

THE LAW SOCIETY OF HONG KONG

MEMBERS' FORUM

CONDITIONAL & CONTINGENCY FEES

HELD AT

THE LAW SOCIETY OF HONG KONG,
LECTURE HALL, 3/F, WING ON HOUSE,
71 DES VOEUX ROAD, CENTRAL, HONG KONG

6.00 pm, Thursday, 11 March 2004

PANEL

MS SYLVIA SIU (Chairwoman)
MR JUNIUS HO
MR ANDREW JEFFRIES
MR MICHAEL LINTERN-SMITH
MR PATRICK BURKE
MR LUDWIG NG

1 [11 March 2004]

2 [6.15 pm Members' Forum commences]

3 CHAIRWOMAN: Ladies and gentlemen, good evening. Sorry for
4 the delay. I hope you can all hear me. I will try not to use
5 the mic because I do not want you to keep hearing the radio show
6 instead of our show.

7 I am very, very happy to greet you all here. You are here
8 for the members' forum on conditional and contingency fees. As a
9 Members' Forum, that means it is your forum and we are merely here
10 to start off the evening with a little bit of introduction to
11 conditional fees and contingency fees. Later on we do want to
12 have your views and do speak up because we really want to know
13 what you think about conditional fees and not what the working
14 party wants.

15 First of all, I would like to introduce our members. On my
16 right is Andrew Jeffries. He will be speaking to you on
17 contingency fees, the position in Hong Kong, the arguments, and
18 the comparison with England. On my left is Mr Patrick Burke and
19 Mr Ludwig Ng. The two of them will also be speaking to you and
20 they will be speaking on the cons, the disadvantages, of
21 conditional fee arrangements and contingency fee arrangements.
22 In fact at the very back, Mr Stewart Crowther can you please
23 stand up? As another member, he should be up here but he decided
24 to sit at the back. He is also a very, very valuable member and
25 he has been contributing a lot to our discussion.

1 I would like to briefly report to you that this working
2 party has worked very hard. We have met about 12 times and every
3 time we have looked into the pros and cons, meaning the
4 disadvantages and the advantages of conditional fees as well as
5 contingency fees. Originally, our terms of reference were
6 limited to conditional fees but we felt we should really look at
7 contingency fees as well to have a more complete picture.

8 On your table you should have with you something like this.
9 Does everyone have a pile of paper? The first one is a ballot
10 paper; that is supposed to be filled in after you hear us.
11 The second one is the usual evaluation and the third one is an
12 executive summary. Do you all have this? The executive paper,
13 together with the list of pros and cons, was sent to you some
14 time ago so I assume most of you have read it. Is my assumption
15 correct or not? Then we will have to go a little more slowly.

16 Can I at least ask does everyone know what is a conditional
17 fee arrangement? No? Can I have a show of hands please? Do
18 I assume those who don't raise their hand don't know what a
19 conditional fee arrangement is? Then I have to read it out to
20 you. In fact you can find it in the executive summary.
21 Conditional fee definition: A standard conditional fee agreement
22 is a no win no fee agreement where a lawyer is paid a pre-agreed
23 percentage uplift on the normal fees charged subject to the
24 review of the courts if a claim is successful. Most common law
25 jurisdictions exclude CFA in criminal and matrimonial matters.

1 Now, can I have a little indication from members? We did
2 this about two years ago at the law convention. At that time we
3 also had Mr Andrew Jeffries, who gave a presentation on
4 conditional fees, and after his brilliant presentation when I
5 asked the audience by show of hands whether they were for or
6 against conditional fee arrangements to be introduced to Hong
7 Kong we had a show of hands that was for conditional fee
8 agreements. A lot of people were for and they spoke for the
9 agreement. As a result, the Council of the Law Society decided
10 to set up this working party and we did look into both
11 conditional fee agreements as well as contingency fee agreements.

12 Not only have we read the materials on these kinds of
13 arrangements, we have also consulted, for example, relevant
14 bodies like the Department of Justice, the Law Reform Commission
15 and the Legal Aid Department. As far as the Department of
16 Justice, we managed to talk to Mr Bob Allcock, the Solicitor
17 General, and we asked why he shelved the consultation paper. A
18 consultation paper was out way back in 1994 but somehow it was
19 shelved. We asked why, first of all, he shelved it and,
20 secondly, why suddenly they are looking into the matter again.

21 Their answer was that they wanted to see the experience in
22 the UK; very wise of them, because there are a lot of things to
23 be learnt from the mistakes they made. Secondly, they are
24 looking into the matter not because of any pressure but because
25 they see this as a possible access to justice and we do hope that

1 it is not because of the cut in legal aid, and this was confirmed
2 by Mr Allcock himself.

3 As far as the Legal Aid Department, they said it is too
4 early. They know the Department of Justice is looking into the
5 matter and they don't know whether conditional fee arrangements
6 will be coming to Hong Kong, so it is too early for them and they
7 have not formed a view one way or the other. We do want to
8 impress on them that even with the introduction of this
9 conditional fee arrangement or contingency fee arrangement we do
10 not want to see any cut in legal aid.

11 We managed to talk to the Bar Association because they also
12 have a subcommittee to look into conditional fee arrangements.
13 Again at that time when we talked to them it was too early, the
14 committee was just formed, and they did not have a view yet.

15 Now the Law Reform Commission has formed a subcommittee to
16 look into this area. In fact, Andrew and I have been invited to
17 join them in our own personal capacity. We have been meeting
18 regularly and I think a consultation paper will be out. At that
19 time I hope by then you will have more information and will be
20 more knowledgeable on this topic and we do hope you will give
21 your view then.

22 I think I had better pass to Mr Andrew Jeffries because he
23 has a very nice presentation with Powerpoint. We started a
24 little late. I do apologise because we were waiting for some
25 members on the panel - here they come. Ladies and gentlemen, I

1 do urge you to speak up. This is a members' forum, which means it
2 is for you.

3 MR ANDREW JEFFRIES: Ladies and gentlemen, thank you for
4 coming along. In the next 20 or 25 minutes or so I am going to
5 run through some of the issues that arise if a lawyer is going to
6 enter into a conditional or contingency fee arrangement, what the
7 essential problems are. We will have a look at the experience in
8 England, which has had these arrangements, at least conditional
9 fee arrangements, for over 10 years now. Quite a few problems
10 have come out of that and some lessons that we may learn from it
11 in what, if anything, we do here.

12 Starting, first of all, with the essential obstacle and I
13 am sure this is familiar to most of you and we needn't spend too
14 long going into it. I have set out quite a bit of the law in my
15 paper here which I won't go through but, as a reference to what
16 it is we are trying to get around if we are looking at
17 introducing the conditional fee arrangement, that is where it is
18 set out.

19 Section 64 of the Legal Practitioners Ordinance, along with
20 various other sections, stands in the way and essentially says
21 that for contentious business the lawyer may not agree with his
22 client to be remunerated in a way which depends on the outcome of
23 the case. As that has been adopted and enhanced by our
24 professional conduct rules, that means effectively not just a
25 simple no win no fee, but no win more fee, lose less fee, or all

1 sorts of similar arrangements are presently outlawed. Note that
2 it is quite narrow and only applies to contentious business. It
3 is pretty much free for yourselves in non-contentious business.
4 On commercial transactions you can agree more or less on any
5 basis, subject to underlying principles of not overcharging your
6 client.

7 It also applies to taking proceedings. If you are acting
8 for a client recovering a debt by negotiation of a settlement or
9 by writing letters to a debtor to get them to pay up not
10 involving proceedings and it is clear that that is the scope of
11 your retainer, you are outside the prohibition and can act on a
12 conditional fee basis.

13 Similarly, it only applies to work done by Hong Kong
14 lawyers and in Hong Kong. So, if your client is owed some money
15 in the United States and you want to get some US lawyers to
16 litigate for it, you, as a Hong Kong solicitor, can agree with
17 them that they will do that work on your client's behalf in the
18 US on a conditional or contingency fee basis.

19 The restriction is quite narrow but, at the heart of it,
20 litigation not on a conditional fee basis at the moment.

21 When this subject first came up, as Sylvia mentioned, at
22 the Law Society Convention where there was an overwhelming show
23 of hands in favour of introducing some sort of conditional fee
24 arrangement, a lot of the discussion at that time was about the
25 broader issues, the moral issues, access to justice and so on.

