT

THIS CONTINGENCY FEE AGREEMENT is made the 1993
BETWEEN:

(the solicitor)

AND

(the client)

RECITALS:

A. The client wishes to engage the solicitor to provide legal services to the client in conducting an action (describe generally nature of action) hereinafter called "the action".

B. The client wishes those services to be provided on a basis that the client will not be obliged to pay for the same (or alternatively shall not be obliged to pay for legal professional costs and only an obligation to pay for out of pocket expenses) in the event that the action is unsuccessful. [Here describe what will constitute an unsuccessful action, eg: no recovery, or recovery of less than a certain amount or the different degrees of success which will lead to different consequences as to the client's liability to pay for out of pocket expenses.]

C. The solicitor is willing to provide the requested service on the basis requested by the client on condition that in consideration for agreeing not to charge the client for such services in the event that the action is unsuccessful, the solicitor shall be entitled to charge the client fees comprising up to (insert percentage) of the amount which would otherwise be payable for the professional legal costs of the action under the scale of costs formally applying (Scale of costs provided for by the Supreme Court Rules Fourth Schedule), together with disbursements and out of pocket expenses. This agreement records that condition and some of the other terms of the engagement of the solicitor by the client for the action.

D. The solicitor has advised the client, among other matters:

   1. of the client's entitlement to seek independent legal advice as to entering into the agreement;
   2. of the existence of a five day cooling off period;
   3. of the client's right to apply to the Supreme Court of South Australia under Section 42(7) of the Legal Practitioners Act to seek to rescind or vary this agreement if it is asserted that a term of the agreement is not fair and reasonable;

4. of the client's right to have the amount of the fees charged reviewed by the Conduct Board under Section 77A of the Legal Practitioner's Act;
5. of the probability that if the client's claim fails the client may well be liable to pay the party and party costs of the other party or parties to the action,

and the client by signing below hereby acknowledges the receipt of such advice.

SIGNED: .....

IT IS AGREED as follows:

1. The client engages the solicitor to act as the client's solicitors in the action.
2. In the event that the client does not obtain judgment in the action there shall not be liability to pay any costs or disbursements to the solicitor (alternatively "there shall only be liability to pay to the solicitor out of pocket expenses and not moneys for professional costs" or other arrangements made for disbursements).
3. In the event that the client does obtain judgment in the action, there shall be liability to pay to the solicitor, in addition to out of pocket expenses, legal costs calculated at (insert percentage) of the amount which would otherwise be payable under the [applicable] scale, (but the solicitor shall only be entitled to claim against the client for the amount, if any, received in respect of the judgment).
   (a) if the client recovers more than $
   the applicable percentage is %.
   (b) if the client recovers more than $
   the applicable percentage is %.
4. The client is entitled, within five clear business days of the signing of this agreement, to terminate the same by notice in writing delivered to the solicitor.
5. In the event that the client whether lawfully or unlawfully or the solicitor lawfully, terminates the engagement of the solicitor prior to the conclusion of the action, this agreement shall remain in force, and if the action subsequently concludes in favour of the client, the client shall then be liable to pay the solicitor the fee for work done by the solicitor calculated in the manner set out in this agreement, but should the action not conclude in his favour the client (shall not be obliged to pay the solicitor for work performed/only obliged to pay disbursements as the case may be), subject to any contrary agreement between the client and the solicitor.
6. (Any other clauses agreed with the client.)

DATED this day of 19

SIGNED (by the client)

this day of 19

WITNESS:

.....

SIGNED on behalf of (the solicitor)

by

WITNESS:

.....

Note: *The form of the agreement may be adapted to meet individual circumstances, and the agreement may be supplemented by other terms, but the substance of the recitals and the rights of the client set out above must not be prejudiced thereby.*

OTHER LAW COMMISSION PUBLICATIONS

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