

# costs update

## Proposals for reform of civil litigation funding and costs in England and Wales

Announced by Justice Minister, Ken Clarke, the Government has continued to show its real commitment to dealing with the problems caused by excessive legal costs, as initially addressed by Sir Rupert Jackson in his detailed report on costs that was published in January 2010 and followed up by Lord Young's recent damning report on the compensation culture.

On the same day two consultation documents were issued, one for the reform of legal aid in England and Wales, the other a set of proposals to progress the implementation of Jackson LJ's recommendations. The two documents total over 320 pages and contain over 51 questions dealing with legal aid and a further 60 questions on costs reform generally.

This edition of our costs update will highlight the major recommendations made and contrast how they have evolved from Sir Rupert's original report. Some of the proposals are startling - for example it is suggested that interest generated by client funds held by solicitors in client accounts be used to offset the costs of legal aid, a truly remarkable proposition.

For those who have been concerned about the level of costs these proposals are welcomed. In the current economic climate the desire to push through the reforms that will dramatically reduce public spending on damages and costs was bound to be attractive. Every year hundreds of millions of pounds is spent by Government, the NHSLA and Local Authorities in dealing with claims.

The Government is ***"seeking to strike the right balance between access to justice for those who need it with ensuring that costs are proportionate and that unnecessary or frivolous cases are deterred"***. Despite much cynicism at the time of Jackson LJ's final report we were always confident that the report would see some degree of reform as the taxpayer was a big winner and in light of the fact that Sir Rupert has been given time off from sitting (1 day every 2 weeks) to oversee the reforms and that quite quickly a number of pilot schemes were put into place.

### Costs reform - past and present

These proposals arise as a direct result of the "Jackson Report" which was written by Sir Rupert Jackson and was published in January 2010 following a 12 month consultation period. Hill Dickinson was pleased to be able to participate in the enquiry with attendance at numerous consultation sessions, in assisting clients with submitting feedback and in arranging a private meeting with Sir Rupert himself.

The consultation runs until 14 February 2011, with a further report due in the Spring. We would be pleased to discuss

with you any submissions you would wish to put forward in response to the questions raised or in order to provide you with further information.

The proposal document is split into two main sections, a set of proposals based largely on Sir Rupert Jackson's recommendations and a section updating on the current status of the recommendations for which there are not current proposals for legislation. Many of the original 109 proposals can be dealt with via judicial intervention or the amendment of practice directions, the main suggestions that need Parliament to act are the focus. It is to be noted that if the main recommendations are not accepted some alternative arrangements are suggested.

continued on page 2 >>>



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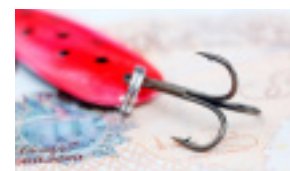
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Legal aid reform  
Page 4



New pilot scheme for  
assessment of costs  
introduced in Leeds  
circuit  
Page 6



Should a costs  
order be made  
for Pre-Action  
Disclosure?  
Page 7

## Welcome

Welcome to the Hill Dickinson costs update December 2010.

This update focuses on the proposals for reform, a new detailed assessment pilot, recent case law and highlights some of our recent successes.

We hope you find this update informative. We would welcome feedback on any of the articles or the update in general.

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# The proposals

## Conditional fee agreements and success fees

Problems in the CFA regime have long been identified, but these proposals highlight a number of flaws:

- Sir Rupert regarded it as wrong that the wealthy and well resourced could use CFAs, for example an insurance company pursuing a claim on behalf of a policy holder against a local authority, thereby massively increasing the costs liability.
- Claimants, especially since the advent of the 'cfa lite' in summer 2003, have had no interest in the level of costs being incurred on their behalf if they are guaranteed 100% of damages. This leads to the Claimant solicitors costs building with no control mechanism.
- Success fees generate 'an excessive costs burden', and the fear of high costs force parties sometimes to settle claims that might otherwise be successfully defended.
- It was felt that claimant solicitors often only cases that are extremely strong are 'cherry picked' to go on CFAs, rejecting weaker cases very early in order to generate "extremely healthy profits".

## Primary recommendation?

It is suggested that the recoverability of success fees be abolished. This is intended to dramatically reduce the cost liability of paying parties and will introduce a control of costs as claimants will become interested in what costs are being incurred.

From a defendant/insurance perspective this would be a substantial shift in policy. To protect Claimants further measures are suggested that there be a 10% increase in general damages, that the amount of success fee that can be deducted be capped at 25% of damages (excluding future care/loss) and a regime of **qualified one way cost shifting** (QOCS) be introduced.