1 I am not going to spend a lot of time on that because I think the
2 debate has really moved on to looking in more detail at what
3 might be feasible and how it might operate and what the real nuts
4 and bolts issues are.

5 People say if a lawyer is acting on a contingency or
6 conditional fee basis they take a financial stake in the
7 litigation and they are going to be motivated to win beyond
8 proper professional practice and they will start shredding
9 documents and tampering with witnesses and so on. There is no
10 evidence as far as anybody can see that that really is an effect
11 of conditional fee arrangements. It is something that we could
12 spend the whole of today debating but I think really the debate
13 has moved on from that.

14 Access to justice is perhaps what is at the heart of it.
15 There seems to be a middle ground, if you like, of people outside
16 legal aid, the test for which isn't that high, who have claims
17 and rights but, because of the costs of litigation, they are
18 unable to bring it.

19 People also worry a lot about ambulance chasing, about
20 speculative litigation. Again, there doesn't seem to be any
21 evidence that that is the consequence of conditional fee
22 arrangements. Ambulance chasing is really a matter of
23 advertising and business getting rules, rather than the fee
24 basis. The fact that we have here the loser pays principle is
25 really a significant deterrent to people taking speculative or

1 nuisance claims. I don't think there is any real evidence that
2 that is something we would need to spend too long on.

3 The future of legal aid and the supplemental legal aid
4 scheme Sylvia says is uncertain. A definite effect of the
5 introduction of conditional fees in England was, in parallel with
6 that, a cut-back in legal aid. Legal aid in England is now much
7 smaller and much less available than it was and one might
8 cynically say, in fact I think the government did themselves say
9 that, that the two went hand in hand and the government was
10 allowing and introducing conditional fees as a means of cutting
11 back the legal aid budget. As Sylvia says, and I think the
12 position is open and uncertain here, but I am sure what we
13 wouldn't want to be doing if we introduce such an arrangement is
14 driving or giving an excuse for legal aid to be cut back.

15 So, what is the essential problem? As I say, this will be
16 applicable largely to a client with a claim, sometimes a defence
17 but it is normally a plaintiff's issue, who has enough assets to
18 take them outside the scope of legal aid, which doesn't take that
19 much doing; of course not in the super rich category who can
20 afford to litigate without any real concern. They cannot afford
21 exposure to litigation. If they take a case it is going to be
22 expensive. If it is lost and they have to pay the other side's
23 costs it is too big a burden and therefore they are unable to
24 bring the claim. Of course he doesn't want the entire damages
25 award swallowed up by success fees or indeed costs. He is not

1 interested in bringing a case just so lawyers can have another
2 victory to chalk up and then swallow up the damages in costs or
3 contingency or conditional fees.

4 The experience in England suggests, and this may be
5 something of a danger, they like to just hand over the file and
6 wait for the cheque. The whole thing is advertised as a no win
7 no fee. You instruct us, we go away, we do the case, and you get
8 the damages at the end of it. It is all very easy. That is how
9 the advertising portrays it and how potential plaintiffs are
10 encouraged to bring their case. Of course there is a problem
11 with the client being too detached from the litigation. There is
12 a problem for the lawyer trying to get them involved in giving
13 proper discovery, in witness statements and so on, and there is a
14 problem in the usual interaction between the lawyer and the
15 client, watching the steps that are being done, are costs being
16 spent properly. So, that can create something of an issue.

17 What if the claim is more marginal? Conditional fees are
18 really for good cases. I don't think anybody is pretending or
19 suggesting that this sort of arrangement is a cure-all panacea
20 for anyone in this middle category. If you have a borderline
21 claim, lawyers are not going to take it on on a conditional fee
22 basis and that is pretty much a fact of life and I'm not sure
23 there is any way round that that conditional fees would solve.

24 What about looking at it from the lawyer's point of view?
25 A lawyer might be prepared to act on a conditional or contingency

1 fee basis but of course, as I have said, will only really want to
2 take on good cases. Lawyers aren't inherent gamblers and it is
3 their business and their livelihood. If it looks like a good
4 case they might be prepared to take the no win no fee risk. But,
5 who pays to assess whether it is a good case?

6 A simple case may be simple and quick to establish that, as
7 far as you can tell though you can never be certain, it looks
8 like a strong case that ought to be pursued. But, something more
9 complicated a lawyer may well shy from. Something that relies on
10 the veracity of witness evidence, somebody's word against
11 something else, seems like too much of a gamble for a lawyer to
12 take. If a client comes to you with a case, you investigate it
13 and decide that it doesn't quite make the test to be a winning
14 case you want to take, then you quite possibly have spent a lot
15 of time that you are not going to get paid for in investigating
16 that.

17 There is a business issue to this. If the lawyer does
18 enough, has a thriving practice of these, then the wins might
19 outweigh the losses and the cash flow consequences of no win no
20 fee being out of money until the end of the case is something the
21 lawyer may be able to bear. But, what about disbursements?
22 Disbursements have to be paid in the meantime. If the scheme is
23 introduced and extended to counsel then counsel might be prepared
24 to act on a conditional fee basis as well, but they might not.
25 Is the lawyer going to have to fund these disbursements and

1 counsel's fees out of his or her own pocket as the case goes on?

2 If you win, of course you get an uplift and you hope that
3 you make enough wins with enough uplifts that it compensates the
4 losses, it compensates you for the cash flow being out of pocket,
5 perhaps having to pay disbursements, and you continue to have a
6 profitable practice. But, if you lose, who pays the other side?
7 Your relatively poor client is not going to want to take on that
8 risk and certainly the lawyer won't.

9 If you win but the defendant can't pay, where does your fee
10 come from? You might say "Well, we will take out insurance for
11 that" and that is certainly the way it operates in England.
12 There are very few, there are some, but there are very few
13 conditional fee arrangements that are entered into that don't
14 have an insurance component in it. But, what if insurance is
15 unavailable? If it is available, who is going to pay the
16 insurance premium? Again, is that something that the lawyer at
17 the beginning of the case has to fund out of their own pocket?

18 Whether insurance is going to be available in Hong Kong is
19 still something of an open question. In the working party we
20 have been trying to take soundings from the insurance industry
21 and it is not clear, we are not getting a resounding yes from
22 insurers saying they will copy what they do in London, it will
23 work, that insurance is going to be there. I don't think we are
24 in a position where we have a clear tick for that on the
25 availability of insurance and that could be very important.

1 Who will explain all this to the client? This touches on a
2 problem that has come up in England. Again, it is part of our
3 professional obligations to our clients so that they understand
4 the fee basis, actually telling the client what they are liable
5 for, if anything, and in what circumstances, what happens if you
6 settle early, what uplift do you get, what uplift do you not get.
7 That takes quite a lot of time. Again, that is probably not
8 recoverable from the other side and can turn into quite a big
9 exercise.

10 What happens if the court intervenes? We will come back to
11 this. This is a big problem in England. You think you have
12 agreed a commercially viable fee deal, you will charge 120 per
13 cent or 130 per cent or whatever of your usual fee if you win,
14 but then the court looks at it and says "No, that is
15 unreasonable, I am going to cut it back" and then all your
16 economic projections of whether this was a good case or not go
17 out of the window.

18 Motivating the client. This is the flip-side of what I was
19 talking about just now, if a client has handed you the whole case
20 and gone away to wait for the cheque. You need client help, you
21 need witness evidence, you need discovery, you need to be taking
22 strategic decisions on instructions.

23 Let's have a quick look at the position in England. The
24 Courts and Legal Services Act in 1990 introduced for the first
25 time conditional fee arrangements in England, not contingencies.

1 It is an uplifted fee, no win no fee, an uplifted fee if the case
2 is successful. The US-style contingency, taking a slice of the
3 damages, is not permitted. It was initially reserved to personal
4 injury and insolvency cases but has since been broadened to cover
5 pretty much all cases, apart from criminal and matrimonial.

6 The CFAs, the conditional fee agreements, that you have to
7 enter into with your client are extremely complicated. Clients
8 certainly struggle to understand them and to get to grips with
9 them. There is a curious obligation to explain the arrangement,
10 not only in writing but also orally, and a number of conditional
11 fee arrangements have been struck down where the written
12 explanation was proper and signed by the client but there was no
13 accompanying oral explanation, a wrong decision you might well
14 think. The unfortunate consequence of that was since the
15 conditional fee agreement was struck out for failing to comply
16 with the formalities that the lawyer didn't get paid, even though
17 the case was successful.

