Editor's Note

Costs capping orders in CFA cases improve costs control but raise questions about the CFA legislation and its compatibility with Article 6 of the European Convention on Human Rights

A.A.S. Zuckerman
Fellow of University College, Oxford

The persistence of high litigation costs under the CPR

For sometime now it has been clear that while the Civil Procedure Rules 1998 have been on the whole successful in improving the litigation culture and in increasing the efficiency of the litigation process, the Woolf reform has not succeeded in reducing the cost of litigation nor in stamping out excesses.

Examples of high and disproportionate expense on litigation abound. A £100,000-bill was presented in respect of a successful appeal (involving a half-day hearing) against an order striking out a counterclaim of £158,000 (*Young v J.R. Smart (Builders) Ltd (Costs)* [2004] EWHC 103 (QB); [2004] 2 Costs L.R. 298). In the event, a sum of £12,200 was allowed in respect of leading counsel's fees for preparatory matters, which did not include the cost of the conduct of the appeal itself. It is not unreasonable to assume that the combined parties' expenses in respect of this appeal on a preliminary matter exceeded the value of the subject-matter in dispute (the claim being for some £10,000) even before the reaching the merits of the parties' respective claims. In *Solutia UK Ltd v Griffiths* [2001] EWCA Civ 736; [2001] 2 Costs L.R. 247 the claimants' solicitors submitted a bill of costs totalling £220,000 in connection with a claim in which their clients had recovered £90,000. Two members of the Court of Appeal expressed grave concerns about the level of the expenditure.

In heavy commercial litigation or group litigation the amounts spent by the parties can be astonishing. For example, in *AB v Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034 (QB) the claimants brought a group action against an NHS Trust following the discovery that certain hospitals improperly retained the organs of deceased children and adults. The group consisted of some 2,100 claimants seeking damages. Within a short time of commencing

proceedings the claimants' lawyers had run up costs of some £1.45 million, which were expected to rise by a further £1 million.

The reasons for the CPR's failure to bring costs under control

Given that the fundamental purpose of the CPR was to simplify process and reduce costs, the question inevitably arises: what has gone wrong? To answer this we must start by looking at Lord Woolf's report on *Access to Justice* (Interim Report, 1995; Final Report 1996) which provided the ideology of the new system and devised its structure. Lord Woolf sought to put an end to the phenomenon of high and disproportionate costs by a combination of two strategies. The first consists of empowering the court to control the depth and pace of litigation, so that the court can ensure that the process employed in individual cases is appropriate to the issues of case and as economical of resources and possible. The second strategy consists in requiring the court to exercise its discretion in ordering and assessing costs in a manner that rewards reasonable and efficient litigation conduct and discourages excessive, unreasonable and obstructive practices (see *Access to Justice*, Final Report, (1996), p.82, para.20, p.83, paras 24–26).

It is indeed the case that only reasonable costs are recoverable and that obstructive litigants may be denied costs when they would otherwise be entitled to them. Thus, a successful party would not necessarily recover every pound spent in lawyers' fees and disbursements. An unsuccessful party will be ordered to pay only costs that are reasonable in amount and reasonably incurred, and, in the case of standard costs, they must also be proportionate (CPR r.44.4). Furthermore, even if successful, an obstructive litigant may be denied costs if the court considers that his conduct complicated and delayed resolution unnecessarily. However, by the time the court comes to assess costs, the parties will have already incurred liability to pay their own legal fees and expenses. A successful party would therefore still have to pay his lawyers the balance of costs incurred that on assessment was found not to be recoverable from the opponent. And an unsuccessful party will have to pay his own lawyers regardless of whether the costs would have been recoverable had the decision gone the other way (though parties may apply for assessment of their own lawyers costs). The above-quoted cases illustrate this point and, more significantly, provide further evidence that the Woolf strategy has not achieved the hoped-for results in this regard. Neither court control of litigation nor the exercise of discretion in the matter of costs have succeeded in discouraging excessive and disproportionate investment of resources in litigation.

The reasons for this are not difficult to identify. They have to do with forensic practices that respond to economic incentives and with the indemnity rule. It is in the nature of things that economic activity should follow the most rewarding path (all else being equal). The provision of litigation services cannot but be influenced by the fact that lawyers are paid by the hour, without an

upper limit (except the size of the client's purse) and, where no conditional fee agreement (CFA) is involved, regardless of outcome. It follows that by and large the legal profession has few, if any, incentives to economise in the conduct of litigation. Even where lawyers may otherwise be inclined to economise, they may be discouraged from doing so by the fear that if they do not do as others do and leave no stone unturned, they may be exposed to claims for professional negligence.

