

PROFESSIONAL REGULATION

The twists and turns of the contingent fee debate

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New Zealand is one of few Common Law jurisdictions where the debate has yet to get much of a public airing, unlike elsewhere where some form of fee sharing arrangements are already well established. There would be few solicitors who were not familiar, at some level, with American litigation process where plaintiffs can persuade lawyers to act for them on a contingent fee basis where a sizable percentage of any award is shared with the lawyer. In PI and negligence cases the 'split' is often around one third to the lawyer and balance to the successful plaintiff.

The English introduced contingent fee arrangements in the Access to Justice Act 1999, Section 27 but somehow managed to create a 'beast' which is now coming home to roost. The consequences in terms of public opinion are not good and seem to be adding considerable fuel to the charge that lawyers are only in business for themselves and not the client.

The popular quote from Charles Dickens (one time court reporter) in his seminal work *Bleak House*, published in 1852-3, comes to mind when he remarks on the overly drawn out suit in the Chancery Division of the High Court; "The one great principle of the English law is to make business for itself." The comment refers to the fictional case of Jarndyce and Jarndyce where an inheritance is consumed by legal fees.

The English contingent fee system is not based on the American model but a more perverse concept where the successful litigant can claim a success 'fee' from the losing side! This grew out of the system whereby successful litigants expected their full costs to be recoverable from the other side. The success fee is capped and cannot exceed 100% of the other side's costs. The foreseeable consequences have seen extra time taken up in preparation and court hearings pushing up fees which, like here, are largely time based. The potential loss factor has also contributed to rising insurance premiums for litigation cover. The recent English case of *The Bank of England vs BCCI* set new standards for longevity and must have been irksome for all concerned. The opening statements took six months and the reply by Stadlen QC for Bank of England taking even longer!

The reality of the present situation, now that it has fully developed, is actions for cost recovery have become an important new area of litigation. The quantum involved can and frequently does exceed the original claim. A recent example concerned a breach of privacy by a newspaper. The complainant, a model, received £3500 in damages – rather less than was claimed/hoped for. The House of Lords has just finished hearing claim for costs where the model's lawyers sought £594,000!

The 'powers that be' have been monitoring escalating costs since the law change and found the cost of going to litigation rose by 15% over the two years 2000 – 2002. The cost of cases that were settled in the same period rose by nearly 50%. These figures provide a robust argument for not following the English example if NZ were to start a debate on contingent fees. The Germans it seems have the best system, for the clients, any rate. There, under pressure from the bench, insurance companies and society as a whole litigation fees are fixed in advance. It seems that asking lawyers to explain their fees is not enough – at least in Germany. The debate is not just contingent fees but goes to the core of lawyers having to explain their charges, society's expectations of the court system, costs recovery, insurable risks, access to justice, the role of incentives in legal fees and a whole lot more. Hopefully the debate will soon start here. As the 'last cab off the rank' there will be no excuses if the consequences of change in the domestic regime fail to live up to expectations.