18 A very controversial amendment introduced in the year 2000
19 was the losing party pays. If a case is brought, a personal
20 injury case, if successful, the losing party has to pay damages
21 and the losing party has to pay costs. That is normal. But,
22 under the regime as now amended, the losing party also pays the
23 insurance premium that the plaintiff's lawyer took out and the
24 uplift on costs, the success fee, or the conditional fee. That,
25 as you might imagine, has caused a lot of problems and a lot of

1 debate and a lot of outrage from insurance companies and defence
2 lawyers. The other consequence of that is that the court
3 intervenes, as I will explain in a moment, in that process when
4 it comes to taxation.

5 What's it been used for? Undoubtedly, the majority are
6 personal injury cases and I guess there is no real surprise
7 there. The statistics show that, yes, it has worked in the sense
8 there are now more plaintiffs who wouldn't qualify for legal aid
9 bringing more cases. So, more people are taking their rights and
10 enforcing them and, to that extent, more lawyers are doing more
11 work. It is slightly difficult to disentangle because at the
12 same time legal aid has been cut back. If legal aid had been
13 left how it is, how much difference would conditional fees have
14 made? Well, some, but perhaps less. It is also interwoven with
15 the Wolf reforms of civil procedure which will have had some
16 effect on people bringing claims where they might not otherwise.
17 So, it is not a completely transparent statistic but undoubtedly
18 more people are bringing more cases.

19 As well as personal injury, it is also used quite a lot in
20 insolvency. Liquidators are very often hard up and take
21 advantage of this to bring claims against debtors who owe
22 companies in liquidation money. It has been used quite a lot for
23 that.

24 It is used quite a lot for defamation cases where legal aid
25 is not available.

1 It is also used extensively in a pro bono situation, where
2 a firm would be acting in a charitable or worthy case for a
3 client pro bono without charge. The indemnity principle always
4 meant that if you weren't charging your client a fee and you won,
5 you could never recover that fee from the other side because the
6 losing party is only liable for costs that the client has to pay
7 and, if you are acting pro bono, then there is no liability.
8 Those sort of cases are now done on a conditional fee basis.
9 With no win no fee, the losing party does have to pay costs, yet
10 the pro bono case can effectively still be done pro bono because
11 if the case is lost then it is no win no fee.

12 It is used to some extent for commercial actions but not a
13 lot. Commercial cases tend to be more complicated and lawyers
14 shy away from doing that sort of thing, taking the risk of it
15 being a good case or turning out to be a bad case, so it is not
16 used that much for that. But, there are a number of big
17 organisations who have a lot of relatively routine and smaller
18 cases that have enough bargaining power, if you like, that if you
19 want to do work for them you act on a conditional fee basis. So
20 there is a little bit of that and it is used to some extent in
21 commercial cases but not that much.

22 What are some of the issues that have come out of this?
23 Court control and taxation, as I have mentioned, is an important
24 part of it. What happens at the end of a case is you have
25 taxation, inter partes taxation, in the ordinary course. As I

1 said, that includes a taxation of the uplift. Some recent
2 examples are where the lawyer and client had agreed a 60 per cent
3 uplift to normal fees if the case was successful and the court
4 cut that back to 20 per cent. In another example the uplift was
5 only 20 per cent and the court cut that back to 5 per cent.

6 What the court says is the proper uplift binds the
7 solicitor and his client, so you can't go back to your client and
8 say "Well, we agreed 60 per cent, I know the court has only
9 allowed 20 per cent, so the extra 40 per cent you must pay me or
10 I can take out of the damages". What you can recover as a
11 winning lawyer against your client is cut back by the court's
12 taxation, as well as the other side's liability.

13 The fact that the losing party pays the insurance premium
14 and the uplift has led to a substantial amount of satellite
15 litigation about the conditional fee arrangements and it is the
16 routine tactic of a defence counsel if they have lost to say that
17 the conditional fee arrangement fails to comply with one or more
18 of the minutiae of the regulations and should be struck down.
19 That has succeeded in a number of cases, and I gave you the
20 example of the oral explanation that wasn't given.

21 If that agreement is struck down then the losing defence
22 side doesn't have to pay the costs because the agreement is
23 struck out, the successful plaintiff doesn't have to pay the
24 costs because the agreement is struck out, and it is the
25 plaintiff's lawyer who loses out. Now, that is something that

1 has been recognised as quite a big problem in England. The Court
2 of Appeal has recently given a decision that tries to say that
3 it's only substantial failure to comply with the CFA agreement
4 that will strike it down. Of course then the argument is what is
5 "substantial"? There has been quite a lot of consultation about
6 it and I think relatively soon the whole process and the
7 agreement will be simplified, which will solve quite a lot of
8 this. But, it has certainly been a problem.

9 The rise of insurance premiums is to be noted. Initially
10 in the early 1990s you could get an insurance premium that
11 essentially if the case was lost the insurance company paid the
12 liability to the other side. It was no win no fee and, if it was
13 lost, the liability to the other side would be paid out of the
14 insurance. It was about 85 pounds in a simple personal injury
15 case. After a few years it had risen to 161 pounds. More
16 recently it is somewhere between 700 and 1,000 pounds, which gets
17 you up to \$HK14,000 or \$15,000 at the present exchange rate.

18 For a simple personal injury case that might not fight that
19 far, that is quite a significant amount. One extreme example was
20 actually a medical negligence case, so a little more complicated
21 than a straightforward personal injury, where the insurance
22 premium quoted was 15,000 to cover against a potential liability
23 of other side's costs of 100,000.

24 So, it is getting much more expensive to get insurance.
25 Insurance is available but it is getting much more expensive and

1 that is becoming something of an obstacle to entering into these
2 sorts of agreements.

3 The merits hurdles are getting higher. Before the
4 insurance company will agree to insure a case and to some extent
5 before a lawyer will take it on, they normally want a counsel's
6 opinion or the opinion of a lawyer if he is someone who has been
7 practising and someone whose opinion they will accept. They will
8 want an opinion and they are looking for somewhere around the 80,
9 90 per cent mark. You can never quite put figures on things, but
10 something that is a 50/50 case or even a 60/40 case would be
11 unlikely to get past the test of getting insurance and probably a
12 lawyer wouldn't take it anyway.

13 There is a lot of front-loading I have mentioned. By the
14 time you have had your client in, you have arranged insurance,
15 you have got counsel's opinion if you think you need one, you
16 have assessed it as a case you will want to take on, you have
17 drawn up and entered into the conditional fee arrangement, you
18 have had your oral and written explanation, the client has signed
19 up, you have done an awful lot of work before the case has really
20 got going. If you do that work and the insurance company turns
21 it down or you conclude it doesn't quite smell right and you are
22 not going to take it, again, as I say, that is wasted time and
23 irrecoverable.

24 The funding arrangements as they operate in most cases are
25 pretty complicated. It is in my note at the back in paragraph

1 6.6, and I was going to read that out because it is quite
2 difficult to get round but this is typically how it works.
3 A typical arrangement is backed both by insurance and financing -
4 this is at the top of the last page. So, the solicitor takes out
5 a loan from a finance company to cover his fees. This includes a
6 loan for the insurance premium and disbursements, including
7 counsel's fees if applicable. If the case is successful, the
8 plaintiff's solicitor recovers his fees from the other party,
9 fine, and recovers the uplift and the insurance premium from the
10 other side, fine. The success fee of course may be cut back by
11 the court, as I have mentioned. However, the solicitor pays the
12 funding costs of the loan. That is part of the cost of doing
13 this business. However, if the case is unsuccessful the
14 insurance company whose premium you have paid pays the
15 plaintiff's solicitors costs if you have taken out both sides
16 insurance or the other side's costs if you have only taken out
17 losing insurance, effectively repaying the loan.

18 It is a combined finance and insurance arrangement and that
19 is how it is operating and that is how solicitors are able to
20 take on the whole burden and overcome the issue I was talking
21 about of what happens, who pays the insurance premium, who pays
22 the front-loading and so on. One advantage of this is you can
23 take money for your costs as you go along, you don't have to wait
24 for the whole lot till the end. As you can see, it is a pretty
25 complicated arrangement. Not all are like this but the typical

1 run of the mill personal injury case is operated that way.

