

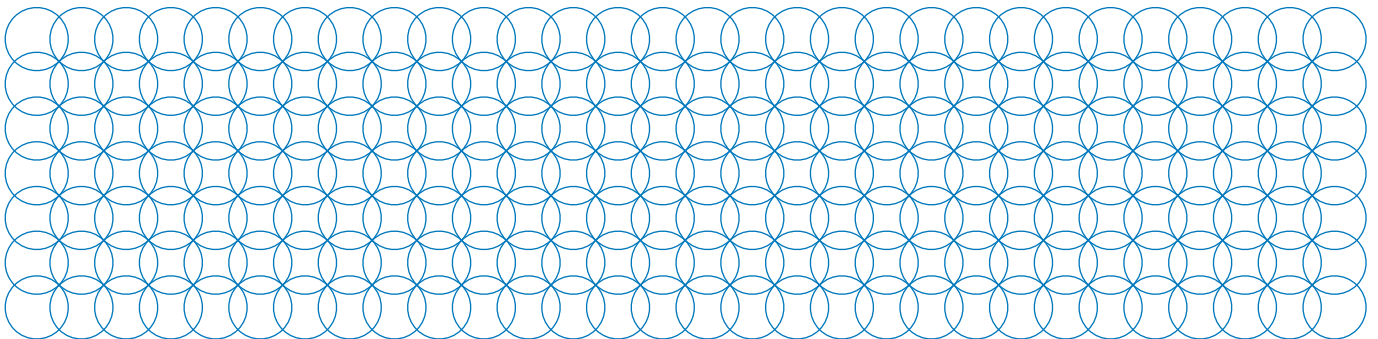


Ministry of
JUSTICE

Conditional Fee Agreements in Publication Proceedings

Success Fees and After the Event Insurance

Consultation Paper CP 16/07
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This consultation will end on 31/10/2007





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**A consultation by the Ministry of Justice. This information is also
available on the Ministry of Justice website at www.justice.gov.uk**

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Conditional Fee Agreements in Publication Proceedings
Success Fees and After the Event Insurance

Executive summary

This consultation paper seeks your views on proposals to implement recommendations from the Civil Justice Council (CJC) on fixed recoverable success fees and After the Event (ATE) insurance premiums in publication proceedings¹ funded under Conditional Fee Agreements (CFAs). Your comments will inform the development of amendments to the Civil Procedure Rules.

The Ministry of Justice is committed to ensure that the cost of resolving disputes is proportionate and reasonable. The Defamation Pre-action Protocol should be strictly adhered to so that litigation is conducted both efficiently and economically and that unnecessary expenses are not incurred.

In July 2004, representatives of defamation legal practitioners and media organisations invited the CJC to conduct a mediation to help resolve costs problems in this area of law. This consultation paper considers the outcome of the mediation process, which was suspended when the House of Lords was deliberating over the costs appeal in *Campbell v MGN Limited*², and the preferred option for reform that the Council has recommended to the Ministry of Justice.

The CJC has recommended amendments should be made to the Civil Procedure Rules to implement what it has named the 'Theobalds Park Plus agreement'. This model agreement sets out a range of fixed staged success fees and limits on the recoverability of after the event (ATE) insurance premiums based on an 'agreement in principle' the CJC believes was reached at a mediation event at Theobalds Park. The agreement in principle has been adopted with some further development by Carter Ruck a law firm specialising in running CFA in publication proceedings and News International a national news organisation. We agree with the CJC's recommendations that the Theobalds Park Plus model agreement is workable and would help ensure that costs of litigation are proportionate and reasonable. It would also bring stability and provide clarity to the cost regime and reduce legal challenges

The Department has been pleased to work closely with the CJC and supported its initiative to facilitate a mediated solution in relation to disputes over costs between the claimant lawyers and media organisations in publication proceedings funded by CFAs. We thank the CJC for their commitment and hard work in the mediation process to help develop an appropriate model agreement.

¹ Includes Defamation and Privacy disputes but excludes Intellectual Property, Copyright and Data Protection Act proceedings.

² *Campbell v Mirror Group Newspaper Limited* [2005 UKHL 61]

Introduction

1. This consultation paper seeks views on proposals to implement the Civil Justice Council's (CJC) recommendations on fixed recoverable success fees and after the event (ATE) insurance premiums in publication proceedings funded by Conditional Fee Agreements (CFAs). The consultation is aimed, in particular, at legal representatives who conduct publication litigation under CFAs, media lawyers, insurers and those in England and Wales with an interest in or views on the proposals.
2. This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The Consultation Criteria, which are set out on page 46, have been followed.
3. The partial impact assessment indicates that legal representatives, media organisations and legal expense insurers are likely to be particularly affected. The proposals are not likely to lead to additional costs or savings for businesses, charities or the voluntary sector, or the public sector. A partial impact assessment is attached at page 29 of the consultation paper. Comments on the partial impact assessment are particularly welcome.
4. An initial equality impact assessment has also been completed and indicates that the proposals would not have a negative impact on any group of people or individual. Comments from consultees on the impact of the proposals on any group are welcomed.
5. Copies of the consultation paper are being sent to:
 1. Allianz Insurance
 2. Association of British Insurers
 3. Association of Law Costs Draftmen
 4. BBC
 5. Better Regulation Commission
 6. Cabinet Office
 7. Carter-Ruck
 8. Chief Master Hurst, Senior Costs Judge
 9. Citizens Advice