This proposed QOCS regime has merit when considering it fits in with

the abolishment of the recovery of success fees and ATE (on one sample of about 23,000 claims considered in the Jackson report defendant insurers would have avoided liability for ATE premiums of circa £2-3million) but it does also present difficulties of assessing how far the qualification works. It seems to be suggested that the regime acts in a similar way to how costs protection works in legal aid, in that as there is no ATE a claimant's liability for costs would be assessed by the court after bearing in mind both ability to pay and conduct together. An extremely wide set of questions apply to this area that require further analysis. We could only imagine this proposal would fairly and realistically work in smaller personal injury cases, perhaps those cases to which the fixed costs regime that is envisaged might apply.

The reports suggest there are a number of concerns about such a proposal and in cases where damages are not sought it is suggested that the inter partes recoverability could remain, but with defendants still only liable for 25%.

## ATE premiums

It is proposed that ATE premiums no longer be recoverable from the losing party. This proposal dovetails with the suggestion that there be QOCS. That proposal restricts the defendant's ability to recover costs from claimants, and in view of that restriction there is less of a need for ATE to cover defendant costs. Claimants would still be able to take out ATE cover for their own disbursements but that will be their own choice and it would not be recoverable. An alternative model is that the ATE premium that relates solely to disbursements could still be recoverable if the claimant can show there is no other way of funding them. We can understand the sentiment however it will only generate a new costs war as defendants will want to investigate the ability to pay disbursements separately to avoid any ATE liability.

If this concession is to be confirmed it will need to be carefully regulated.

Of interest to trade unions will be the proposal that if ATE is not recoverable then their premium equivalents or notional premiums will also no longer be recoverable. This will have a large impact on the ability of trade unions to fund claims.

### Part 36 Reform

The Part 36 regime has been subject to some important case law recently and it looks like its rules are again under scrutiny. The Government wants to reform the rules so that they encourage settlement. It is felt that the current regime operates in favour of defendants and the sanctions against claimants are stricter (i.e. no costs since the date the offer could have been accepted) than against defendants (indemnity costs) so it is suggested that a defendant who fails to equal or beat a claimant's Part 36 offer at trial will have to pay an additional 10% of damages. This proposal will, we believe, have two likely outcomes:

- First, fewer cases will go to trial to avoid the risk of the penalty which in larger cases could be significant and more than the difference between the parties.
- Second, it could lead to appeals or satellite litigation.

Sir Rupert proposes that appeals will need to be discouraged by the judiciary.

### Alternative packages

No doubt in anticipation of a strong rejection of his proposals by claimant solicitors Sir Rupert sets out a number of variations to his main proposals. These include the extension of fixed recoverable success fees, no recoverability of success fees on costs of assessment, no success fee recoverable during the pre-action protocol period and the recovery of ATE to be capped at 50% of damages recovered, or for ATE to be not recovered if liability is admitted in the protocol period.

It is clear that whilst the Government might be clear in its intentions it knows it faces a tough battle to push through some of the more revolutionary reforms and that some degree of compromise or watering down of the ideas may be required.

### Proportionality

The concept of proportionality is one that has concerned lawyers and costs draftsmen over the last decade. One can understand the motivation behind the concept however there has been no definition in the rules and just one major case (Lownds) on the issue for guidance.

Too often the courts are reluctant to make a firm decision as to whether costs are disproportionate. A new clearer definition is proposed in the proposals document that would provide consistency and assist Defendants in challenging excessive costs. The new definition would take into account the monetary and non monetary value of the case, the complexity of the case, any wider public importance factors and the conduct of the paying party. Of immediate concern is that the proposed definition doesn't mention the conduct of the receiving party. The proposal document acknowledges this new definition may generate new satellite litigation and that further guidance from the Costs Practice Directions may be needed.

### Contingency fee agreements

These no win no fee agreements are currently only allowed in non contentious work, though they are popular abroad. The claimant ultimately gives his lawyer a percentage of the damages recovered.

These arrangements have seemingly been rebranded as "Damages-Based Agreements" or DBAs. Sir Rupert supports the use of DBAs as the costs charged are by their nature proportionate and they encourage efficiency on the part of the conducting solicitors, unlike other funding

arrangements. DBAs are also viewed favourably as their simplicity should in theory at least reduce the likelihood of satellite litigation.