2 Very briefly, the United States, as I am sure you are all
3 aware, has huge success with huge contingency fees. What makes
4 it so different there, contingency fees are allowed, you can take
5 a big slice of the damages, and I am sure you have all read
6 things in the papers about huge awards of damages and huge awards
7 of fees to lawyers. It is a private lawyer/client deal. It is a
8 simple arrangement between the lawyer and his client, doesn't
9 involve the other side at all, and more often that not doesn't
10 involve insurance. Insurance isn't really part of it. And why?
11 They don't have loser pays.

12 The risk that needs to be covered by insurance, question
13 mark, for our sort of litigation really doesn't apply because in
14 most cases you can bring a case, even if it is fairly frivolous,
15 there are some limits on this of course, but you can bring a case
16 and if it is lost you don't have to pay the other side's fees.
17 That is what really enables them to have the wide contingencies,
18 to keep it a private arrangement just between the lawyer and his
19 client, and not to have to get into court taxation issues, courts
20 cutting it back and controlling it, and the whole insurance
21 arrangement.

22 Finally, some ideas. The English experience, to my mind,
23 teaches us that if you don't make the losing defendant pay the
24 uplift and the insurance premium, don't make them liable for
25 that, you cut out an awful lot of the complication. You

1 certainly cut out the taxation. Judges have been saying to us
2 "We are not equipped to judge whether a 20 per cent or a 25 per
3 cent uplift fee is the right thing or not. We just don't want to
4 get into that. We have just about got the hang of ordinary
5 taxations. This is not something we want to spend time on".
6 Defendants and defence lawyers say "Why should I have to pay a
7 much higher fee on the first case because it is done on a
8 conditional fee than on the next case, which is pretty much
9 identical, simple personal injury, but it is not on a conditional
10 fee so what I have to pay in costs is a lot less? Why should the
11 defendant be liable for this?"

12 If you are able to have a simple solicitor/client
13 arrangement that doesn't involve the other parties you do cut out
14 a lot of that complication.

15 No complex CFAs. I think everybody would think that the
16 way the English process has been so far is unnecessarily
17 complicated. The English system has recognised that and is
18 trying to cut it down. It is not necessary. Of course the
19 client has to understand what they are in for, and why and how,
20 and our professional ethics rules mean you cannot overcharge your
21 clients, and they may well need to be altered or bolstered in
22 some way. But, it could just be your arrangement between
23 yourself as the solicitor and the client. Essentially then the
24 contentious proceedings, contentious business position on fees,
25 would be very similar to the non-contentious business.

1 Insurance seems to be important. If you can't get
2 insurance - and, as I say, it is still a slightly open question
3 for Hong Kong - if you can't get insurance to cover the prospect
4 of losing a case there is likely to be a lot less cases where you
5 can take this forward. The modestly well-off but poor client is
6 not going to want to take the risk of having to pay the defence
7 costs if it is lost, nor of course will the lawyer.

8 So, the usefulness if there isn't insurance will certainly
9 be cut back. To my mind, I don't think that means we shouldn't
10 do it. There will be cases where it is useful. As I say, it is
11 used in defamation, insolvency, pro bono and some commercial
12 cases, a wide range of things. We will see what people have to
13 say but I'm not hearing people say in the discussions we have had
14 there is some inherent disadvantage to allowing it, even if the
15 amount of extra access to justice it gives is relatively modest.
16 So, insurance is still an open question.

17 Of course legal aid is still an open question. What is
18 going to happen with that? Is it going to be expanded? Is the
19 SLAS scheme going to be expanded or is it going to be cut back
20 again? That is something that is not yet certain.

21 That is a quick review of some of the issues and some of
22 the things that may come up. I will now hand you over to whoever
23 is next.

24 MR JUNIUS HO: Ladies and gentlemen, I believe Andrew has
25 just set out a very comprehensive overview as to the operation of

1 the CFA in the UK and also in other jurisdictions. I am not
2 going to read out point by point the advantages that we perceived
3 in relation to the CFA, which is already set out in the
4 hand-outs. Suffice to say, I would like to summarise several
5 quick bullet points.

6 It seems that there may be a perception that as soon as the
7 CFA has been introduced into Hong Kong there may be a possibility
8 of abolition of legal aid in Hong Kong, which has already
9 happened in the UK, so therefore by inference that may also be
10 the logical step to follow shortly.

11 Two, the burden of meeting all these so-called commitments
12 which are expected to go along with the running of the scheme
13 itself may be very onerous on the part of lawyers. It seems that
14 the public themselves do not have too much worry to bear but,
15 rather, the burden, especially on the financial aspect, will be
16 upon the lawyers.

17 My short answer to these two points -- perhaps I may answer
18 in a reverse order. Whatever the situation or the difficulty
19 might be or perceived to be, the facts remain true. In the
20 mid-19th century the contingency fee arrangement has already been
21 introduced in the United States and then in eighteen-something it
22 is accepted in Canada. Even in the most conservative legal
23 jurisdiction, England, they have had it since 1995, although
24 there have been some teething problems which go normally along
25 with the introducing of a new operation or new scheme. They

1 modified the scheme along the way. In 2000 even the earlier
2 conservative view of disallowing the so-called success fee and
3 also the premium for the after-the-event insurance are now
4 permitted in Europe since 2000.

5 So, the situation and the facts remain true. This is
6 happening outside; in Australia, in the United States, in
7 Canada, in the UK, this is already being accepted.

8 I think the reality is that the lawyers would certainly
9 know how to look after themselves but, in doing so, how to
10 balance the interests of the lawyers, the members of the
11 profession, and the members of the public? I am sure this point
12 is well addressed and considered by other jurisdictions already.

13 Perhaps one may also suggest that it is quite difficult to
14 run this sort of CFA scheme in Hong Kong because we have a
15 two-tiered profession. Would that CFA cover and extend to
16 counsel fees, which in the normal situation form the greatest
17 part of the disbursements? How about the experts' fees? If the
18 lawyers can strike a deal with members of the public, I have no
19 cause to doubt that equally this sort of arrangement and
20 agreement could also be logically worked out. In the UK they
21 have already a standard agreement for members to think about and
22 that is the starting point. How are you going to modify that or
23 shape it up in a way that is suitable to meet all needs, all
24 expectations? It is up to the professional people to do the job.
25 I am sure we are trained to do it.

1 Therefore, the short answer, having explained this part of
2 the question, the onus which is perceived to be particularly
3 onerous on the part of the members of the profession, I don't
4 buy.

5 Secondly, can we peg the introduction of the CFA to the
6 consequence of an abolition of the legal aid regime? We have
7 just had a very interesting talk with the representatives from
8 the LASC, the Legal Aid Services Council. I happened to be
9 wearing two hats. I am a member of that Council and I am also a
10 member of the Law Society Council and also the chairman of the
11 Legal Aid Committee.

12 I think it may not work out in that way as bad as we are so
13 afraid of. In fact the Legal Aid Department can have a more
14 practical role to play. Such as what? They can run the CFA.
15 They can run the conditional fee arrangement. At the moment they
16 have OLAS, the ordinary legal aid scheme, which is to cover the
17 most unfortunate class of members of the public who don't have
18 sufficient means to run their own case. Then there is the second
19 layer, the SLAS scheme, the Supplementary Legal Aid Scheme. That
20 was invented in Hong Kong and, as Patrick Moss has gladly
21 confirmed, he was the midwife and also the inventor of that
22 scheme, and that is unique to the Hong Kong situation.

23 What is the idea of running SLAS itself in Hong Kong? To
24 enable those people who are outside the OLAS and not eligible for
25 the ordinary legal aid scheme to enjoy the funding program

1 provided by the Legal Aid Department. Upon their successful
2 claim, they give back something as a contribution out of their
3 fruits and the results of the litigation into the fund. What
4 does that mean? That is exactly a contingency fee arrangement.
5 They are taking a percentage of the result. That is exactly what
6 is happening already.

7 I have just mentioned to the Legal Aid Department why
8 couldn't you just take one step further to enlarge the scope of
9 the SLAS or create another class so as to engulf a bigger group
10 of people to be entitled to the benefit of having legal
11 assistance? I think this point has never been thought of - I
12 don't know, I need to check that out - in the UK but this is
13 quite a worthwhile point to be explored in our Hong Kong
14 situation.