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10. Civil Justice Council
11. Civil Procedure Rules Committee
12. Confederation of British Industry
13. DAS Legal Expenses Insurance Company
14. David Price Solicitors & Advocate
15. Department for Business, Enterprise & Regulatory reform
16. Express Newspaper
17. Forum of Insurance Lawyers
18. Guardian News and Media
19. Group Litigation Costs Services
20. Independent News & Media
21. Institute of Legal Executives
22. Irwin Mitchell Solicitors
23. Jeremy Morgan QC
24. Law Reform committee of the Bar Council
25. Law Society
26. MGN Limited
27. News International
28. Newspaper Society
29. Office of Fair Trading
30. Reynolds Porter Chamberlain LLP
31. Russell Jones and Walker
32. Schillings
33. Telegraph Media Group Limited
34. Temple Legal Protection Ltd

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- 35. The Judges' Council
- 36. The Publishers Association
- 37. Treasury Solicitor
- 38. Trinity Mirror PLC

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

The proposals

Background

1. The use of CFAs in publication proceedings emerged as a controversial issue during the 2003 CFA review paper '*Simplifying CFAs*'. Several national and regional media organisations took the opportunity provided by the review to raise a number of concerns about the impact of the use of CFAs in publication proceedings. Media organisations claimed that CFAs inhibited the right to freedom of expression and encouraged unmeritorious claims. Claimant lawyers felt that the use of CFAs in publication proceedings had greatly widened access to justice and placed claimants on an equal footing with their opponents.
2. In the 2004 consultation '*Making Simple CFAs a reality*', media organisations reiterated the view that CFAs needed to be controlled in publication proceedings. They stressed that funding defamation cases by CFAs (particularly where the claimant had significant personal wealth) impinged on the media's right to freedom of expression because the success fee could effectively double a claimant's lawyer's cost. This resulted in the 'ransom' or 'chilling effect' (a term used by the Court in the *Musa King*³ judgement) that forced the media to settle claims they might otherwise fight due to excessive costs. They also expressed concerns there was no true ATE insurance market, and the failure of the cost judges to effectively control CFA costs in defamation proceedings.
3. Claimant lawyers believed that CFAs provided access to justice for all in an area of law where many would otherwise not be able to afford to seek redress. They also made the point that CFAs played an important role in discouraging irresponsible journalism. The sharp decline in the number of claims issued in this area, after the introduction of CFAs in publication proceedings, indicated that lawyers were being more cautious when advising clients who were considering litigation. They believed that CFAs should not be banned or restricted in this area of law, but that success fees should be staged – 100% for cases going to trial and less for cases that settle early.
4. The media put forward suggestions for controlling costs and a system for recovering success fees in defamation proceedings. This covered the position, where cases are funded under a CFA without any ATE insurance.
5. The Department's view was that the existing powers at the Courts' disposal to control costs adequately dealt with cases where costs were considered to be unreasonable and/or disproportionate. The conclusion at that time was that there

³ *Musa King v Telegraph Group Limited* [2004] EWCA 613 (Civ).

was no need to amend the legislation concerning the use of CFAs in defamation proceedings.

6. The judgment in *Musa King* and the 2004 CFA consultation paper prompted media organisations and claimants lawyer groups to try and reach an agreement on the way forward. Following the CFA round table hosted by the DCA in July 2004, both sides approached the CJC to mediate. A pre-mediation forum was held in December 2004 to consider the main issues and there was general agreement that there should be mediation without prejudice to try to secure agreement from all parties on success fees and ATE insurance premiums.
7. In April 2005, Lord Falconer, the previous Lord Chancellor, spoke about CFAs and costs at a Fleet Street Lawyers Society event. Lord Falconer called for proper control and proportionality in the costs-risks attached to publication litigation and urged claimant and media lawyers to try to find a solution through discussion.
8. The CJC mediation was suspended pending the outcome of the House of Lords' judgment in *Campbell v MGN Limited*. The key issue was the compatibility of CFAs with the European Convention of Human Rights (ECHR); it was suggested that the success fee under a CFA was disproportionate and infringed the media's freedom of expression as guaranteed by Article 10 of the ECHR. The House of Lords found that the existing CFA regime is compatible with ECHR, but expressed some reservations about the impact of disproportionate costs.
9. The Constitutional Affairs Select Committee, in its inquiry on the Compensation Culture in March 2006, concluded that CFAs play an important role in giving people access to a remedy if they have been defamed or their privacy has been invaded. It felt that Courts could address disproportionate costs through appropriate cost control measures. The Government agreed with the Committee's suggestions, which included developing staged recoverable success fees, where controls might help to make costs more proportionate.
10. At the Fleet Street Lawyers Society 2006 event Baroness Ashton, then DCA civil justice Minister, spoke about CFAs and invited media lawyers to put forward proposals that would meet their concerns within the existing legislative framework. In late August, media lawyers submitted rule amendments, which merited consideration and the Master of the Rolls recommended that the CJC host a Forum that would include appropriate representatives from the media, legal profession and insurance.

CJC Mediation

11. The CJC hosted the first forum on 25 October 2006 at Theobalds Park to discuss the post *Campbell* position. There was agreement to consider matters in three stages:
 - Success fees and ATE insurance premiums
 - Costs Control
 - Code of Behaviour