The indemnity principle combines with these forensic incentives to drive up costs. Litigants' fear of costs acts of course as a deterrent to litigation. But once it is clear that a dispute is destined to go all the way to trial, the indemnity principle tends to erode resistance to cost. Given that success brings with it not only the sum claimed but also the expenses laid out, a litigant who believes that an increase in the amount spent on litigation will increase his chances of success has good reason for progressively raising his stakes. Once one party has done so, the opponent would feel compelled to follow suit for fear that by using inferior procedural devices he could compromise his chances of success and run a greater risk of having to pay the other party's costs as well as losing the subject-matter in dispute. It is therefore not uncommon for litigation to reach a point where the parties would have reason to persist with investment in litigation not so much for the sake of a favourable judgment on the merits, as for the purpose of recovering the money already expended in the dispute, which may well outstrip the value of the subject-matter in issue. Even before proceedings have commenced, a claimant may feel obliged to invest considerable resources in pre-action protocol activity in order to persuade a defendant to enter into serious negotiations. It is clear, therefore, that the high cost of litigation could itself generate further upward pressure on costs.

Given the magnitude of litigation costs, a litigant's worst nightmare is that he will have to pay the other party's costs as well as his own. As a result, every party has a powerful motivation to try to shift the cost to some other party. This phenomenon itself tends to increase costs because it gives rise to further litigation about costs. One of the more disturbing aspects of the present state of affairs is that satellite litigation about costs has become a growth industry. The CPR have themselves contributed to this because cost-shifting is used as an instrument for promoting reasonable litigation practices. Since costs orders are less rule-based and more fact-based decisions there is considerable room for uncertainty, for argument and inevitably for satellite litigation. Lastly, expenditure on litigation may be used to put pressure on an opponent. A rich litigant may intimidate a poorer opponent simply by running a high-cost litigation strategy. The litigant who cannot afford to raise the necessary funds to match the opponent's procedural stakes, may well feel obliged to settle on unfavourable terms.

Much of the post-CPR development was predictable, largely because the powerful forensic economic incentives were not addressed directly, so that the legal profession continued to operate with no financial incentive to economise (see Zuckerman, "Lord Woolf's Access to Justice: Plus ça Change . . . " (1996) 59 M.L.R. 773). What was not predictable at the time of the Woolf Report

was that the structure of the CFA legislation would combine with the existing inflationary factors to inflame the situation even further. This is because the adverse incentive possessed by lawyers to complicate and protract the litigation process, could in some situations be magnified by the size of the success fee. For if the success fee is 100 per cent, every billable hour charged at a certain rate could yield twice as much. Of course, the risk of losing might discourage CFA lawyers from investing too much effort in a case. But this may not always be the case. Lawyers tend to take mainly cases in which they are fairly confident of success. Even where success is uncertain, they may reckon that by investing more in the process they would increase their chances of success, or at least impress the opponent with the risk of such a high costs order in the event that their client is successful that the opponent may be induced to settle.

A direct approach to controlling costs—*King v Telegraph Group*

All this has come to a head in *King v Telegraph Group Ltd* [2004] EWCA Civ 613, which both illustrates the malaise and offers the hope of a better remedy than those hitherto tried. The claimant maintained an internet site where he posted news and offered a political forum. He claimed that he was defamed by articles in the *Sunday Telegraph* suggesting that he had contacts with al-Qa'eda and assisted persons involved in terrorism, and that his used his internet services for this purpose. The claimant was represented on a conditional fee basis but without ATE insurance. The defendant newspaper was concerned that while they were exposed to the risk of having to pay a success fee as high as 100 per cent, in the event that the claimant was successful, it had no prospect of recovering its own costs in the event that it was successful because the claimant had no significant financial means. In an attempt to overcome this disadvantage, the defendant applied for an order directing the claimant to provide security for costs. The application was made pursuant to CPR r.24.6 and PD 24, 4. The latter provides that where "it appears to the court possible that a claim . . . may succeed, but improbable that it will do so, the court may make a conditional order . . . " Such conditional order may, according to PD 25, 5.2, require a party to pay a sum of money into court.