As with success fees it is thought that there would be a cap on the level of deduction being applied, in personal injury cases it would be 25%. In cases where there is not a QOCS regime it is conceded that where the claimant solicitor takes on the risk of being liable for adverse costs orders then the percentage could be increased. A higher percentage may also be appropriate if the claimant solicitor assumes responsibility for disbursements if the case lost.

Our view is that the biggest obstruction to the success of DBAs is that it is proposed that there be specific regulation including the need to get independent advice. This undermines the whole proposed regime. There is the risk that the independent solicitor will simply try to undercut the instructed solicitor who will presumably want to charge for the advice (who would be responsible for the fee? We would guess it would be at least £75 plus VAT) and the independent solicitor may not feel able to advise adequately without seeing the whole file, in order to assess the merits of the percentage to be charged.

### Litigants in person

It is submitted that the prescribed rate for Litigants in Person should be raised from £9.25 per hour to £20 per hour.





## Legal aid reform

Legal aid still supports a considerable amount of litigation, largely in the realms of clinical negligence, abuse work and in respect of Immigration appeals. How these cases are brought in future (if indeed they can be) will dramatically change with public funding being withdrawn in some areas and with financial eligibility being tightened. There is no doubt that where claimants have a direct interest in the costs being incurred they are more careful in terms of deciding whether to pursue a claim or not. We accordingly welcome the proposed amendments to eligibility.

Under considerable pressure to slash Government spending the proposals to reduce spending on legal aid are dramatic, and will have a real impact on the volume of claims and how those claims are brought in the future. By 2014-5 the MOJ is expected to have saved almost £2billion from its budget, and part of this is a £350million saving on legal aid spending.

The Government submits that as part of its rationale for reducing the scope of Legal Aid there are many situations where individuals should be encouraged to seek alternative methods of funding or other ways to resolve disputes. It is proposed that the legal aid and Jackson reforms be introduced in parallel and see the introduction of a supplementary legal aid scheme.

### Reducing the scope of public funding

Whilst acknowledging that the Government has obligations imposed by the European Convention on Human Rights there is a commitment to reduce the scope of public funding, expecting individuals to *“work to resolve their own problems, rather than resorting to litigation at a significant cost to the taxpayer”*.

With no proposals to restrict criminal legal aid the report focuses on family and civil legal aid. It is noted that reform needs primary legislation and is unlikely to be implemented before 2012.

Paragraph 4.17 sums up the Government’s approach: *“We consider that proceedings where clients are primarily seeking monetary compensation will not generally be of sufficient importance to merit public funding, unless there is another*

## Update on other recommendations

### Fast track fixed costs/Referral fees

Both of these subjects have been subject to much debate. Fast track costs are desirable as they create certainty and referral fees are currently subject to an ongoing separate consultation where it has been noted that they can add circa £900 to the cost of a case, approximately 15% of the overall costs, with no tangible benefit.

The Government notes that both areas require further consideration but it is noted that there is a commitment that ***“the Government aims to extend the [fast track fixed costs] scheme by April 2012”*** to personal injury claims and low value clinical negligence claims. Such reform would have considerable impact. We have commented previously that whilst fixed costs regimes provide a degree of certainty Sir Rupert’s proposals include provision for an “escape clause”. This opens up the potential for a new costs war over conduct in such cases. Anyone who remembers the pre CPR regime might recall that scale 1 costs were the equivalent to the fast track and by the time the CPR was introduced discretion to exceed the fixed sum for preparation was almost always granted.

### Pilot schemes

There are a number of ongoing schemes trying to promote the improvement of costs and case management. Pilot schemes are being run in mercantile, technology and construction cases, regarding costs management in Birmingham, regarding expert evidence in Manchester and interestingly a costs pilot in the Leeds circuit where the paper assessment of costs takes place in bills of less than £25,000.

### The indemnity principle to remain

In Sir Rupert’s report of January 2010 it was recommended that if possible the indemnity principle be abolished. The indemnity principle is at the heart of most challenges on costs and it was felt that removing it would lead to a situation where claimant lawyers got paid a fair price for a fair job. This was one of the few proposals that was made where there was no definitive solution as to how it could be achieved. It is noted that the Government clearly state that they are not currently convinced that abrogating the indemnity principle is a necessity and it is not proposing to take any further steps on it.

*significant aspect to the claim that considerably increases its importance. For example, a damages claim which arises out of the abuse of a child or vulnerable adult, or out of serious abuse of state power, has an importance that goes beyond a simple money claim."*

This suggests that funding for abuse claims, many of which are pursued as part of group litigation will continue to be publicly funded.