12. At the first forum the CJC believes an 'agreement in principle' was reached which it has called '**The Theobalds Park Agreement**'. This included fixed levels of success fees and ATE insurance premiums that would be recoverable between the parties when the action was settled. If a case was settled and amends were agreed within 14 days there would be zero success fee and ATE insurance premium recoverable. The details of the agreement in principle are set out at Annex A.
13. Four technical issues relating to fixed periods, used to define the different stages, were still to be agreed. A smaller group drawn from representatives at the forum was remitted to try to resolve these issues. Little progress was made due to a dispute over whether an agreement in principle had actually been achieved at Theobalds Park. There had also been some reappraisal of the ATE insurance premium aspects of the initial agreement in principle.
14. The CJC hosted a further forum in February 2007 to conclude stage 1 of the mediation process – an agreement on the appropriate levels of success fees and ATE premiums. This concluded with the development of an alternative proposal – the **Hunton Park near Agreement** (at Annex B) but it was not possible to secure agreement on. As no further progress could be made the mediation was terminated and the parties were informed that the Master of the Rolls and DCA Ministers would be advised of the outcome and invited to make a decision on how the matter should be taken forward.
15. Despite the disagreements considerable progress was made in the mediation towards finding a workable solution as an agreement in principle was reached. Subsequently Carter Ruck and News International agreed to work together to refine the original Theobalds Park agreement in principle and agreed a protocol which the CJC has named the '**Theobalds Park Plus Agreement**' (see Annex C). The CJC accepted this agreement and it is currently being promoted more widely amongst claimant and media lawyers.
16. The BBC and David Price Solicitors & Advocates separately from the mediation process agreed to a bilateral protocol (see Annex D). The Law Society's Law Gazette (28 June 2007) and Litigation Funding publication (June 2007, issue 49) reported the agreement included no success fee if the case settled before proceedings was issued and no ATE premium taken out unless and until the BBC rejected the claim. The protocol also included a cost cap of £250,000 inclusive of success fee and an agreement to mediate. The agreement has been used to settle the claim of Inspector Ian Kibblewhite in relation to the book *Not One of Us*, written by Chief Superintendent Ali Dizaei and serialised in March as the BBC's book of the week. The CJC has not made any recommendation on this protocol.
17. The Bar Council has supported the mediation process and accepted the levels for stages for success fees in the majority of the publication proceedings and we would welcome its comments on the proposal.

Options for consideration and consultation

18. The CJC has proposed two alternatives for consideration:

- Do nothing
- Implement the Theobalds Park Plus Agreement

19. Doing nothing would retain the existing funding procedures with its complexities and increase legal challenges on costs issues. This option might also minimise the use of CFAs and deny access to justice to people with genuine claims, thus hampering the development of CFAs as a preferred means of funding litigation. Legal costs would continue to increase with defendants and liability insurers having to pay success fee and ATE premiums from the initial stage of a claim.

20. The MoJ agrees with the CJC that doing nothing is not acceptable and would mean allowing the parties to resolve their issues on a case by case basis, which may result in satellite litigation. The DCA stated in its response to the Constitutional Affairs Select Committee (CASC) Compensation Culture report (March 2006) and in its conclusion paper on CFAs published in August 2005 that cost control in publication proceedings was a serious issue. The Department confirmed that it would take steps to make costs control more proportionate and reasonable, including developing staged recoverable success fees.

21. The Department agrees with the CJC that the Theobalds Park Agreement included appropriate levels of success fees and ATE insurance premiums. However this did not include four technical issues set out above. Without these the agreement was incomplete and therefore did not meet the objectives of the mediation. The Hunton Park Near Agreement provided wider variance in the stages and levels of success fees but the parties could not agree on the agreement.

22. The Department agrees with the CJC that the Theobalds Park Plus Agreement is the most refined and complete of the three agreements. It is based on the agreement in principle achieved at Theobalds Park and covers the four technical issues that are important if the proposal is to work effectively. This agreement also includes a draft protocol regarding the behaviour of parties to litigation and has the support of leading claimant and media lawyers who were party to the mediation. The Theobalds Park Plus Agreement sets out the variance in levels of success fees recoverable at different stages of a claim. It also includes a nil recoverable success fee if cases are settled and amends agreed within 14 days, and a 100% recoverable success fee if the case reaches trial or settles within 45 days before the start of a trial.

Question 1

Do you agree that the Theobalds Park Plus Agreement should be given statutory force and incorporated into rules of court?

Question 2

Do you agree with the detailed stages specified and fixed recoverable success fees set out in the Theobalds Park Plus Agreement? If not, please state why and alternative proposals.

ATE Insurance premiums

23. ATE Insurance is generally taken out at the start of a claim when a claimant does not hold Before the Event (BTE) insurance or it is not suitable for a particular claim. ATE providers work on the premise that 'the many pay for the few'. Insurers argue that this allows for costs and administration to be distributed evenly across all claims.
24. The Department agrees with the CJC that a zero rated recoverable period should be achievable within the market and that staged ATE premium discounts could track the success fees figures. Under the proposals it is not considered appropriate for any ATE insurance premium taken out within 14 days of a claim to be recoverable. During the initial stage of a claim there should be no risk as to adverse costs.

Question 3

Do you agree that ATE insurance premiums should not be recoverable if cases settle or an offer of amends is agreed within 14 days?

Question 4

What would be the impact on the ATE market for publication proceedings of this proposal?

Annexes

- A. Theobalds Park Agreement**
- B. Hunton Park Near Agreement**
- C. Theobalds Park Plus Agreement**
- D. BBC and David Price Solicitors & Advocate Agreement**

Annex A

Theobalds Park Agreement

PUBLICATION PROCEEDINGS

AGREEMENT IN PRINCIPLE

25 October 2006, Theobalds Park, Cheshunt

Staged success fees and staged ATE premiums should track each other. ATE Insurers have agreed that premiums can be restructured to reflect the five stages below.

Success Fee and Insurance Template

1. 14 days 0%

Where the claim has been agreed between the parties* in terms of general settlement and amends, there shall be a zero success fee, and no ATE premium payable.