15 Another very interesting report has just been released on
16 the 5th of this month. You may treat this as a Yellow Pages, in
17 fact I call it the Pink Pages, but it is the Civil Justice Reform
18 final report. The basic idea of this report is to look into
19 areas by the judiciary to find out ways to improve the efficiency
20 of legal proceedings in Hong Kong, as well as to make it a
21 cost-effective one. These are the two objectives that the entire
22 judiciary has been spending two and a half years on, if I am
23 right to say that, to find out ways to achieve these two points.

24 If you look at one of the sections, paragraph 865, there
25 it identifies also the needs of the litigant in person, those who

1 are not legally represented. The judiciary recognised to take
2 care of this group of people. In fact this class of people is
3 growing bigger and bigger. That recently resulted in the
4 establishment of the so-called Legal Resources Centre, and that
5 is built at the expense of the Law Society's robing room.

6 Now, the judiciary said that we need to take care of all
7 these people because they are not legally represented and we need
8 to allow them to have access to justice and we also need to give
9 them, if I may quote, "Unrepresented litigants should be given
10 latitude in responding to the timetable, questionnaire,
11 procedures, pleadings", etc, etc, etc. Now, what does that mean?

12 The judiciary is on the one hand saying that we need to
13 have very good case management to make our life more simple and
14 to achieve a very cost-effective product, then on the other hand
15 to take care of all these people who are not legally represented
16 and to give them a greater latitude to play around with the rules
17 and to pretend to be innocent in some cases. At the expense of
18 who? Those who are properly legally represented. Is it right?
19 I can see a lot of flaws in this logic. It is a contradiction in
20 terms. This report, the initial preamble setting out the terms
21 of reference and paragraph 856 is a contradiction in terms.

22 Hong Kong, I am proud of saying that we have 5,300
23 well-trained, qualified lawyers and another 800 barristers,
24 making a total population of 6,100. We are not stupid. We are
25 standing in the forefront of the international arena here.

1 People here are well protected. We have the Basic Law, we have
2 the Bill of Rights, we have a comprehensive range of legislation
3 provided to protect them, their civil rights or whatever.

4 Looking at other than legal aid, what else do we have? We
5 have the duty lawyer scheme to take care of those who are not
6 legally represented at the magistracy. We have the pro bono
7 scheme offered by both the bar and the solicitors branch. We
8 also have legal aid, more importantly. The latest product is the
9 resource centre to do legal counselling and advice.

10 So, what is left to us? Our hands are tied. We have to be
11 wearing a straitjacket. Companies are doing what they want to do
12 outside. The Department of Justice can't do anything to clamp
13 down on their malpractice. We are still living in a
14 straitjacket. Sometimes I ask myself when I wake up in the
15 middle of the night why should I have to put an unnecessary
16 constraint upon my own practice? If I run it wrong, I have my
17 PIS to answer. If it is not sufficient, my top-up will cover me
18 or, even if that is not sufficient, I personally have to be
19 responsible for all that. This is how I see it. I can see a lot
20 of pros in releasing ourselves from these sort of unnecessary
21 self-imposed constraints. It might be for some good reason in
22 the past, but we are moving along the time-line and we need to
23 see some changes to work in a more friendly environment.

24 Thank you.

25 CHAIRWOMAN: Junius has taken up my time, but I have a

1 little bit to add and that is choice. We should really think of
2 conditional fee arrangements as giving ourselves, as well as the
3 public, a choice. Why should we be deprived of the choice? Why
4 should the public be deprived of the choice? Having the CFA
5 arrangement doesn't mean people have to bind themselves into the
6 arrangement. Why be deprived of the choice? All the other
7 jurisdictions are having it. Why can't we also have it? Andrew
8 was citing an example that if someone is an American lawyer they
9 can enter into an agreement like that in Hong Kong doing an
10 American case. As a Hong Kong lawyer, why can't we do likewise?

11 It is a matter of the decision between the parties. You
12 don't have to enter into the agreement. The party doesn't have
13 to enter into the agreement with you. Why be restricted?

14 I do urge you all to please read the list of advantages and
15 disadvantages.

16 MR PATRICK BURKE: I will be very short because I think we
17 are breaking at 7.15 to give you time for quick refreshments.
18 Ludwig and I have been given the task of highlighting any cons
19 of conditional fee agreements. I think we should emphasise that,
20 as a committee, we have not reached any particular decisions. We
21 are still being guided, we are still seeking people's views,
22 particularly experiences from other jurisdictions where they do
23 have CFAs, and perhaps we may get some input this evening.

24 I think Andrew set out very comprehensively the matters
25 that we have discussed over the last year or so, Junius has made

1 his points, and Sylvia has emphasised to give choice, let's
2 increase access to justice. Everybody would agree with that. We
3 as lawyers enter into this profession to help people. I support
4 that and of course, from a selfish point of view, if you get more
5 work you feel better.

6 In fact, as Junius was speaking I realised that we do in
7 Hong Kong already have a very extensive scheme of conditional fee
8 agreements and it is run by the Legal Aid Department. It is run
9 on the basis, in a sense, no win reduced fee. Subject to
10 whatever contribution you have to pay, if you lose the case that
11 is all you pay. We also have under the supplementary scheme a
12 contingency fee arrangement. We are running these sort of
13 systems and it is interesting to note that those, particularly
14 SLAS, is only available for personal injury cases. Ludwig and I
15 basically only do personal injury cases and I certainly, and I
16 think Ludwig as well, have been concerned by what we have heard
17 from the UK as to their experience, problems with various
18 matters.

19 There seems to have been a concerted decision and effort by
20 insurance companies to argue every possible technical point about
21 the validity of conditional fee agreements, about the payment of
22 success fees, about the actual rates, percentage of that success
23 fee, and about recovery of insurance premiums. That litigation
24 is still going on. These cases have been argued up to the House
25 of Lords. There are now, I understand, attempts to try to reach

1 a cease-fire but it is still going on.

2 We did have a telephone conference a number of months ago
3 with a solicitor in London - a Mr Andrew Gold I believe his name
4 is - who is one of the leading PI lawyers in England and is
5 involved with an association called the Association of Personal
6 Injury Lawyers. We spoke to him for about an hour and he
7 highlighted these problems. I have spoken to other English
8 solicitors who do a lot of PI work and they say it is terrible.
9 They just don't know whether they are going to get paid, due to
10 some technical problem, and they don't know how much they are
11 going to get paid because they don't know what success fee they
12 will be allowed.

13 There is one good thing, apparently. CFAs have resulted in
14 increased litigation in personal injury work in England and
15 Wales. That has resulted I think because it has become a
16 commercial opportunity for what may be termed claims agents or
17 claims bonds. They go out and advertise. They go out and talk
18 to people on the street; if they see anybody with a walking
19 stick or a plaster, "Have you had an accident?"

20 I am all in favour of ambulance chasing. I used to work in
21 the Legal Aid Department and they stopped me from ambulance
22 chasing. I was amazed. I was invited to go and see some people
23 in hospital and I was told "You can't go". Absolutely
24 incredible. I am in favour of advising everybody about their
25 potential rights and helping them to pursue those claims. We can

1 do that, not necessarily in the PI field, but we can do that in
2 two ways. We don't necessarily need CFAs. We can do it in two
3 ways; by increasing and focusing the advertising and, as Junius
4 has said, we extend SLAS to cover every PI case.

5 Ludwig has prepared a hand-out and perhaps Ludwig would
6 like to add a few words.

7 MR LUDWIG NG: It is so unfair to put me just before the
8 coffee break. I hope you won't all go out when the clock strikes
9 7.15.

10 I have prepared a one page hand-out which lists some of the
11 cons of the CFA. Actually, these are just some points that I
12 extracted from the master list that has already been handed out
13 to you and I urge you to go through that list when you have time.

14 Before I go through my points, I would like to come back on
15 two issues that have been raised. One is the relationship
16 between legal aid and conditional fees. Junius mentioned that we
17 now have SLAS, which was proudly introduced by Patrick Moss, our
18 Secretary General, when he was in legal aid. SLAS, I think you
19 know what it is. It is a scheme that enables more people to be
20 entitled to legal aid but, if the claim is successful, the
21 claimant will be required to pay over 12 per cent of their
22 compensation to the Legal Aid Department.