This contrasts with immigration cases as an example where litigation arising out of a litigant's own personal life decisions about where they want to live, study or work are now viewed as not having the highest importance. This, the writer believes, must be an approach to avoid the expenses which he has recently seemed claimed. In one immigration case a Court of Appeal bill was claimed at £195,000 in respect of issues arising because the claimant wished to remain in London after a period of study. The Government distinguishes such claims from asylum work or cases where the claimant is detained.

The Government clearly set out that where CFAs or LEI is available they should always be used to pursue a claim, ahead of legal aid. Legal aid will remain for judicial review, but only for individuals which essentially maintains the status quo.

It is proposed to exclude all clinical negligence cases because it was felt that other forms of funding such as CFAs are readily available. It is noted that the report comments that legal aid has to a degree depressed the costs that the NHS has had to pay due to saving on not having to pay success fees. It is therefore crucial that to avoid costs paid by the taxpayer increasing that such reform is introduced in conjunction with Jackson's proposals to reform the current CFA regime. It is acknowledged that this will impact on a small number of cases with high disbursements and proposals for dealing with some excluded cases via a SLAS are also put forward.

Public funding is being withdrawn for consumer and general contract claims, which are money based. Public funding is being withdrawn on the basis that advice can be obtained via other sources such as trading standards. It is also being withdrawn for education, employment and many types of housing claims.

### Restrictions on expert fees

The Government is looking into introducing a new set of fees that will include fixed and graduated fees (and some limited hourly rates) for experts to do work in legally aided work. This is no doubt to drive down experts fees which in clinical negligence cases as one example can be very expensive. This will raise some interesting issues. In legally aided cases where the claim is successful the Claimant's solicitor is not limited to those prescribed rates on an inter partes basis. It is hoped that such an exception to the indemnity principle will not be applied here and that expert's fees will face a downward pressure. Often, we feel, the cost of extra reports can outweigh the actual benefit obtained.

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## Alternative sources of funding

The Government is looking for new and innovative ways of funding legal aid, as presently all funding is via tax revenue. The options mooted are dramatic and will attract much attention with additional funds being either taken from solicitors or clients. There is little doubt on whose side the media will focus its support!

The first option is to introduce a compulsory scheme whereby all solicitors have to advise their banks to remit all interest (save that which belongs to clients) that technically solicitors could previously take from client account to the Government and these sums would be ploughed in the legal aid fund.

On the face of it solicitors will regard this as an outrageous proposal, especially when a failure to comply with the compulsory version of the proposal is to be regarded as gross misconduct. In other jurisdictions this currently works. In the USA in 2007 such a scheme raised \$370million. A voluntary model is also suggested, however I can't imagine this would generate much income at all!

The alternative proposal is for a supplementary legal aid scheme. To the writer this seems to be a more equitable model, particularly when legal aid in family cases has long been regarded as only a loan for many years and where costs were repaid in many circumstances with interest on top. This scheme would see claimants paying a percentage of damages recovered into the SLAS, a scheme which would be used to supplement other cases. This second scheme would also fit in with some of the other amendments proposed by Sir Rupert Jackson whereby it seems as if claimants will no longer be able to expect to receive 100% of any compensation. It also stops legal aid becoming far more attractive as a method of funding claims.

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# Success stories

## Yosefi -v- Hill Dickinson client

*Breach of CFA regulations saw entire bill wiped out*

Costs were claimed at £32,938.49. The defendant alleged there was a breach of Reg 4.2(c) of the CFA regulations, which requires solicitors to consider alternate methods of funding. It was agreed that the claimant had BTE cover available under the driver's policy which they had failed to consider.

At the Detailed Assessment it transpired that the claimant solicitors had considered BTE may have been available but as the claims were proceeding against the driver decided it was unreasonable to further investigate. Ordinarily this would have been enough to satisfy the regulations but the defendants argued that although BTE had been considered that consideration was not sufficient. This is particularly the case when modern BTE policies are set up to ensure independent solicitors are appointed. The court agreed with the defendant and all solicitors' costs were disallowed.

Disbursements were still recoverable at about £4,000, however these were offset against the defendant's own costs of assessment leading to defendants making no net payment.

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## Hopkins -v- Hill Dickinson client

*55% disallowed from £132,000 bill*

We recently attended a fully contested hearing at the senior courts costs office where the claimant's bill was £132,205.45. Substantial savings were achieved following a robust approach and detailed Points of Dispute.