2. Pre issue 25%

Where a claim settles after the fourteen day period, but before issue of the claim, the success fee will be 25%, and the ATE insurance premium payable shall be 25% of the full premium

3. Post Issue 50%

Where a claim settles after issue, but before the first exchange of witness statements, the success fee will be 50%, and the ATE insurance premium payable shall be 50% of the full premium

4. 1st Exchange of witness statements 75%

Where a claim settles after the first exchange of witness statements, and more than 45 days* before the trial date, the success fee will be 75%, and the ATE insurance premium payable shall be 75% of the full premium

5. 45 days pre Trial 100%

Where a claim settles within 45 days of the trial date the success fee will be 100%, and the full ATE insurance premium shall be recoverable.

The Agreement in Principle was achieved with the acceptance that there were four outstanding issues that needed to be addressed before formal recommendations were made to Government.

These issues would be discussed at the next CEO (Planning) group meeting, and a date would be scheduled in London for either the full group, or a smaller representative group, to take forward.

Outstanding Issues

There remain four outstanding items that should be resolved before instructions to the Civil Procedure Rule Committee.

- (a) A precise definition of where a claim has been agreed between the parties, or is deemed settled. This should include consideration of; damages, defined words of amends, and costs
- (b) Whether the fourteen day (0%) period may be extended by agreement of the parties
- (c) Whether there should be a short, additional, defined period for the parties to consider the content of the first exchange of witness statements, before settling at the 75% stage.
- (d) Whether a success fee should be recoverable on detailed cost assessment?

It is proposed that claimants should be entitled to recover 50% of the success fee, recoverable at the stage of settlement.

Annex B

PUBLICATION PROCEEDINGS

NEAR AGREEMENT

22/23 February 2007, Hunton Park, Hertfordshire

1. **0%**

(i) If within 14 days of receipt of the letter of claim (extendable by agreement of the parties acting reasonably and in accordance with the pre action protocol) with an admission of liability

(ii) Further 14 days to settle terms (apology damages and costs) extendable by agreement as above

2. **12½%**

If case defendant admits liability outside 0% window

3. **30%**

(a) if defendants response to the letter of claim pursuant to 5.3(5) of the pre action protocol denies liability

(b) on issue of proceedings including Part 8 (5.2 DA) and costs only the parties acting reasonably and in accordance with the pre action protocol

4. **50%** *[60% claimant – not agreed]*

On service of defence *[Part 36, go back to 30% - not agreed]*

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5. **75%**

Where a claim settles after first exchange of witness statements, and more than 45 days before the trial date

6. **100%**

Where a claim settles within 45 days of the trial date

7. **50% of the success fee**

On detailed cost assessment

Annex C

Draft Protocol between News International and Carter-Ruck PART 1 - success fees in media related cases

Referred to in the paper as the “Theobalds Park Plus Agreement”

Base Costs

1. 0% success fee

Save as provided in 2-7 below, no success fee will be recoverable in cases where within 14 days from receipt of the letter of claim in which notice is given that a funding arrangement has been entered into or within 14 days of receipt of notice that a funding arrangement has been entered into:-

- (a) the defendant makes an offer of amends pursuant to Section 2 of the Defamation Act 1996 i.e. effectively admits liability, which is accepted and/or leads to the action being settled with damages and costs being agreed without court proceedings or a Request for Detailed Assessment being taken out.
- (b) the defendant’s detailed response to the letter of claim pursuant to either the Pre-Action Protocol for Defamation or the Practice Direction on Protocols (for non-libel claims) admits liability and leads to the action being settled with damages and costs being agreed without court proceedings or a Request for Detailed Assessment being taken out.
- (c) proceedings are issued solely for the purpose of a statement in open court.

2. 25% success fee

A 25% success fee will be recoverable where:-

- (a) a case settles before service of the defence and the defendant has not responded to the letter of claim as set out in 1. (a) or (b) above.

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- (b) the defendant makes an offer of amends pursuant to Section 2 of the Defamation Act 1996 which is accepted but agreement cannot be reached on damages and Part 8 proceedings under s. 3 (5) are issued and served.
- (c) agreement is not reached on damages and proceedings are issued and served.
- (d) costs are not agreed and a Request for Detailed Assessment is taken out.
- (e) the parties agree to a binding arbitration on any issue AND the defendant offers to pay for the arbitration, if the action settles under 1 (a) or (b) above as a result of the binding arbitration.

3. 50% success fee

A 50% success fee will be recoverable where:-

- (a) a case settles after the defendant states or otherwise indicates in a response to the letter of claim that the defendant will be raising a substantive defence to the letter of claim or there is a denial that the publication is actionable. This includes cases in which the defendant disputes that the publication is (a) defamatory and/or (b) identifies the claimant and/or (c) amounts to a misuse of private information.
- (b) a case settles after service of the Defence but on or before the 14th day following first service of witness statements. This period shall be extended, if within the 14day period following service of witness statements the defendant makes a Part 36 offer, which is accepted.
- (c) a case settles after the trial of a preliminary issue (save where the time scale envisaged in stage 4 or 5 below has already been reached with regard to the hearing of the preliminary issue, in which case that percentage success fee shall apply).

4. 75% success fee

A 75% success fee will be recoverable where:-

a case settles after the 14th day following first service of witness statements (or any extension thereto as set out above) but earlier than the 45th day before the date listed for the start of trial,

5. 100% success fee

A 100% success fee will be recoverable where;-

a case reaches trial or settles within 45 days before the date listed for the start of the trial-

6. Extensions of time

Any period provided for in this Protocol may be extended by agreement between the parties. If a Part 36 offer is made and subsequently accepted the relevant success fee will be the success fee at the time the offer was made.

7. Costs of Detailed Assessment

A success fee of 25% will be recoverable on the costs incurred in preparation of and of any detailed assessment hearing if the case settles under paragraphs 1, 2 or 3 above and in other cases will be 50% of the success fee applicable to the case at the point of settlement.