23 But, there is a big difference between SLAS and conditional
24 fees. With conditional fees, if you lose the plaintiff's lawyer
25 won't get paid. With SLAS, the plaintiff's lawyers do get paid,

1 even if he loses the case. So, it is fundamentally different and
2 you can't say that we already have SLAS so why don't we go a step
3 further and have CFAs?

4 The second point on which I would like to respond to the
5 proponents of CFAs is that very often they highlight the
6 necessity of giving members of the public more choice or giving
7 lawyers more freedom to agree on the basis of their fees. I
8 totally agree to that. But, I think actually CFA is not a fee
9 arrangement. We all want freedom of choice but, when we think
10 about it, is CFA really a fee arrangement? It is subject to so
11 many conditions.

12 I don't mind if we have a system like the US where there is
13 no loser pays principle, where the plaintiff and their lawyer can
14 agree whatever fee arrangement, but I don't think that is
15 practically possible. The US has had this system, as mentioned
16 by Junius, for over 100 years. They have so much experience
17 behind them and their lawyers are already accustomed to that.
18 Can you imagine Hong Kong introducing this system?

19 Another reason why the US can run this system is that their
20 damages are not assessed by judges. All people who have
21 experience in PI will know that our judges assess damages very
22 strictly, according to the actual loss of the plaintiff, so you
23 never hear of awards of up to billions of dollars like those in
24 the States. If Hong Kong lawyers have to share a percentage of
25 those awards, I don't think personal injury practice will be

1 profitable any more. So, that is out of the question.

2 I admire Junius for his noble ideals but I think the market
3 reality is if we introduce CFAs market forces will mean that all
4 lawyers will have to do it this way and there will be no more
5 choice. If a lawyer does not agree to take it on, the case will
6 just be passed on to another lawyer, so there is no real choice
7 for lawyers.

8 My time is almost up. I would just like to highlight a few
9 points in my hand-out. Of course we don't know as yet whether
10 legal aid will be abolished if we introduce conditional fees but
11 I would think that if conditional fees are introduced then the
12 government says since we have such a huge budget deficit and the
13 economy is not turning out as well as Mr Tang expected, why don't
14 we cut legal aid? If we introduce CFA and then the government
15 says lets cut legal aid because those poor without means can go
16 to lawyers who would undertake on a CFA basis, politically, it
17 would be very difficult for them to resist at that time.

18 I have some difficulty in imagining how legal aid and CFA
19 can run in parallel. Imagine you are a victim of an accident.
20 If legal aid is available to you, will you go for CFA? Imagine
21 if you are a lawyer handling a PI claim. If your client is
22 entitled to legal aid, would you rather advise him to go to the
23 Legal Aid Department to apply for legal aid and then assign the
24 case to you, or would you undertake it on a CFA basis? I have
25 some difficulty in imagining how CFA and legal aid can run

1 parallel to each other.

2 If legal aid is cut, at point two of my hand-out, the
3 victims of non-clear-cut cases will have no means to enforce
4 their case. Those of you who have experience in PI cases will
5 know that there are many non-clear-cut cases in which you need to
6 spend a lot of resources to find out the real cause of the
7 accident, or you have to spend money on medical experts to find
8 out whether the particular disease that the victim is suffering
9 from is actually caused by work or the accident. I don't think
10 lawyers would take up these risky cases if it is to be done on a
11 CFA basis. If lawyers are not ready to take it up and if there
12 is no legal aid to finance these claims, those victims would be
13 left with no means to enforce their claims.

14 Since it is already coffee break time, may I just highlight
15 the last few points in my hand-out, the cons of conditional fees
16 to lawyers. My three conclusions are that our lives are tense
17 enough and we do not need it to be even more tense. Maybe I am
18 over-conscientious but whenever I handle a plaintiff PI case,
19 whenever there is a payment in court I become very nervous. Even
20 with the knowledge that I will get paid if the client cannot get
21 the payment in, I still get very nervous because you are
22 interacting with your client day-to-day and if in the end your
23 client cannot beat the payment in and all his damages go to pay
24 the defendant's lawyers fees, how will you feel? How will you
25 face the client? It is already tense enough. With the

1 introduction of CFAs, if you lose the case you have no payment at
2 all. I am quite sure for me the cases will be haunting me every
3 night. I don't know how you will handle that.

4 Secondly, our finance is tight enough. Is there anyone who
5 can say that their finance is not tight enough? With CFAs we
6 have no interim bills to issue. We have to finance the case from
7 start to finish. Sometimes we even have to pay the disbursements
8 out of our own pockets. I wouldn't like such a system, really.

9 Our risks are high enough. Do we want to take on more
10 risks? Sometimes even a simple case carries risk. What if the
11 client is lying? What if the defendant proved that he has
12 exercised all reasonable care and the accident to your client is
13 simply an act of God, your client is simply unlucky, and the
14 lawyer is even more unlucky?

15 With these problems, I don't think it is time to introduce
16 CFAs in Hong Kong now. Thank you very much.

17 CHAIRWOMAN: We will now have a 10-minute break. Please
18 come back in 10 minutes.

19 [7.20 pm Members' Forum adjourns]

20 [7.32 pm Members' Forum resumes]

21 CHAIRWOMAN: Since I did not have my seven minutes, can I
22 at least have one minute to respond to what was said? Thank you.

23 Earlier Patrick mentioned that SLAS covered every PI case,
24 no doubt about it. My question is what about other cases, how
25 can that be taken care of?

1 Another very important point that I need to respond to is
2 Ludwig mentioned the difference of SLAS and the conditional fee
3 and he mentioned that with SLAS the solicitor will definitely be
4 paid in any event, even if he lost the case. I stress that SLAS
5 is self-financing. In fact even though SLAS had to pay the cases
6 that they lost, they are still self-financing. That is why I
7 support Junius, his proposition that it may work, and we should
8 not really just close our eyes to that idea.

9 The last thing that Ludwig mentioned, that if conditional
10 fees were available then people would have no choice because if
11 you don't do it you won't survive; but, that is not the case in
12 England.

13 Lastly, the most important thing is the rich can definitely
14 afford lawyers, a lot of QCs or senior counsel, a whole team.
15 But what about the poor sandwich class, which is the majority of
16 Hong Kong people? How do they get justice? Where do they get
17 it? Why can't we have this extra choice for them?

18 I have to make two announcements. For those of you who
19 would like to apply for CPD points, please remember to scan your
20 membership card at the counter outside. If the scanning machine
21 cannot scan your card, please ensure that you provide your name
22 to the receptionist.

23 Secondly, please use the microphone when you want to raise
24 a question, as we will be having a Q & A session very shortly.
25 And, for the benefit of the transcriber, please kindly provide

1 your name before you ask the question.

2 I would now turn the mic to Michael, who will sum up what
3 we have said so far.

4 MR MICHAEL LINTERN-SMITH: My job is to sum up, give a
5 brief synopsis of what has been put forward, and then to invite
6 you to give an opinion. You may be aware that the working party
7 set out a questionnaire which was put onto the website and that
8 was accompanied by an executive summary and you have further
9 copies of that today. We are very, very interested in your views
10 and the whole point of having a forum is to give you the chance
11 to ask questions, express views, and we would like to have some
12 kind of indication from the membership as to whether they want to
13 go forward with a conditional or contingency fee scheme.

14 We did ask for responses from the website. I am afraid
15 that the response was rather disappointing; in fact I think we
16 had about six responses altogether, not really enough to test the
17 water to see what the opinion is amongst the profession.
18 Therefore, you have been given -- it's called a ballot paper.
19 There is a number in the top right-hand corner but it is not a
20 lucky draw, I am afraid, it is simply to check that people don't
21 vote twice, three times or four times. If you wouldn't mind
22 filling it in and dropping it in the box, which is right at the
23 front but it will be put as soon as I have spoken somewhere
24 outside near the door.

25 After I have done my summary, we will have questions and

1 answers, as Sylvia has said, so if you need to leave and you want
2 to vote please fill in the form and put it in the box as you
3 leave.

4 Rather than just sum up, I would like to put my own little
5 spin on contingency fees and conditional fees. Andrew gave us
6 what I thought was an excellent summary on how the conditional
7 fee scheme is operated in England and he has sufficiently
8 highlighted the pitfalls and the advantages.

9 The executive summary, which you have in front of you, at
10 paragraph 19 onwards it sets out the advantages and then it sets
11 out the disadvantages. So, please have a look at those before
12 you express your opinion and your vote on the ballot paper.