This unusual application is comprehensible only when one realises the sheer amounts involved. The defendant initially estimated its costs alone to be in the region of £300,000, which it feared it would be unable to recover if it were successful. Ordinarily, the risk of being unable to recover costs because the opponent is impecunious would cut little ice. For, as Hoffmann J. pointed out in *Oxy Electric Ltd v Zainuddin* [1990] 2 All E.R. 902, there is no power (and, one may add, no justification) to require an impecunious plaintiff to give security for costs as a condition to proceeding with his claim for no better reason that he is poor and will be unable to pay the opponent's costs. What provided the defendant with a more understandable cause for complaint was that if the claimant were to win at trial, his bill of costs is likely to be at least

as high as the defendant's and that as a result of the uplift by way of a success fee this could result in total costs in excess of £1 million. The defendant argued that any damages award was likely to be so low in comparison to the costs of a trial and that therefore it made no economic sense to defend the proceedings even if the publication was fully justified. Looked at from a purely financial point of view, it would be better off paying the claimant the sum of £150,000, representing the likely damages, than defending, winning and being landed with a £400,000 bill (which was later estimated to be the likely cost to the defendant alone). The defendant felt compelled by its journalistic integrity to resist the claim despite the lack of economic sense. But if that position were allowed to stand, the defendant newspaper argued, it would lead to a self-imposed restraint on publication for fear of being sued by impecunious claimants, and that such a chilling effect on a newspaper exercising its right to freedom of expression would be contrary to the public interest. It therefore argued that to allow the present action to continue without security for costs infringed the defendant's right to freedom of expression under the European Convention on Human Rights (ECHR), Art.10.

Eady J. rejected this argument, pointing out that the Court of Appeal in *Olatawura v Abiloye* [2003] 1 W.L.R. 275 at [26] warned against "exorbitant applications for summary judgment . . . in a misguided attempt to obtain conditional orders for security for costs". He pointed out that there was no point in ordering a payment into court of a token character and that ordering a substantial payment would stifle the claim because the claimant had no means, thus hindering the claimant's access to justice and working against one of the principal policy considerations underlying the CFA regime. Eady J. dismissed the defendant's application.

The possibility that the cost of successfully defending an unmeritorious claim could be higher than the value of the claim itself is not confined to defamation actions against newspapers. Whatever the nature of the action, it would offend the most basic principles of justice to require poor claimants to pay security for costs as a condition to proceeding with their action, because such an order would effectively deny them access to justice. The defendant's real complaint was therefore not that the claimant was persisting with his claim when he would not be able to pay the defendant's costs, but that the claimant was doing so with the help of legal representation (without which the claimant would presumably have been unable to mount an effective case) that was provided on the basis of a hefty success fee, which could eventually have to be met by the defendant.

By making this complaint the defendant newspaper was drawing attention to some of the more pressing difficulties affecting the administration of civil justice today, as Brooke L.J. explained:

> "56. The present difficulties arise at the interface between the civil justice reforms and the reforms concerned with litigation funding. The case is also set against a background of disquiet about the level of legal costs and the size of jury awards in libel cases which recent changes in the law have not entirely dissipated. That something is still seriously wrong can be

> readily gleaned from the fact that it was common ground that the claimant's award would be unlikely to exceed £150,000 even if he succeeded on every issue, including his claim for aggravated damages. In February 2004 the claimant's solicitors estimated their past and prospective costs in the main action to be just under £360,000. This figure did not allow for any success fee uplift, or for the costs of these ancillary proceedings before Eady J. and this court. In March 2004 the defendants' solicitors said that their likely costs, past and future, would be just under £350,000, a sum which did include all the costs of this ancillary litigation other than a figure of about £35,000 for the likely costs after Mr Caldecott and his junior were instructed on this appeal."

Moreover, something seems to have gone seriously wrong, Brooke L.J. went on to say, when "the gulf between the value of this action to the claimant and its value to the lawyers instructed in the case" (at [57]). Clearly, since the claimant's solicitors stood to recover £720,000 in fees, including the success fee, if the claimant recovered against the defendant, the solicitors had a powerful incentive to prosecute the claim as hard as they could. For the reasons mentioned above, the risk of losing may not operate as a brake on excessive investment or resources, especially where the CFA lawyers believe that the sheer amount of their bill, should they win, could act as a lever to obtain a lucrative settlement.

Brooke L.J. drew attention to a number of striking features about the way in which the claimant's solicitors conducted this litigation. Although there were no significant pre-action costs, the claimant's solicitors revealed that by the time statements of case had been exchanged they had already incurred costs in excess of £ 32,000 (a sum equivalent to a potential liability of £64,000 for the other side on the basis of a 100 per cent success fee). Later, the solicitors said that their overall costs of the action were likely to be £238,250, of which over half was attributable to the cost of preparing for trial and for the five-day trial itself. Brooke L.J. thought that:

> "Because the claimant's solicitors knew of their client's lack of means and the absence of any ATE cover, they knew that the defendants would be placed in the awkward position that whatever they did to defend themselves they would be unlikely to recoup the legal costs they incurred, and if they attempted a settlement they would probably have to pay an uplift (which might be as much as 100%) on all the claimant's solicitors' legal costs. In other words, none of the usual constraints existed which tend to encourage a party's solicitors to advance their client's claim in a reasonable and proportionate manner." (at [59])

There are really two distinct, though related, issues here. The first is concerned with the powers that the court has to ensure that the parties and their lawyers do not run up excessive and disproportionate legal fees. As already noted, in this case each party was expected to incur fees in the region of £350,000 making a total of £700,000 when the claim could at its improbable best yield no more than £150,000. And if the claimant succeeded, the total cost to the

defendants would be in excess of £1 million. The second issue concerned the role of a CFA, and in particular the success fee, in litigation of this type.

The court's power to spare litigants from excessive costs

On the first issue the Court of Appeal had no difficulty in holding that the court possessed the power to make a costs-capping order, whereby the recoverable costs are determined early in the proceedings. Such a power was found to exist by Gage J. in *AB v Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034 (QB), where he capped the claimants' recoverable costs to some £0.5 million notwithstanding that their prospective lawyers' fees were expected to rise to some £1.5 million by the end of the trial. This case was followed by Hallett J. in *Various Ledward Claimants v Kent & Medway HA* [2003] EWHC 2551 (QB). Without inquiring into the source of the power, Dyson L.J. said in *Leigh v Michelin Tyre plc* [2003] EWCA Civ 1766; [2004] 2 All E.R. 175 at [34] "that the use of CPR 43 PD para 6.6 to control costs by taking estimates into account at the assessment stage is not the most effective way of controlling the cost of litigation. It seems to us that the prospective fixing of costs budgets is likely to achieve that objective far more effectively."

Brooke L.J. found no shortage of legislative authority for this power. He observed that the language of the Supreme Court Act 1981, s.51 "is very wide, and CPR 3.2(m) confers the requisite power" (at [85]). CPR r.3.2(m) empowers the court to "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective". "It is, after all", Brooke L.J. said, "an important feature of the overriding objective that the court must be enabled to save expense and deal with a case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party (CPR 1.1), and the parties are required to help the court to further the overriding objective (CPR 1.3)" (at [83]). He went on to explain that in deciding what order to make, the court should take the principles set out in CPR r.44.3 (which govern the retrospective assessment of costs) as an important point of reference.

Although it is only recently that the courts have started to make use of their cost-capping power, its importance to the maintenance of proportionality of expenditure in litigation was already flagged in the Lord Woolf Report. In a paper I wrote for the Woolf inquiry I drew attention to the German system in which recoverable costs are calculated by reference to the value of the subject-matter in dispute. I did not advocate the adoption of the German system in that shape but a flexible system of cost-capping that could respond to the needs of individual cases. In *Access to Justice, Final Report*, Lord Woolf said (pp.82–83):

> "16. . . . the Inquiry published an issues paper by Adrian Zuckerman, which discussed a number of mechanisms for controlling costs in advance, such as budget-setting, fixed fees related to the value, fixed fees related to procedural activity or a mixture of the two.

> 17. The paper occasioned a general outcry from the legal profession. Prospective budget-setting was seen as unworkable, unfair and likely to be abused by the creation of inflationary budgets. The ability of judges to be involved in the hard detail of matters such as cost was generally doubted. The imposition of fixed fees, even relating only to *inter partes* costs, was seen as unrealistic and as interference with the parties' rights to decide how to instruct their own lawyers. There was a widespread concern that these suggestions heralded an attempt to control solicitor and own client costs. The restrictions were generally seen as 'artificial and unworkable'. But the debate which they occasioned has been both instructive and encouraging.
> 18. . . . The Association [the London Solicitors' Litigation Association], in response to Adrian Zuckerman's paper, suggested that:
>
> > ' . . . costs reductions in litigation can only follow a vigorous attack on the roots of the problem: unnecessary delays, complexity in procedure and the service provided by the courts themselves.'"