(Nothing in this agreement shall prevent a defendant from requiring a claimant to have its base costs or disbursements assessed by the Court in accordance with normal assessment principles, or from challenging the reasonableness of the claimant issuing proceedings.)

Draft Protocol between News International and Carter-Ruck

PART 2 - Costs Information and Controls in CFA media related cases.

1. Both sides will seek to conduct the case in accordance with the CPR in a reasonable and proportionate manner.
2. Both sides agree to provide the other side with an estimate of costs stating the approximate costs incurred and anticipated to be incurred if called upon to do so in writing 28 days prior to a particular stage or event in the litigation. The costs estimate so requested must then be delivered 14 days prior to the particular stage or event in the litigation.
3. Both sides will notify the other side if there is likely to be any variation from the estimate of costs in excess of 20%.
4. Both sides agree that the Claimant or the Defendant's solicitors, if the said litigation is being handled by an outside firm of solicitors, are aware of the terms of this protocol and that they should abide by it.
5. Either side may bring this agreement to an end but must do so prior to any complaint being made or proceedings entered into.

Annex D

AGREEMENT RE CONDITIONAL FEE AGREEMENTS

DATE:

DAVID PRICE SOLICITORS & ADVOCATES

of 21 Fleet Street, London EC4Y 1AA

BRITISH BROADCASTING CORPORATION

of MC3C6 Media Centre, 201 Wood Lane, London W12 7TQ

A General

This agreement is reached between David Price Solicitors & Advocates (DPSA) and the British Broadcasting Corporation (BBC).

Either party can bring this agreement to an end in relation to all new cases at any time by notifying the other in writing. This means that if DPSA notifies the BBC of a new claim, both parties will be bound by the protocol in relation to that claim unless one party has previously notified the other that the agreement should end. Notification of a claim must take place after the publication complained of. Pre-publication correspondence does not constitute notification under this agreement.

This agreement relates to defamation, privacy and breach of confidence proceedings where DPSA acts for the claimant on a CFA and the BBC is a defendant. DPSA will ensure that in all cases to which this agreement applies, its client terms of retainer will bind the claimant to the terms of this agreement.

Where there is more than one claimant, any reference to 'claimant' in this agreement means 'claimants'. The claimants will be treated as one for the purpose of this agreement, eg the costs cap of £250,000 (see below) will apply to the combined costs of all claimants – there will not be a separate cap of £250,000 for each claimant.

Where the claimant wishes to bring proceedings against more than one party in relation to the same or similar publication or set of facts, it will do so in one set of legal proceedings. If this is not possible, any non-BBC defendant in such proceedings shall be treated as a co-defendant for the purposes of this agreement, eg for the purposes of the next paragraph.

Where the BBC is not the sole defendant, this agreement will also apply to any co-defendant if they are represented by the same lawyers as the BBC (ie by BBC Litigation or an external firm). It will also apply to any other co-defendant (with their agreement) if the BBC is indemnifying their legal costs. Where this agreement applies to more than one defendant, any reference to 'defendant' in this agreement means 'defendants covered by this agreement'.

B Costs Cap

Both the claimant and the defendant will agree to a mutual costs cap of £250,000 being the maximum recoverable costs from the other party. The costs cap shall include:

- a) Any success fee;
- b) Disbursements except as indicated below.
- c) Any other recoverable costs not excluded below.

The costs cap shall not include:-

- a) VAT.
- b) The costs of an assessment.
- c) The costs of any appeal (at the end or in the course of the claim).
- d) The claimant's court fees.
- e) The claimant's ATE insurance premium

The parties will conduct the litigation in a reasonable and proportionate manner. A court shall be entitled to take into account the costs cap in determining any matter before it.

C Success fee

All CFAs will have success fees at the following rates:-

- **0% if the case settles before issue of proceedings or proceedings are issued solely to enable a statement in open court to be read or costs to be assessed as a term of settlement reached before the commencement of proceedings.** The 0% success fee will also apply in the event of an offer of amends being made and accepted before the issue of proceedings, but the parties being unable to agree damages and the claimant/DPSA issuing Part 8 proceedings for a damages hearing.

- **50% if the claim settles after proceedings are issued but at least one week before trial.**
- **100% if the case settles 1 week or less before the commencement of trial.**

The defendant will not challenge the success fees set out above on an assessment, except to the extent that it can be argued that it was unreasonable of the claimant to issue proceedings. It will not be unreasonable of the claimant/DPSA to issue proceedings in the event of a failure by the defendant to respond substantively to a claim within a reasonable period of time.

D ATE insurance

The claimant/DPSA will give the defendant reasonable notice in writing before taking out insurance and also give reasonable notice of the amount of the premium and provide a copy of the policy wording and schedule to the defendant save that the claimant/DPSA will not be obliged to provide any information that indicates the insurer's or DPSA's assessment of the merits of the claim .

E Pre-action protocol

Both sides agree to attempt to resolve the claim before proceedings are issued, if reasonably possible.

Both sides will conduct correspondence efficiently and will respond in a timely fashion to correspondence. In particular, the claimant/DPSA will provide adequate details of the claim and the defendant will seek to respond substantively to the claim as soon as possible.

Neither party will unreasonably refuse a request for mediation and in the event of refusal will provide its reasons in writing. The parties will agree to enter any mediation in good faith. The mediation shall take place as soon as possible.

Both sides will adopt a "cards on the table" approach, as far as possible. It is accepted that this does not mean that the defendant has to give disclosure before service of statements of case and allocation, but neither shall the claimant/DPSA be precluded from making an application for disclosure either pre-action or before service of statements of case.

F **Offer of amends**

In the event that an offer of amends is accepted both sides will seek a prompt resolution of any outstanding matters. If either party reasonably requests a meeting between lawyers, the other side will agree. If that meeting fails to reach agreement it will be open to either side to seek a mediation as set out above.