13 The spin I would like to put on it is just to look at a few
14 aspects of it and try to provoke some thought amongst members.
15 The question I would like to ask is what do we need if we are
16 going to move to contingency fees or conditional fees? First of
17 all, I would suggest we need a new sense of ethics, we need new
18 ethical values. We have a system whereby we have all been taught
19 that we play a dispassionate part in litigation. We advise the
20 client what is in his best interests and we don't take into
21 consideration our own interests and of course if our interests
22 clash with those of our clients we are obliged to follow what is
23 in the client's interests. That, in my view, is one of the
24 pillars upon which our profession is built, it is what
25 distinguishes us as a profession from a mere business.

1 We are not far away from champerty and maintenance, and I
2 think at least one of those may even still be on the statute book
3 in Hong Kong, in that the 19th century and possibly even earlier
4 concept of not maintaining your client, not playing a part in the
5 litigation and not having a stake in the outcome of the
6 litigation is what has guided us in England and Wales. That no
7 longer prevails. But, I would venture to suggest that we are
8 still not very far away from those type of considerations.

9 The question we need to ask ourselves is do we want to move
10 forward? It may well be that it is a good thing. We do want to
11 move into the 21st century and certainly legal services in this
12 current century will be as different from those that were
13 practised in the 20th century as they differed from the previous
14 one. Things are moving fast and the pace of change is
15 quickening. We would need to completely re-examine the ethical
16 values. Do we have a stake in the outcome of litigation? Is
17 that a good thing, is it a bad thing?

18 Secondly, I would suggest that we need to re-evaluate our
19 concept of damages. Consider a case where the appropriate award
20 of damages is \$1 million. What do we award in future if we are
21 operating on a contingency fee or a conditional fee? If we allow
22 solicitors to take 30 per cent of those damages, what happens to
23 the plaintiff? He receives \$700,000 instead of his \$1 million.
24 Has he been compensated for his loss? That seems to be totally
25 at odds with what I was always taught about what damages are and

1 what damages mean. It is supposed to be compensation for your
2 loss.

3 If you are not getting that, then how do you make sure that
4 the plaintiff is fully compensated? One way to do it of course
5 would be to add the amount of the costs and the uplift, as they
6 have tried to do in England with conditional fees, you add it to
7 the amount of the award. Is that fair? Does that not mean that
8 one party is paying more than the amount of damages? Is that
9 fair on the defendant? Will the defendant be compensating for
10 loss and damages? You may think it is no different to our
11 current system because you pay legal costs in any event. Is that
12 the way in which you are going to compensate them? Is that the
13 way to go forward?

14 One thing we certainly need is new legislation. It is
15 currently prohibited under the Legal Practitioners Ordinance. In
16 order to change it, we have to go to Legco. There are no
17 subsidiary legislative powers which are given to the Law Society
18 to make a determination in this. We are going to have to go to
19 Legco, the bill is going to be sponsored through Legco, and we
20 are going to face severe examination of our reasons for making
21 changes. There is going to be a wider public debate and we are
22 going to have to justify our position.

23 Therefore, we need to be very, very sure of the way
24 forward. What does it amount to ultimately? What is it all
25 about? Really what we are talking about here is who pays for

1 litigation. At the present time we have what you might think is
2 a very, very comfortable system of client pays. We are used to
3 sending bills to our clients as litigation progresses and being
4 paid. Some of us have done very well out of it. You might say
5 that some of us have grown fat out of that system. It is quite a
6 comfortable position. It is a nice one to be in if you have a
7 client who can afford to pay.

8 The contingency fee system as it is in the USA shifts that
9 burden; it takes it away from the client and it shifts it to the
10 lawyer. How is that going to be funded? Which kind of law
11 firms, you might want to ask yourself, are going to be able to
12 fund litigation? They do it in the USA because they have huge
13 law firms with deep pockets who can afford to fund litigation.
14 Also, there are very small firms and with a system where there is
15 no payment of costs by the loser of the litigation you have small
16 lawyers who can afford to take this on, small firms with very
17 little funding.

18 Does that lead to more litigation? Andrew suggests that
19 that is not the case. What it certainly does mean is that the
20 burden shifts from the client to the lawyer. Do we have the
21 maturity in the legal profession in Hong Kong? What is the
22 demography of the profession? We have a lot of sole
23 practitioners which is possibly a hang-over from the conveyancing
24 glut. What are they going to be doing? What is going to be
25 their position? Equally, we have a lot of international firms.

1 How will they see this? Will this be an opportunity? Would they
2 be in favour because they feel that they have the deep pockets
3 and they could corner the market? These are questions which you
4 need to ask yourself when deciding whether or not you are in
5 favour of any change.

6 Who else could be used to fund litigation? We have seen
7 with the system which was adopted in England and Wales on
8 conditional fees that there is an alternative, that the insurer
9 pays. You take out insurance after the event in a personal
10 accident scenario, you go to an insurance company, you pay a
11 premium, and basically they are evaluating your case. So,
12 insurers pay. But, is there anybody likely to come into the
13 market in Hong Kong? There has been not a particularly good
14 experience in England and Wales, whereas a lot of insurers
15 started out by offering the service but now they are reduced in
16 number. That could be a good thing or a bad thing because it
17 means that they are specialised and therefore more knowledgeable
18 and they are better able to evaluate the risks. That is a
19 possibility. But, will there be such an insurer who is going to
20 come forward in Hong Kong to fund a conditional fee system?

21 The fourth alternative - and I don't see any more than four
22 personally - the fourth alternative is that the government pays.
23 Despite all of the cries about huge deficits, we are nevertheless
24 quite a wealthy government in Hong Kong. We have huge reserves
25 compared with most countries and it is not outside of the realms

1 of possibility of the government being able to fund litigation.
2 Why should Hong Kong not consider a scheme, be a leader in the
3 whole of Asia, if not the world, by offering legal assistance?
4 Of course, as has been rightly pointed out particularly by
5 Junius, we already have the basis for doing that.

6 We have the Supplemental Legal Aid Scheme, which is
7 basically a contingency fee system because you pay back a
8 proportion of your damages into that fund if you are successful.
9 Is it possible that that could be extended so that it is not just
10 for relatively low income persons? Despite the fact that there
11 are higher limits, I understand there are still limits on it.
12 Why should it be restricted to personal injury? Could it not be
13 extended to all litigation? Could we not have a welfare
14 protective system where everyone is entitled to it and everyone
15 has access to justice because the government funds it?

16 The government is not going to be in favour because they
17 may lose money on it, but not if it is run on an actuarial basis
18 and the risks are assessed and if it is a conditional fee then
19 surely somebody can run a legal aid scheme and make sure that
20 enough money is paid out to cover the amount of money which is
21 received and therefore it doesn't have to be run on a loss basis,
22 it can be run on a self-funding basis.

23 Is it likely? Am I just dreaming? Well, it is being
24 reviewed. There is a working party sitting at the moment, and
25 both Junius and myself are members of it, which is looking at the

1 whole concept and rationale of legal aid. My feeling is that
2 there are persons on that working party - it is a government
3 working party not a Law Society one - who are in favour of that.
4 But, is it likely that the government is going to implement the
5 recommendations of its working party? Who knows?

6 One other question that you might want to consider is that
7 given that - and I'm taking my lead from Andrew's comment - that
8 so far the conditional fee system in England has been shown to be
9 useful in limited areas, how will the Hong Kong client view a
10 system where he is told "Oh, you can get legal representation for
11 nothing or for next to nothing, you can challenge the amount of
12 the fees"?

13 Those of you who know what happened in relation to
14 conveyancing with the rationale of section 56 allowing us to
15 enter into written agreements which overrode any fee scale which
16 was set out, that basically meant that fee-cutting was
17 legitimised. Does it happen in any event anyway? What are
18 clients' attitudes going to be? They have already found that you
19 can negotiate on conveyancing fees. They are going to find that
20 you can negotiate or you can almost have your litigation funded.
21 Will it have a knock-on effect? I won't, I would venture to
22 suggest, be restricted only to personal injury cases, it will
23 probably extend to all kinds of litigation and may well even have
24 consequences beyond that. Is that a likely scenario? You might
25 want to ask yourself those questions.

1 You don't have to be particularly shrewd to be able to
2 perceive that we have a fairly divided working party and one of
3 the reasons we are going to the members is that there are diverse
4 views and quite opposing views, which is why we need feedback.
5 As I said, there wasn't a great response to the posting on the
6 website but we would like to have your vote this evening.