Lord Woolf believed that better designed procedure and effective court control of litigation combined with an exercise of the discretion in matters of costs to deter unreasonable party behavior were going to make litigation more affordable. Yet, during the years that have passed since the implementation of the CPR, litigation costs have not fallen despite a significant reduction in delays and complexity and improvements in the efficiency of court services. It seems quite clear that costs have not fallen because of adverse economic incentives. That is why the Court of Appeal was of the view "that it would be very much better for the court to exercise control over costs in advance, rather than to wait reactively until after the case is over and the costs are being assessed" (at [92]). Brooke L.J. said:

> "93. In my judgment, the court possesses pursuant to CPR 3.2(m) similar powers in relation to the conduct of litigation which it may exercise without the parties having any opportunity to agree otherwise. If defamation proceedings are initiated under a CFA without ATE cover, the master should at the allocation stage make an order analogous to an order under section 65(1) of the 1996 Act [Arbitration Act, which authorises cost capping]. In the ordinary course of things this order would cover the normal costs of the litigation. The master may consider it desirable to make the order subject to a condition along the following lines:
>
> > ' . . . that if either party wishes to make any application to the court that may significantly increase the costs in this action, it must first apply to the court in writing for a direction varying this order and serve notice of its application on all the other relevant parties[a]ll relevant parties must file and serve up to date estimates of costs pursuant to Section 6 of the Costs Practice Direction within . . . days of such notice being givenhe court will then decide whether and to what extent it will vary this direction before it permits the application to be issued.'

> 94. It would be helpful if the senior master were to assign a particular master to handle case management applications in this specialist field of law because they demand a degree of practical experience that will not become available if they are distributed generally among the masters. If the master considers that a budget or cap is required he should refer the issue of imposing a cap to a costs judge. The costs judge should determine what sum is reasonable and proportionate to fix as the recoverable costs of the action. Similar arrangements should be made, if and when necessary, in district registries of the High Court outside London.
> 95. The judgment of Lord Woolf C.J. in *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 1 W.L.R. 2450 should be particularly helpful in this context. While counsel were correct to observe that in a defamation action the maximum financial value of a claim should not necessarily be decisive when determining the amount of costs it is reasonable to incur in pursuing it (because the claimant may prize the vindication of his/her reputation far above any monetary compensation), it is likely to provide a useful starting point in most cases."

As a result of this case the Woolf policy of using *ex post facto* costs orders as a means of discouraging unreasonable litigation conduct is relegated to second place. Brooke L.J. explained:

> "105. There are three main weapons available to a party who is concerned about extravagant conduct by the other side, or the risk of such extravagance. The first is a prospective costs capping order of the type I have discussed in this judgment. The second is a retrospective assessment of costs conducted toughly in accordance with CPR principles. The third is a wasted costs order against the other party's lawyers, but this is not the time or place to discuss the occasions when that would be the appropriate weapon.
> 106. In my judgment recourse to the first of these weapons should be the court's first response when a concern is raised by defendants of the type to which this part of this judgment is addressed."

There can be little doubt that a cost-capping order will focus minds and ensure that lawyers take great care not to invest more resources than are likely to be recovered in the event that their client is successful, unless of course the client is prepared to pay in costs more than he is likely to recover from the opponent or the court has altered the amount of recoverable costs for some special reason.

It is important to stress at this point that although the court was mainly concerned with capping the claimant's recoverable costs, a cost-capping order must work both ways and cap each party's recoverable costs. It would be unfair to say to the claimant that in the event that he was successful he would be able to recover only up to a certain amount but there was no upper limit to what he would have to pay in the event that judgment went the other way. Leave the defendant free of any such constraint so that he would be able to recover from the claimant whatever he "reasonably" chooses to spend, would amount to an

infringement of the right to equality of arms under ECHR, Art.6. After all, the need to curb costs is not confined to lawyers representing clients on a CFA basis. While CFA lawyers may have a greater incentive to intensify input, others have a pretty strong incentive too. In this very case, by the appeal stage, the defendant's lawyers' estimate of their own costs was £400,000.

Compatibility of the CFA scheme with the ECHR

Having addressed the issue of court control over excessive costs, the Court of Appeal turned its attention to the special difficulties raised by CFAs, particularly in defamation actions. The nub of the matter is, as Brooke L.J. recognised, that a party opposed to one funded by a CFA may have to pay costs in excess of what is otherwise a reasonable level because the success fee has to be paid on top of the reasonable and proportionate costs. In defamation proceedings this feature of the CFA scheme creates a tension with the right of freedom of expression under ECHR, Art.10(1), because it imposes the risk of an extra burden on the exercise of the freedom of speech. Article 10(2) permits derogation from the right to free expression if it is "necessary in a democratic society . . . for the protection of the reputation or rights of others". The general rule that the unsuccessful party in a defamation action has to pay the successful party his reasonable and proportionate costs is compatible with Art.10(2) because it assists claimant to protect their reputation. But what justification can there be for landing a defendant with a success fee on top of the claimant's reasonable and proportionate costs?

