

# Additional Liabilities Today

## Recent Cases

Brett Dixon  
APIL Fellow  
Costs and Funding  
Group Secretary

---

---

---

---

---

---

---

---

## Additional Liabilities Today



- Pankhurst v. White and MIB [2010] EWCA Civ 1445
  - The current scheme in relation to ATE can distort the operation of Part 36
  - The Claimant's solicitors arrangements were grotesque
  - They were relevant factors in refusing to award interest on costs

---

---

---

---

---

---

---

---

## Additional Liabilities Today



- "In addition to their base costs (i.e. their proper costs for conducting the litigation) they are extracting from MIB a "success fee" of some £100,000 for running a risk which simply did not exist."  
Jackson LJ

---

---

---

---

---

---

---

---

### Additional Liabilities Today



- *Redwing Construction Limited v Wishart [2011] EWHC 19(TCC)*
  - Not unreasonable to enter in to a CFA or obtain ATE
  - However, an inference can be drawn that it is done at times to put economic pressure on a Defendant to settle early even where they may have an arguable defence

---

---

---

---

---

---

---

---

### Additional Liabilities Today

- Virtually bound to substantially win = 20% uplift
- ATE premium was 42% of the insured amount – unreasonable
- 20% of ATE premium recoverable
- No reasonable excuse for not notifying Defendant of CFA
- No uplift on costs prior to notification

---

---

---

---

---

---

---

---

### Additional Liabilities Today



- *Sousa v. Waltham Forest London Borough Council [2011] EWCA Civ 194*

---

---

---

---

---

---

---

---

### Additional Liabilities Today

- Reasonable to enter in to a CFA
- The recoverability of the success fee and the uplift rate were within the discretion of the Court
- Were they unreasonably incurred or unreasonable in amount
- The Court will take in to account what other methods of funding were available

---

---

---

---

---

---

---

---

### Additional Liabilities Today



- The Court dealt with MGN v UK:
  - The Council submitted that this decision supported the wider proposition that it was unreasonable for a Claimant who can finance litigation without a CFA to do so

---

---

---

---

---

---

---

---

### Additional Liabilities Today

- The Court rejected this submission:
  - MGN v UK dealt with a disproportionate interference with a right to free speech and was unreasonable on that account – this case was not “remotely comparable”;
  - The success fee there infringed a convention right, unless it does so here, then questions of proportionality and reasonableness do not arise; and

---

---

---

---

---

---

---

---

### Additional Liabilities Today



- Parliament is best placed to decide on overall access to justice
- The submission was contrary to the House of Lords decision in Campbell v MGN (No 2) which is binding

---

---

---

---

---

---

---

---

### Additional Liabilities Today



- Thornley v. MOD [2010] EWHC 2584 (QB)
  - Once BTE indemnity had ended it was reasonable to enter in to a CFA
  - You can still enter in to a CFA if liability is admitted as long as you properly take the level of risk in to account in setting the success fee

---

---

---

---


---

---

---

---

### Additional Liabilities Today

Mid Essex Hospital Services   
NHS Trust

- LXM v. Mid Essex Hospital Services NHS Trust [2010] EWHC 90185 (Costs)
  - The Claimant entered in to a CFA with ATE cover when Legal Aid was available
  - Was it reasonable to do so:
    - At the time; and
    - In the eyes of the Claimant

---

---

---

---

---

---

---

---

### Additional Liabilities Today



- You must analyse the advantages / disadvantages of public funding as against the CFA and ATE
- Not unreasonable here
- Court persuaded by the inclusion of no shortfall provisions set against the position in relation to the statutory charge if legally aided

---

---

---

---

---

---

---

---

### Additional Liabilities Today

- The Defendant claimed the additional liabilities were disproportionate
  - CPR 44.4(2)(a) applies to all costs
  - The Court did not like this argument
    - The success fee will not be disproportionate as it would be based on the reasonable and proportionate base costs that the Court has allowed
    - It could not see that the ATE premiums were disproportionate
    - it was reasonable to take out, reasonable in amount, and the Defendant did not challenge the amount

---

---

---

---

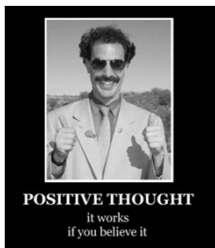
---

---

---

---

### Additional Liabilities Today



- The Defendants challenged the success fees
  - The Claimant had positive expert opinion on breach of duty at the time of entering in to the CFA

---

---

---

---

---

---

---

---

## Additional Liabilities Today



- Solicitor 1:
  - 100%
  - 67% allowed
  - Risks still apparent from
    - the Defendant's getting their own expert evidence;
    - joint meetings; and
    - potential cross examination

---

---

---

---

---

---

---

---

## Additional Liabilities Today



- Solicitor 2:
  - 33% allowed based on a 75% chance of success
  - Already had judgment on liability
  - Only risk was on failure to beat a Part 36 offer
  - Took account of the fact that the success fee was staged

---

---

---

---

---

---

---

---

## Additional Liabilities Today



- Counsel's Success Fee
  - 100% allowed
  - Liability trial one month away

---

---

---

---

---

---

---

---

### Additional Liabilities Today



- The Defendant objected to interest on costs
  - No liability to pay costs on behalf of Claimant to the solicitor

---

---

---

---

---

---

---

---

### Additional Liabilities Today



- Hunt v RM Douglas Roofing Limited [1990] AC 398 followed
  - an order for costs is a judgment debt
  - Interest runs from the date of judgment
  - Raised in other cases since – no merit

---

---

---

---

---

---

---

---

### Additional Liabilities Today



- Robinson-Tait v Cataldo [2010] EWHC 90166 (Costs)
  - Failure to serve Notice of Funding in relation to certain additional liabilities
  - Relief from sanctions sought

---

---

---

---

---

---

---

---

### Additional Liabilities Today

- The main substance of the information the Defendants were entitled to had been disclosed informally
- The policy number, the date of the policy, and the claims to which it related were disclosed much later but were less significant
- Relief granted

---

---

---

---

---

---

---

---

### Additional Liabilities Today



- Burgess v J Breheny Contracts Ltd [2009] EWHC 90131 (Costs)
  - The court could use its own experience to assess the level of an ATE premium with a broad brush approach

---

---

---

---

---

---

---

---

### Additional Liabilities Today



- Kris Motor Spares Ltc v Fox Williams LLP [2010] EWHC 1008 (QB)
  - The Defendant must raise any arguments over the level of the ATE premium and provide some proof to support their arguments

---

---

---

---

---

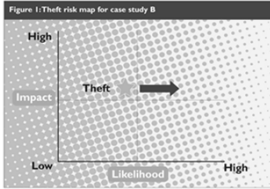
---

---

---



### Additional Liabilities Today



- If a Defendant challenges the premium it is good practice to get the insurance company to provide the risk assessment matrix they used in assessing the premium if available

---

---

---

---

---

---

---

---

### Additional Liabilities Today



- Parker v Seixo [2010] EWHC 90162 (Costs)
  - The Defendant sought to use figures from LJ Jackson's review to second guess the assessment of premium by the underwriter

---

---

---

---

---

---

---

---

### Additional Liabilities Today



- An individually rated and staged premium
- A high value claim
- The Court should not (without expert assistance) interfere with the underwriters assessment

---

---

---

---

---

---

---

---