G **Assessment of costs**

Both parties will act promptly where a costs assessment is required. Before instructing a costs consultant to prepare a bill the recovering party will provide a breakdown of their costs and will answer reasonable requests for information. In the event that this does not lead to a resolution the recovering party will be entitled to instruct a costs consultant and proceed with an assessment of the bill.

When costs are assessed by the Court this will be in accordance with normal assessment principles on the standard basis except where the court orders otherwise. The receiving party will not be entitled to recover more than the costs cap identified above.

Partial Impact Assessment

Ministry of Justice	Impact Assessment on staged Success Fees and After the Event Insurance in publication proceedings
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Stage: Consultation	Version: 1	Related Publications: Simplifying Conditional Fee Agreements ; Making Simple CFAs a Reality; New Regulations for CFAs
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Available to view or download at: <http://www.justice.gov.uk>

Contact name for enquiries: Rita Khan

Telephone number: 020 7210 8742

What is the problem under consideration? Why is government intervention necessary?

The use of conditional fee agreements (CFAs) with success fee and after the event (ATE) insurance premiums in publication proceedings has emerged as a controversial issue. The media organisation claimed that CFAs inhibit the right to freedom of expression and encouraged unmeritorious claims. The effect of success fees and ATE premiums in CFA funded cases, when added to the high costs charged by claimant solicitors, constituted a heavy inducement to settle a case on commercial grounds irrespective of merits. Effective procedures are necessary to bring about costs control in this particular area of law.

What are the policy objectives and the intended effects?

To examine the key issues and perceived problems concerning success fee and ATE insurance in relation to publication proceedings cases funded by a CFA.

To bring more effective costs control to publication proceedings and to ensure that costs are more proportionate and reasonable.

What policy options have been considered? Please justify any preferred option.

1. A range of options have been considered including doing nothing.
2. Adopt the proposed changes to simplify the costs regime in publication proceedings by implementing fixed recoverable success fee and ATE insurance premiums. This option would maintain stability of the costs regime and reduce legal challenges in the courts on costs issues.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

3 years after implementation.

Ministerial Sign-off

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options

Signed by the responsible Minister:



Date:



Policy Option Description

<p>ANNUAL COSTS</p> <p>One off Yrs</p> <p>£0 <input type="text"/></p> <p>Average Annual Cost (excluding one-off)</p> <p>£113k</p>	<p>Description and scale of key monetised costs by 'main affected groups'</p> <p>Business annual costs - £0 HMCS annual costs - £0 Insurers - £ 113K</p> <p>Total Cost (PV) £970k</p>
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Other **key non-monetised costs** by 'main affected groups'

None

<p>ANNUAL BENEFITS</p> <p>One off Yrs</p> <p>£0 <input type="text"/></p> <p>Average Annual Benefit (excluding one-off)</p> <p>£433K</p>	<p>Description and scale of key monetised benefits by 'main affected groups'</p> <p>Business annual benefits - £300k HMCS annual benefits - £20k Insurers annual benefits - £113k</p> <p>Total Benefit (PV) £3.73m</p>
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Other **key non-monetised benefits** by 'main affected groups'

Legal Profession: reduction in aggressive behaviour by both parties to litigation; introduction of clear, transparent and stable charging mechanisms, improved compliance.

HMCS: simplified methods of assessing costs.

Key Assumption/Sensitivities/Risks : The high cost of success fees in defamation proceedings has encouraged the settlement of unmeritorious claims which inhibits the freedom of the press and other groups. This concerns an area of law where there are so few cases (around 300 per year) and where often both sides litigate in an aggressive manner and consequently run up enormous costs.

Price Base Year 05/06	Time Period Years 10	Net Benefit Range (NPV)	NET BENEFIT (NPV Best estimate) £2.75m
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Conditional Fee Agreements in Publication Proceedings
Success Fees and After the Event Insurance

What is the geographic coverage of the policy/option?	England and Wales			
On what date will the policy be implemented?	2008			
Which organisation(s) will enforce the policy?	courts			
What is the total annual cost of enforcement for these organisations?	£0			
Does enforcement comply with Hampton principles?	N/A			
Will implementation go beyond minimum EU requirements?	N/A			
What is the value of the proposed offsetting measure per year?	N/A			
What is the value of changes in greenhouse gas emissions?	N/A			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro 0	Small 0	Med 0	Large 0
Are any of these organisations exempt?	No	No	No	No

Impact on Admin Burdens Baseline (2005 Prices)			
Increase of	£0	£0	£ 0

Key:

Annual Cost: Constant Prices

(Net) Present Value

Evidence Base for Summary Sheets

Publication Proceedings - partial impact assessment

Title and proposal

1. Fixed recoverable success fee and after the event insurance in publication proceedings cases funded through conditional fee agreements (CFAs).

Purpose and intended effect

2. The objective of these proposals is to bring more effective cost control to publication proceedings litigation funded through conditional fee agreements. These proposals are intended to ensure that costs are proportionate and reasonable. The proposals would also remove the threat from the 'ransom factor' in cases funded by a CFA and without ATE insurance. This means that if the claimant loses he will not be able to pay the successful media defendants their costs. The chilling effect – which means that the effect of success fees in publication proceedings when added to the high costs typically charged by claimant solicitors constitutes a heavy inducement to settle a case on commercial grounds irrespective of merits - on the freedom of the press and other groups would also be removed.
3. The changes will be achieved by amending the Civil Procedure Rules.
4. Legal representatives and clients using CFAs in such cases should find the process quicker, more straightforward and transparent. The courts should experience a reduction in the number of cases involving challenges on success fee and costs.