Unfortunately, the point was not raised in argument and the Court of Appeal has not directly addressed this question. Although apparently doubtful about the legitimacy of shifting the success fee to the opponent in the context of ECHR, Art.10, Brooke L.J. considered that the court could not "thwart the wish of Parliament that litigants should be able to bring actions to vindicate their reputations under a CFA, and that they should not be obliged to obtain ATE cover before they do so" (at [100]). But he noted that the court is obliged to read and give effect to relevant primary and secondary legislation so far as possible in a way that is compatible with a publisher's Art.10 Convention rights (Human Rights Act 1998, s.3(1)). Speaking for the whole court he contrived to reconcile these two legal positions as follows:

> "101. In my judgment the only way to square the circle is to say that when making any costs capping order the court should prescribe a total amount of recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability. It cannot be just to submit defendants in these cases, where their right to freedom of expression is at stake, to a costs regime where the costs they will have to pay if they lose are neither reasonable nor proportionate and they have no reasonable prospect of recovering their reasonable and proportionate costs if they win.

> 102. If this means, now that the amount at stake in defamation cases has been so greatly reduced, that it will not be open to a CFA-assisted claimant to receive the benefit of an advocate instructed at anything more than a modest fee or to receive the help of a litigation partner in a very expensive firm who is not willing to curtail his fees, then his/her fate will be no different from that of a conventional legally aided litigant in modern times. It is rare these days for such a litigant to be able to secure the services of leading counsel unless the size of the likely award of compensation justifies such an outlay, and defamation litigation does not open the door to awards on that scale today. Similarly, if the introduction of this novel cost-capping regime means that a claimant's lawyers may be reluctant to accept instructions on a CFA basis unless they assess the chances of success as significantly greater than evens (so that the size of the success fee will be to that extent reduced), this in my judgment will be a small price to pay in contrast to the price that is potentially to be paid if the present state of affairs is allowed to continue."

This welcome development gives rise to several questions. Brooke L.J.'s statement that "the court should prescribe a total amount of recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability", is capable of two interpretations. It may be taken to mean that the court should set a cap at a certain level, which will be inclusive of any uplift. Thus, if the claimant's reasonable billable hours reach or exceed the capped amount, there will be no room left for an uplift. An uplift will be recoverable only where the billable hours fall short of the capped amount and only up to that amount. On this reading the defendant's recoverable costs will also be recoverable up to the same cap.[1]

This way of dealing with a success fee raised the question of whether such costs capping order amounts in effect to denying the success fee altogether. Suppose that in this very case the claimant had agreed to a 100 per cent success fee, which is later accepted as reasonable. The court subsequently makes a costs capping order of £200,000, which represents a proportion of each party's expected costs. It follows that if, as expected, the reasonable billable hours will exceed this amount, the claimant's solicitors would be unable to recover any uplift. It may be argued that a costs capping order that leaves no room for a success fee is contrary to s.58A(6) of the Court and Legal Services Act 1990 (as amended by the Access to Justice Act 1999, s.27), which states that a "costs order made in any proceedings may . . . include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee". Although the section suggests that the court is merely permitted to award a success fee as costs, it is clear that the legislature intended that such additional liability should be recovered in all cases, save where it was found to be unreasonable or where the conduct of the party or of his solicitors

[1] For the sake of simplicity, the example used assumes a CFA claimant suing a defendant who does not have the benefit of a CFA. But it should be borne in mind that similar considerations would apply where a non-CFA claimant faces a CFA defendant. It is however fairly rare for defendants to be represented on a CFA basis, and almost unknown for both parties to have made a CFA arrangment.

justified denying them the success fee. After all, it was the Government's intention that CFAs should replace legal aid as an instrument of affording litigants with limited means access to court, which objective could not have been achieved without giving CFA lawyers a premium (see *White Book—Civil Procedure*, Vol.2, 7A-1; PD 44, 9.1 and 11.5). Brooke L.J. himself observed that "Parliament has decided that it is appropriate to order a party opposed to one funded by a CFA to pay costs at a level that would not ordinarily be regarded as reasonable or proportionate" ([96]).

There is however another interpretation of Brooke L.J.'s dictum that "the court should prescribe a total amount of recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability", which is consistent with the legislative policy. On this interpretation when the court makes a capping order it determines the maximum recoverable costs, *e.g.* £200,000, and the maximum uplift, *e.g.* 50 per cent, thus deciding in advance that the claimant will be able to recover no more than a total of £300,000. However, under this reading, while a defendant would have to pay up to £300,000 if he loses, he would be able to recover no more than £200,000 if he wins. This raises a question of compatibility with the right to equality of arms under ECHR, Art.6.

