

For further
information contact:

Claire Sharp
csharp@metcalfes.co.uk
0117 9453044

OPPORTUNITY FOR INSOLVENCY PRACTITIONERS TO COMMENT ON PROPOSED FORTHCOMING CHANGES FOR CONDITIONAL FEE AGREEMENTS

As you may be aware, in early 2010 Lord Justice Jackson published what is now known as the Jackson Report, a review of civil litigation costs. Whilst his focus was particularly personal injury litigation, his proposals will affect all litigation funding which is based on conditional fee agreements (CFA's) and may radically alter the future of insolvency litigation in particular.

Considering the relevant parts of the report to Licensed Insolvency Practitioners, it is proposed that CFA success fee should no longer be recoverable from Defendants if a Claimant is successful in litigation. The success fee would still be chargeable by the solicitor, but would be paid by the Claimant, either out of his damages or his own pocket. There is an obvious difficulty for insolvency litigation in that whilst the Report envisages Claimants negotiating with solicitors and getting the success fee down to the lowest possible amount (which arguably does not happen at the moment as Claimants know that any success fee payable will be paid by the Defendant), that marketplace analogy really only applies to personal injury where there is great deal of competition. In the narrow field of insolvency litigation there are few solicitors who are even prepared to consider taking a matter under a CFA (of which Metcalfes is one) but also the nature of the litigation is so specialised that there are relatively few solicitors able to properly consider and litigate any such matter. Indeed the amount of time and effort involved in merely quantifying an insolvency litigation claim and the chances of success are such that only one firm of solicitors generally is instructed to consider the matter.

The removal of the recoverability of the success fee from losing Defendants will also have an impact tactically in that Defendants advised by knowledgeable solicitors will now be told that whilst of course they will remain liable for legal costs if they lose, the amount for which they will be liable will be significantly lower than at the moment. This may well affect the attitude of the Defendant. Furthermore, if damages are likely to be reduced by the recovery of the success fee by the successful Claimant's solicitors, the cost-benefit analysis by both the Licensed Insolvency Practitioner and his solicitors will be significantly affected. The creditors are not likely to receive anywhere near as much money and the success fee will have to be included in the initial calculations when deciding whether or not litigation is viable. The Defendant's solicitors will also consider this fact knowing their potentially lower offers to settle the matter will be considered more seriously when the Claimant's solicitors know their success fees need to be paid using the settlement monies, and therefore an earlier settlement for less money might ironically benefit the creditors more in the long run.

An even more fundamental problem is that the Jackson Report also proposes that after the event (ATE) insurance premiums will not be recoverable from losing Defendants. Again in the insolvency litigation sphere such premiums are usually substantial given the lack of competition and the fact that they normally form part of a deferred payment agreement (i.e. no monies are paid upfront) and it is therefore not unusual for the insurance premium to be five figures or more. If the insurance premiums have to be deducted from the damages, again as described above, this will have a significant effect on the cost-benefit analysis as whether or not litigation should be brought at all, and on the tactics of the Defendant's solicitors.

Whilst sensible insolvency solicitors are always prepared to talk about ways to "share the pain" following litigation in order to ensure a maximum recovery for creditors, it should not be forgotten that the whole purpose of success fees are to ensure that solicitors make sufficient profit from litigation in order to cover the costs of unsuccessful cases brought under a CFA. Again, if success fees are not going to be recoverable from the Defendant and are unwilling to be paid by the Claimant, the availability of CFA's are likely to be reduced. However, the government is currently considering whether rather than abolishing success fees from being recoverable from losing Defendants in their entirety, it is possible the government will propose to cap the maximum recoverable success fee from a Defendant at 25% of the success fee with the balance of the success fee paid by the Claimant.

At the moment the consultation on the Jackson Report and its proposals in relation to the recoverability of success fees and ATE insurance premiums is set to run until 14 February 2011. Licensed Insolvency Practitioners are a key group to consider responding to the Ministry of Justice and setting out their thoughts as to whether or not the impact of such proposals would have a beneficial effect for the creditors of insolvent companies. In our view, in concentrating so closely on personal injury litigation, both the Jackson Report and the government have missed the fact that other types of litigation are at least partially dependant on CFA's, including both commercial and insolvency litigation. Certainly if the insolvency profession does not get involved in the consultation, our position when complaining about the outcome is seriously weakened. For the time being, Metcalfes remains committed to bring cases forward on a CFA basis where appropriate, and even if the Jackson Report is implemented along the lines of its current terms, it would not have any impact on litigation commenced before 2012.

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