Devolution

5. This change applies to England and Wales only.

Background

6. The use of CFAs in publication proceedings litigation first emerged as a controversial issue during the June 2003 CFA review *Simplifying CFAs*. Several national and regional media organisations took the opportunity provided by the review to raise a number of concerns about the impact of the use of CFAs in publication proceedings cases. The media organisations claimed that CFAs inhibited their right to freedom of expression and encouraged unmeritorious claims. Claimant lawyers said in return that they

believed that the use of CFAs in publication proceedings cases have widened greatly access to justice and placed claimants on an equal footing with their opponents (mainly media organisations).

7. The responses to the June 2004 consultation confirmed the media organisations' view that CFAs needed to be controlled in publication proceedings to allow the media freedom of expression and remove the 'ransom factor' particularly where cases brought are funded by a CFA but without ATE insurance.
8. The media organisations argued that the effect of a success fee in publication proceedings, when added to the high costs charged by claimants' solicitors, constituted a heavy inducement to settle a case on commercial grounds irrespective of the merits. The media organisations believed the position had been reached where the costs and CFA provisions needed to be revised in order to protect their legitimate right to freedom of expression.
9. The claimant practitioners argued that CFAs provided actual and effective access to justice in this area of law where many would otherwise not be able to afford to seek redress. They argued that CFAs and costs discouraged irresponsible journalism and since the introduction of CFAs there had been a sharp decline in the number of defamation claims. They argued that CFAs should not be banned but suggested that success fees should be staged –100 per cent for cases that go to trial but substantially less for cases that settle early.
10. The proposed changes are as follows:
 - Introducing fixed recoverable success fees in defamation proceedings
 - ATE insurance to track success fee stages
 - Working with Civil Procedure Rule Committee to make any necessary revisions to the Civil Procedure Rules.

Risk Assessment – the problem

11. The main risks identified are that the effect of success fee in publication proceedings has encouraged the settlement of unmeritorious claims which inhibits the freedom of the press and other groups. This concerns an area of law where there are so few cases (around 300) and where often both sides litigate in an aggressive and extravagant manner and consequently run up enormous costs. For example, in *Campbell v Mirror Group Newspaper Limited* [2005 UKHL 61] the sum of £3,500 was awarded as damages compared to the bill of costs of £1,086,295 served by her solicitor. Some cases are funded by a CFA but without any ATE insurance, which have caused concerns among the media organisations since they are unable to recover their costs win or lose.

Costs judges have been ineffective in addressing unreasonable and disproportionate costs through the regulatory regime.

12. Fixed recoverable success fees and ATE insurance would reduce unreasonable and disproportionate costs, improve the current charging mechanism by the professionals, achieve greater stability, simplicity, transparency and higher standards, which would help both the claimants and the professional bodies and the courts.

Scaling the issues

13. There is a lack of data on the number of claims brought under a CFA in this area of law. This information is not collected centrally and many claims settle out of court. The media organisations have suggested that CFAs have contributed to a huge increase in legal costs, which imposes undue strain on the viability of business - mainly the regional media organisations.

Options

14. The options are:

Option 1 – do nothing

Option 2 – to control costs of litigation by introducing fixed recoverable success fee and ATE insurance premiums in publication proceedings cases.

Equity and Fairness

15. **Option 1** – Do nothing – This option would retain the existing funding procedures with its complexities, increasing legal challenges on costs, using court time dealing with costs hearings cases. It might also minimise the use of CFAs and deny access to justice to people with genuine claims, thus hampering the development of CFAs as a preferred means of funding litigation. Legal costs would continue to rise with defendants and liability insurers having to pay success fee and ATE premiums from the initial stage of a claim.
16. **Option 2** – Adopt the proposed changes to simplify the costs regime in this area of law by implementing fixed recoverable success fee and ATE insurance premiums. This option would make the process simpler for both claimant and media lawyers who wish to litigate. The proposed changes will remove inconsistencies in charging success fees, provide clarity and transparency between the parties, build trust and confidence among the lawyers and bring stability to the costs regime thus reducing legal challenges in the courts on costs.
17. There would be savings in legal costs if fixed recoverable success fee and ATE insurance are introduced. The lower starting point for recoverable fees of 0%

up to 14 days of a letter of notice of a claim being issued, up to a maximum of 100% if the claim goes to court will have an impact on costs overall. We estimate that there are about 300 defamation cases and about half would be funded by a CFA with a different variance of success fee and ATE insurance premium. There should result in a reduction in cases going to courts on cost issues.

18. The value of the benefits is difficult to quantify and information is invited from consultees as to the probable level of savings.

Key groups affected by the proposals

19. The Legal representatives specialising in this area of law (small and large businesses) would benefit from the proposals. The proposed fixed recoverable success fee and staged ATE insurance would bring clarity, transparency and stability in CFA funded cases and defendants would not behave aggressively or challenge the legal costs. The proposed changes should lead to fewer cases being taken into courts on cost issues.
20. Media defendants would benefit from the proposals as they would not have to pay a set success fee and insurance premium irrespective of when the claim was settled. The proposed fixed recoverable success fee and ATE premiums would bring stability and allow insurers to accurately calculate the risk.

Costs and benefits for businesses

Legal profession

21. The legal profession specialising in this area of law (small and large) will be the major beneficiary of the proposed changes. If the proposals to introduce fixed recoverable success fee and ATE insurance is adopted then the burden on this group should be reduced as costs will be controlled.
22. Accurate information is not available on the number and costs of defamation proceedings funded by a CFA with success fee and ATE insurance. However, we estimate there are about 300 claims per year and we assume for the purpose of this partial assessment that half would be subject to the new proposals.
23. We also assume there will be no start up costs involved for businesses (small and large) about the proposed changes. We are inviting consultees who will be affected by the proposals to provide information about the likely implications and costs associated with the proposed changes

Savings for businesses

24. For the purpose of this impact assessment we have adopted the hourly rates and number of hours allowed by the Senior Costs Judge Master Hurst in the *Adam Musa King v Telegraph Group Limited [2004] EWCA 613 (Civ)*. The Senior Costs Judge allowed :

- Grade A solicitors (partner) -£325
- Grade B solicitors (assistant) - £210
- Grade D solicitors - £105
- Costs Draftsman - £125
- Total hourly costs - £765.