Keith Ashby and Cyril Glasser have questioned whether requiring a defendant to pay by way of a success fee costs in excess of reasonable and proportionate costs is compatible with the right to fair trial. This question, which goes to the heart of the CFA scheme, was not considered in *King v Telegraph Group*. But the Court of Appeal addressed a different question of compatibility: compatibility with ECHR, Art.10. On this point Brooke L.J. said that the unfairness of a system whereby a defendant publisher is exposed to paying twice the reasonable and proportionate costs of the claimant, if the claimant were successful, but would recover nothing if the publisher were successful, is bound to have a chilling effect on a newspaper exercising its right to freedom of expression ([99]). The point that needs emphasis is that the unfairness is just the same where no freedom of expression is affected.

Of course, the risk of being unable to recover costs because the claimant is impecunious is not confined to CFA situations, but can arise whenever a poor claimant brings proceedings or a poor defendant resists a claim. It is one thing to let a defendant take the consequences of the impecuniosity of his claimant, quite another to require a defendant to make an additional payment to enable the claimant to obtain representation without having to pay for it. A party who chooses to finance the litigation by borrowing cannot recover as costs the interest paid. Why should a party who chooses to finance litigation by a success fee be entitled to recover it?

Equality of arms requires that each party must have a "reasonable opportunity of presenting his case to the court under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent" (*De Haas and Gijsles v Belgium* (1997) 25 E.H.R.R. 1 at [53]). A party must not therefore be given a significant procedural advantage denied to other parties. However, the right to equality of arms is an implied right derived from Art.6, not an express right.

It may therefore be subject to limitations, provided that any limitation is imposed in furtherance of a legitimate aim or public interest, and provided that any limitation is reasonably proportionate to such aim or interests (see *Brown v Stott (Proc Fiscal Dunfermline)* [2001] 2 All E.R. 97 at 119; [2001] 2 W.L.R. 817 at 840, PC).

The aim of the CFA scheme was described by Lord Bingham in *Callery v Gray (Nos 1 and 2)* [2002] 3 All E.R. 417; [2002] 1 W.L.R. 2000 at [2], HL:

> "The 1999 Act [Access to Justice] and the accompanying regulations had (so far as relevant for present purposes) three aims. One aim was to contain the rising cost of legal aid to public funds and enable existing expenditure to be refocused on causes with the greatest need to be funded at public expense, whether because of their intrinsic importance or because of the difficulty of funding them otherwise than out of public funds or for both those reasons. A second aim was to improve access to the courts for members of the public with meritorious claims. It was appreciated that the risk of incurring substantial liabilities in costs is a powerful disincentive to all but the very rich from becoming involved in litigation, and it was therefore hoped that the new arrangements would enable claimants to protect themselves against liability for paying costs either to those acting for them or (if they chose) to those on the other side. A third aim was to discourage weak claims and enable successful defendants to recover their costs in actions brought against them by indigent claimants. Pursuant to the first of these aims publicly-funded assistance was withdrawn from run-of-the-mill personal injury claimants. The main instruments upon which it was intended that claimants should rely to achieve the second and third of the aims are described by my noble and learned friend: they are conditional fee agreements and insurance cover obtained after the event giving rise to the claim."

These are undoubtedly legitimate aims that further the public interest. But the real question is whether there is "a reasonable relationship of proportionality between the means employed and the aim sought to be realized" (in the words of Lord Hope in *Brown v Stott (Proc Fiscal Dunfermline)* [2001] 2 All E.R. 97 at 130; [2001] 2 W.L.R. 817 at 851–852, PC); *i.e.* between the objectives mentioned by Lord Bingham and imposition of an obligation on unsuccessful defendants to pay their claimants' success fee.

There may well be circumstances where the recoverability of the success fee would be compatible with Art.6. For instance, in *Callery v Gray* [2001] 3 All E.R. 833, CA the Court of Appeal discussed the fairness of requiring defendant insurance companies to pay the ATE premiums of successful personal injury claimants. Lord Woolf C.J. said:

> "[94] Permitting ATE insurance premiums to be recovered as costs has the effect of shifting to unsuccessful defendants the costs which the insurers will have to pay to successful defendants. Under the old regime successful defendants would not normally recover their costs where claims were

> legally aided. Thus, in bearing the burden of meeting ATE insurance premiums, defendants in general are paying for cover that will ensure that their costs are paid if they succeed."