Time was reduced by over 30% as the court found too much was recorded. The claim was a slip/trip matter yet a success fee was claimed at 100%. At the time the CFA was signed liability had been in dispute for quite some time but the point was pursued firmly. Ultimately the court allowed only 43%.

Pre CFA costs of £17,500 were struck out. The claimant solicitors argued that their CFA was retrospective but

this held to not be the case. The bill was therefore assessed at £58,250. Arguments ensued about interest and offers. The Costs Master indicated he would allow the claimants their costs up to the date of the defendant's offer and the defendant would be allowed its costs thereafter.

The claimants detailed assessment costs, claimed at £14,780.65 were allowed at only £951.75. The defendant recovered over £2,000 for its assessment costs.

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## MOJ reforms update

The new RTA claims process has now been in place for over six months and the data gathered to date is eagerly being reviewed to see how the new regime is working. We believe that at this stage it is too early to derive conclusions, given only the most straightforward claims will have been resolved as the regime only covers accidents that occurred on or after 30 April 2010.

A recent edition of *Litigation Funding* refers to figures from AXA showing they are admitting liability within 15 days in 61% of cases and costs have fallen by £200 a claim. Our own data suggests that any difference is nominal at this stage. It is unlikely that any cases have got to the Stage 3 hearing and once cases do reach that far then we expect the average costs of a claim to dramatically increase.

We also believe that it is too early to assess whether the regime will generate a new 'costs war' in respect of conduct. Already there are grumblings about the conduct of some claimant firms but commercially no decision has been made as to how far these points will be pushed. Time will tell.

## New pilot scheme for assessment of costs introduced in Leeds circuit

Following on from Sir Rupert Jackson's report on costs a new costs pilot scheme has been introduced for detailed assessments which are based in the Leeds, York or Scarborough Courts, where base costs are £25,000 or less. The assessment is to be conducted on paper, unless the court takes the view that the case is unsuitable for a provisional assessment.

If the court completes a provisional assessment, it will send a copy of the bill as provisionally assessed to each party with a notice stating that either party may request the court to list the matter for full argument on any aspect of the provisional assessment within 21 days of receipt of the notice.

Costs of an oral hearing may be awarded to a paying party if the amount allowed is reduced to a sum which is 80% or less than the sum which had been provisionally assessed (excluding provisional assessment costs) and costs may be awarded to a receiving party if the amount allowed is increased to a sum which is 120% more than the amount provisionally assessed (excluding provisional assessment costs). These sanctions encourage parties to only seek a hearing if they are sure that a fundamentally wrong decision has been made.

This new regime raises some interesting points. In future Points of Dispute will need to be very detailed as we cannot add new points as they arise and all documentation we want to refer to will have to be bundled, paginated and referred to in the Points of Dispute.

In addition case law will have to be clearly and concisely quoted and a paginated authority bundle will need to accompany points of dispute. So whilst the costs of a hearing will be avoided more work will be required in advance. We do however believe that the new regime may be beneficial in that defendants will be in a better position to raise points and have files scrutinised without the risk of a hefty hearing bill.

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## Lord Young criticises claims farmers

Before his publicised resignation recently, in continuing the process started by Lord Justice Jackson the Government has continued to show a commitment to reducing legal costs. Recently Lord Young was asked to look at health, safety and compensation issues. His report preceded the Government's commitment to reform, as highlighted elsewhere in this update.

Whilst the majority of the report focussed on health and safety issues the report makes interesting reading on legal costs. David Cameron provides the foreword and provides a commitment to "curtail the promotional activities of claims management companies and the compensation culture they help perpetuate" He notes that in 2009 there were 800,000 compensation claims.

The report itself is explicit in its intentions, to support reform that will reduce legal costs. It sets out an intention to "free businesses from... fear of having to pay out unjustified damages claimed and legal fees".

The report fully endorses Jackson's report and contains some interesting data. It was noted that in 2009/10 the NHSLA paid out £297million in damages and £164million in costs. The report also focused on referral fees (note that a separate consultation on referral fees is due to be concluded in December) and notes that these typically are £800 per case, which amounts to 15% of the total costs despite adding nothing to the progress of the claim. It was also noted claims management companies are part of a referral market worth £300million a year, with £40million per year spent on advertising alone.

Young proposes the introduction of the Jackson recommendations, plus an extension to the RTA fixed costs regime from £10,000 to £25,000 and with restrictions on the volume and type of advertising allowed by CMCs.

With the taxpayer being the ultimate winner the pressure to follow through with the implementation of the reforms continues to grow.

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## Should a costs order be made for Pre-Action Disclosure?