Number of hours allowed:

- Partners work – 20 hours
- Assistant solicitor – 30 hours
- Counsel's work –30 hours

25. We estimate the current total hourly costs would be about £1000 and solicitors would save about 2 hours on each CFA funded case with a total savings of about £300k per year (£1000 x 2 hours x 150 cases).

26. We are inviting consultees likely to be affected by these proposals to provide information on the likely savings if any.

Costs and benefits for the courts

27. Proceedings were started, in the Queens Bench Division of the High Court, in 252 defamation cases in 2005. (Data is not available for 2006). We estimate that about half of this proportion would have been funded by a CFA. We estimate that the new proposals would bring about 50% reduction in the number of cases taken to court on costs issues and we also estimate saving of a day's judiciary work at £316 per day.

28. We assume that no start up costs for the courts would result from the proposed changes.

Savings for the Courts

29. We assume the costs of a detailed assessment on costs issues per day is £316 based on a salary of £98,000 per year for a Cost Judge and £17,000 per year for a court staff (admin). We estimate a reduction of one day's judicial work on detailed assessment hearing at Supreme Costs Office would bring savings of around £20k per year (£316 x 63 cases).

Costs and benefits for media defendants

30. We assume the minimum premium for a publication proceeding dispute to be about £2,250 with a liability of £100,000. We estimate out of 150 cases funded under a CFA that one third would benefit from the new proposals, so making a total saving of around £112,500. However, the proposals would also have an adverse impact on ATE insurance providers costing about £112,500.

Legal Aid

31. The proposals would have no impact on the legal aid fund as this area of law is excluded from legal aid.

Small Firms Impact Test

32. As mentioned above, we have consulted small businesses on this issue and conclude that small businesses which are legal representatives specialising in this area of law will benefit from the proposals. Therefore we do not anticipate that the proposals will have a negative impact on small firms. The regional media organisations have already been consulted and involved in this work, through meetings with officials and forums, and we will engage further with small businesses as part of the consultation. We will also consult with the Small Business Service as we progress with this policy. Consultees are invited to provide information about any cost implications associated with the proposed changes.

Question 5

What would be the potential costs/savings to your business of this option? Please indicate the size of your business: micro (1-9), small (10-49), medium (50-250) and also which sector you operate in?

Question 6

What would be the potential consequences to your business of this option?

Competition Assessment

33. It is not anticipated that option two will have any impact on competition. The competition filter has been completed and indicates no impact on competition. The market most affected by the proposals is the ATE insurance industry.

Equality Impact assessment

34. The proposals will have no adverse impact on any group of people or individual. The initial screening of the Equality Impact Assessment has been completed and indicates no impact on any group of people as described in the equality and diversity impact assessment.

Enforcement, sanctions, and monitoring

35. The courts may sanction solicitors costs if found to be non-compliant with the proposed changes.
36. The professional bodies will monitor the conduct of practitioners and the courts will consider the cases that come before them.

Specific Impact Tests – Checklist

Type of testing undertaken	Results in Evidence Base? (Y/N)	Results annexed? (Y/N)
Competition Assessment	Y	
Small Firms Impact Test	Y	
Legal Aid	Y	
Sustainable Development	Y	
Carbon Assessment	N	
Other Environment	N	
Health Impact Assessment	N	
Race Equality	Y	
Disability Equality	Y	
Gender Equality	Y	
Human Rights	Y	
Rural Proofing	N	

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

- 1. Do you agree that the Theobalds Park Plus Agreement should be given statutory force and incorporated into rules of court?**
- 2. Do you agree with the detailed stages specified and fixed recoverable success fees set out in the Theobalds Park Plus Agreement? If not please state why and alternative proposals.**
- 3. Do you agree that ATE insurance premiums should not be recoverable if cases settled or an offer of amends is agreed within 14 days?**
- 4. What will be the impact on the ATE market for publication proceedings of this proposal?**

Questionnaire: Partial Impact Assessment

We would welcome responses to the following questions arising out of the Partial Impact Assessment.

Question 5

**What would be the potential costs/savings to your business of this option?
Please indicate the size of your business: micro (1-9), small (10-49), medium (50-250) and also which sector you operate in?**

Question 6

What would be the potential consequences to your business of this option?

Thank you for participating in this consultation exercise

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (eg member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

How to respond

Please send your response by 22 October 2007 to:

Rita Khan
Ministry of Justice
Claims Management & Private Funding Branch
3.10
Selborne House
54-60 Victoria Street
London
SW1E 6QW

Tel: 020 7210 8742
Fax: 020 7210 0613
Email: rita.khan@justice.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.justice.gov.uk/index.htm>

Publication of response

A paper summarising the responses to this consultation will be published in [insert publication date, which as far as possible should be within three months of the closing date of the consultation] months time. The response paper will be available on-line at <http://www.justice.gov.uk/index.htm>

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The Consultation Criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact the Ministry of Justice Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622, or email him at consultation@justice.gsi.gov.uk

Alternatively, you may wish to write to the address below:

**Laurence Fiddler
Consultation Co-ordinator
Ministry of Justice
5th Floor Selborne House
54-60 Victoria Street
London
SW1E 6QW**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under **the How to respond** section of this paper at page 44.

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