It appears therefore that Lord Woolf regarded requiring unsuccessful defendant insurance companies to bear claimants' ATE premiums as fair because road accidents insurers were also deriving a benefit from the scheme. Claimants are protected from the risk that they would have to pay defendants' costs, while defendants are protected from the risk of being unable to enforce a costs orders against claimant. This justification could conceivably render the CFA scheme compatible with the right to equality of arms under ECHR, Art.6 in so far as personal injury actions are concerned because the risk is spread. But this justification does not apply where a defendant is exposed to the risk of having to pay the claimant's success fee when the claimant has no ATE insurance.

Beyond personal injury litigation, it is difficult to find a proportionate relationship between the aims of the CFA scheme and defendants' liability to a success fee. In particular it is difficult to establish proportionality where no repeat players are involved. True, CFAs improve access to justice for those who have no ability to pay their lawyers upfront or who are deterred by the risk of losing and having to pay costs. But there seems to be no argument in fairness that justifies requiring an individual defendant, who may be in no better position to shoulder such a burden, to pay extra in order to pave the claimant's access to justice. If anything, fairness points the other way, because the claimant has a choice of not suing, whereas the defendant has no such choice. A simple illustration should suffice to show the potential for injustice. A claimant obtains CFA representation with a 100 per cent success fee to sue a defendant whose only substantial asset is his house. The defendant borrows money to finance his defence. If the claim is successful, the defendant might have to pay double the reasonable and proportionate costs. But if the defence is successful, the defendant would not be able to recover by way of costs the interest he paid on the money he borrowed to pay his lawyers. By making litigation potentially much more expensive for a defendant, the CFA legislation could be argued to place him under a considerable disadvantage in the pursuit of his defence.

The way in which the success fee is calculated adds to the difficulty of justifying the shifting of the uplift to the defendant, as Ashby and Glasser have pointed out. It is an inherent feature of the present CFA scheme that it penalises defendants with strong defences. The magnitude of the success fee is a function of the strength of the claimant's case. The weaker the claimant's case, the higher the risk that the claimant's solicitor is running, and therefore the higher the success fee to which he is entitled. By the same token, it follows that the higher the defendant's prospect of success on the merits, the more he would have to pay the claimant by way of success fee, in the event that the claimant wins. Put differently, the more reason that the defendant has to resist the claim the harder he would be hit if he loses. True, the stronger the defendant's case, the less likely it is that he would lose and be ordered to pay

the claimant's costs. However, persons of limited means tend to be risk averse and can ill afford to take even a small risk of ruinous fees. It may be therefore said that CFAs place defendants of limited means under a serious disadvantage, and may even be argued that the extra risk burden imposed on them is constitutes an obstacle to access to justice.

The jurisprudence of the ECtHR encourages member states to make provision for poor litigants, but it is suggested that the best way of doing so is by a publicly funded scheme, which spreads the cost amongst taxpayers according to means. In *Callery v Gray (Nos 1 and 2)* [2002] 3 All E.R. 417; [2002] 1 W.L.R. 2000, HL, Lord Hope observed "that the new [CFA] regime is not beyond criticism. It is plain that it has transferred the burden of meeting the cost of access to justice in these cases from the taxpayer through the medium of the legal aid fund. Instead a different kind of taxation is involved. The burden of meeting the cost of access to justice now falls on liability insurers. It thus falls indirectly on their policy holders, who are likely to have to face increased premiums" ([54]). Yet, it is difficult to see how there can be justification for transferring the claimant's access to justice to the particular defendant that he chose to sue, who may himself have no means of shouldering the burden.

It may be possible to reconcile the CFA scheme with Art.6 by devising a way of avoiding injustice to non-CFA litigants. An example of the kind of arrangement that may be possible can be found in Community Legal Services (CLS) legislation. Normally, a party who has succeeded against a party funded by the Legal Services Commission (LSC) is not able to recover either against the assisted opponent or against the LSC. However, the Access to Justice Act 1999, s.11(4)(d) and the Community Legal Service (Costs Protection) Regulations 2000 empower the court to make a costs order against the LSC if otherwise the non-funded party would suffer severe financial hardship. By adding a provision to the CFA legislation authorising the court dispense with payment of an even reasonable success fee, when to do so would cause injustice, it might be possible to resolve the incompatibility issue. Such provision would deter lawyers from entering into a success fee arrangement against defends of limited means in the first place, which would be no bad thing because it would remove the scope for oppressing financially vulnerable parties with the threat of costs above what is reasonable and proportionate.

More generally, we should reconsider not just the CFA scheme, but also the reasons for which it was created. It was introduced because the Treasury could no longer bear the financial demands of the aid scheme. However, it is now clear that the CFA legislation has merely succeeded in pushing the high costs onto insurance companies, their policy holders, and worst of all on unlucky individual defendants. Surely the time has come to try and control the cost of litigation and not just shift it around.