Many firms of solicitors exploit pre-action disclosure applications as a way to boost their costs or recover their referral fee outlay on a case where they have a low prospect of success.

Claimants routinely succeed on receiving costs orders in these cases, on the basis that the defendant has acted unreasonably in failing to follow a pre-action protocol or failed to disclose appropriate documentation. We believe that often defendants too easily concede and agree to pay. This article explores what approach to take.

CPR 48.1 states that the usual order is that the defendant should receive the costs, yet in practice, defendants rarely make such an argument, and rarely are awarded their costs. CPR 48.1 (c) states that the court can make a different order - it does not state that the correct order is that the defendant should pay the claimant's costs. Working with the presumption being in the Defendants favour, the more appropriate order where there has been a breach of a pre-action protocol would be "no order as to costs".

To allow the claimant their costs is a double punishment. It would seem that this should only be used in cases where there is a real argument of misconduct or unreasonable opposition. This of course goes to the heart of the issue and we need to bear in mind the conduct of ourselves and our client in

co-operating with reasonable requests.

It is useful to explore the court's approach, which has been reiterated recently. In *SES Contracting -v- UK Coal PLC (2007)* the Court of Appeal reiterated the rules stating that "unreasonably opposing" an order is not satisfied by a defendant merely asking the claimant to satisfy the court that the documents should be disclosed.

It stated that to justify an order in the claimants favour conduct would have to be clearly unreasonable for the respondent to oppose the application or the manner of his opposition was so unreasonable it would be appropriate to require him to bear the whole of both parties' costs.

The issue was again dealt with by Flaux J in *Alan Kneale -v- Barclays Bank plc [2010] EWHC 1900 (Comm)* where despite the finding of the Trial Judge that the bank had been unreasonable in opposing the application for pre action disclosure, the appropriate order in those circumstances would be one of "no order as to costs".

Even if the court is minded to make an award of costs against the Defendant it is still possible to resist paying costs. It is arguable, particularly in CFA cases that unless the claimant has a liability to pay their solicitor's costs at this stage then the defendant cannot be requested to provide indemnity until conclusion of any substantive action.

The first argument hinges on the definition of "win" within the conditional fee agreement. The law society model stated "If you win your claim, you pay our basic charges, our disbursements

and a success fee.”. The definition of win reads: “...your claim for damages is finally decided in your favour, whether by a court decision or an agreement to pay you damages or in any way that you derive benefit from pursuing the claim.” Until the claimant has recovered damages the definition of win has not been satisfied.

This means that unless the claimant has won his claim i.e. when damages have been agreed, he does not have a liability to pay his solicitor any costs. This is the very nature of the “no win, no fee” CFA. Following the indemnity principle, a solicitor cannot recover more from his opponent than his client is liable to pay. As the claimant’s liability has yet to crystallise when a PAD application is issued, costs cannot be recovered from his opponent as there is nothing to indemnify. Of course many claimant solicitors have redrafted their CFAs to close this loophole.

In light of these issues, particularly if the claimant solicitors refuse to disclose their CFA, then an option is to proceed to the pre action disclosure hearing on the costs issue alone. It should be made clear that we are in effect being forced to attend due to the claimant’s failure to disclose what is a non-prejudicial term of their CFA. The claimant’s solicitor should be put on notice that we will seek to recover costs from them as a result of their unreasonable conduct. This may in itself force the claimant’s solicitor to defer their PAD costs until the conclusion of the claim.

If the claimant’s solicitor discloses their CFA or tells us that they are using the Law Society model CFA, we should offer to defer payment of the PAD costs until the conclusion of the claim. This can be agreed by consent. A more robust approach means that the claimants’ solicitors may be dissuaded from issuing PAD applications on weak cases in future.

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## STOP PRESS

### A time limited offer cannot be a valid Part 36 offer

In our last costs update we advised that in light of the [Gibbon -v- Manchester City Council \(2010\)](#) case all Part 36 offers should carefully be checked. This important decision has led to further scrutiny of the role of Part 36 after the court in [Gibbon](#) ruled that normal contractual rules did not apply to the strict Part 36 regime. In the recent case of [C -v- D \(1\) D\(2\) \(2010\) EWHC 2940 \(Ch\)](#) it was held that a order purporting to be a Part 36 offer that had a 21 day time period for acceptance was not a valid Part 36 offer as this it would be inconsistent with the policy behind Part 36. Part 36 is intended to encourage settlement and Part 36 offers can only be withdrawn in a formal way via service of a notice within CPR36.9(2)

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