7 We do have to have a positive policy because we are not
8 alone in looking at this issue. I don't know if it was announced
9 earlier but the Law Reform Commission has its own working party
10 looking into contingency and conditional fees, and we have
11 representatives on that of course. But, they are going to
12 eventually come to a decision and, if we don't have a clear
13 position ourselves that we can argue and, if necessary, take to
14 Legco if we need to make the changes, it is possible that
15 somebody out there will start making the changes on our behalf
16 and I personally would prefer to be in control of my own destiny
17 by having a clear policy, with the guidance and assistance of all
18 of the members, and to be able to take it forward positively.

19 Thank you all for coming. As I said, please vote. I think
20 we are now going to move to questions and answers.

21 CHAIRWOMAN: Any questions for us to answer?

22 MR ANDREW JEFFRIES: Questions or comments.

23 CHAIRWOMAN: No questions?

24 MR JEFFREY LANE (Wilkinson & Grist): A question, probably
25 for Andrew. The system of contingency fees coming in is hoping I

1 think to bring access to justice for more people, particularly
2 those of limited means. Presumably, conditional fee arrangements
3 can be made with people from Hong Kong and from overseas.
4 Normally, if you had someone coming in from overseas they could
5 be made the subject of a security for costs application at some
6 point. If you have got somebody on a conditional fee
7 arrangement, has the party considered how that could be affected
8 by an application for security for costs? I said I would try to
9 find a difficult question.

10 MR ANDREW JEFFRIES: Thank you. You promised to try to
11 find a tough question. The procedural rules of course would
12 still apply in their existing form and a poor but overseas
13 plaintiff, on the face of it, would be liable to put up security
14 for costs. Since almost all the arrangements that are entered
15 into or a very great part of them are certainly purely domestic
16 and personal injury in England, of course it doesn't really
17 arise.

18 If you were representing an overseas plaintiff who happened
19 to have been here and been injured but has then gone home and was
20 therefore vulnerable to a security for costs application, then
21 that would have to be part of your package and part of your
22 insurance cover I guess. If you couldn't get that, you probably
23 wouldn't take the case. The rules would stand. In England
24 certainly that rule hasn't been amended so a plaintiff is still
25 vulnerable in the same circumstances to security for costs. I

1 guess practically it doesn't arise that often because most of it
2 is local domestic personal injury work but the risk is certainly
3 there.

4 CHAIRWOMAN: May I supplement a little bit? Conditional
5 fees, the beauty of it is the success fee. Why do we have the
6 success fee? The success fee in England can be up to 100 per
7 cent although, strictly speaking, right now they seldom go beyond
8 40. Even for 40, the court would still have discretion and they
9 are still assessing whether the success fee is actually
10 reasonable.

11 I do think with conditional fees the whole reason why it
12 would work and should work is because you take on some cases that
13 are more risky and then you take on some that are less, so it
14 should balance off. Sometimes for the sake of justice maybe
15 there is a poor client, he cannot afford anything and he comes to
16 me, and if I am able to do a conditional fee arrangement I may
17 take him on even if there is a certain amount of risk. But maybe
18 it will balance off with other cases that I take. Would that
19 answer your question?

20 MR JEFFREY LANE: Thank you.

21 CHAIRWOMAN: Any more questions please? You have to be
22 here until 8 in order to get your two CPD points.

23 Since I did not talk too much earlier on, if you don't have
24 too many questions I would like to add something before we end
25 the session. We have heard and we do know, we are very mindful

1 of all the problems that are being experienced in England,
2 including the success fees they are looked at very harshly by the
3 courts. This kind of arrangement may have to be remedied if we
4 are to take on conditional fees and make it work in Hong Kong.

5 I appreciate a lot of times the success fee is negotiable
6 and depends on the merits of the case and the complexity of the
7 case, etc. In order to avoid what is happening in England, maybe
8 we have to make a very simple case and just say success fees be
9 set at a particular rate and be happy with it, be it a very
10 complicated case or be it an easier case. Secondly, in England
11 the success fee may have two stages, for example, if the case is
12 settled earlier you can have one success fee and if it goes on
13 till the end of the trial then you have another. Maybe we have
14 to consider that as well.

15 Thirdly, maybe we also need to go and think of the usual
16 costs order, the rules of the costs that we have right now. Can
17 we really think of a very major change, namely, to take on
18 something like the Americans are doing and let the parties bear
19 their own costs and not have to take care of the losing party?
20 If that is the case, then we do not have to worry about
21 insurance. Insurance is a very major factor. Whether
22 conditional fee arrangements will work or not hinges on
23 insurance. As Andrew mentioned earlier, what was originally
24 85 pounds could go many, many times higher.

25 In Hong Kong we tried to get a quotation from an insurance

1 broker. We wanted him to quote us what he will be charging for
2 before the event and after the event insurance. He just left and
3 didn't come back with any quotation. And, we have enough problem
4 with our insurance premium. I don't want to bother you with
5 other premiums. We are all smart people. We can see the
6 problems experienced in England. I am sure we can pull together
7 some sort of formula and make it work in Hong Kong.

8 Being lawyers, we know that law is not static, it changes
9 with time. Talking about champerty, should we still have those
10 principles in place? Isn't it about time for us to move and
11 think ahead and be with the other jurisdictions, and maybe beyond
12 them, do better than England? I am sure we can think of ways.
13 We know their problems. We will not fall into the same pitfalls
14 as the UK.

15 MR RICKY NG (Ricky S.P. Ng & Co.): In my recent experience
16 of taking a case to the United States, my client is a mainlander
17 and he wants to have the case on a contingency basis. When I
18 start telling the American lawyer about this arrangement, he
19 tells me off, he says they are not going to do this kind of
20 arrangement on a commercial case.

21 Can we start on something like personal injury cases and,
22 borrowing the American experience, the court is not going to ask
23 for costs against defendants who lose their case? I think we had
24 better think small, maybe have one field like a test, and then we
25 can move forward to other areas. That is my suggestion if we are

1 going for a sort of conditional contingency basis.

2 CHAIRWOMAN: Thank you very much. In fact this is exactly
3 what happened in England. In the beginning they were restricted
4 to personal injury cases, they thought it was successful, and
5 then it was expanded to other cases, except criminal and
6 matrimonial matters, that cannot be covered by conditional fees.

7 MR PATRICK BURKE: I do almost totally personal injury work
8 and if I thought that conditional fees or contingency fees would
9 improve the present situation I would be talking very loudly and
10 favourably. At present, in Hong Kong we have by far the best
11 system in the world of legal aid and it is extremely
12 comprehensive for personal injury work. The majority of people
13 who get injured in accidents will be eligible for legal aid.
14 I saw somebody yesterday who is one of those unfortunate people
15 and I said "You are very unfortunate because most rich people
16 don't have accidents". She is unfortunate, she is rich, and she
17 has had an accident. But, how many of these people are there?
18 Very, very few. We now have a very good system that is working
19 very well. Why mess with it? If you want to have a test on
20 conditional fees or contingency fees, go somewhere else, don't
21 come to personal injury.

22 I would like to mention two things because apparently
23 nobody has any questions. Perhaps we should have made our CPDs
24 conditional on questions.

25 What about insurance premiums? I have tried to get after

1 the event insurance on some cases, without success. I did have
2 success in one case in the sense that we had a quote. The quote
3 was 50 per cent of the estimated costs; it wasn't 15 per cent.

4 Secondly, there's been a development about success fees.
5 They are working very hard in England about getting standard
6 success fees. There is a proposal, I'm not sure if it has come
7 in yet, that road traffic accidents if the case goes to trial,
8 solicitors fees you will get 100 per cent success fee, trial
9 presumably on liability. If it settles before trial, your
10 success fee is 12.5 per cent, and that is sort of agreed.

11 MR WARREN: Is any member of the working party seriously
12 advocating the case for contingency fees?

13 MR ANDREW JEFFRIES: No, I don't think so.

14 MR JUNIUS HO: Speaking about the pros, I personally speak
15 in favour of conditional fees first. Given the fact that the
16 terms of reference of our working party have been enlarged to
17 cover this contingency topic, that is why we also included it and
18 explored the merits and the demerits of it. I agree that we
19 should take things one step at a time and if conditional fees are
20 a suitable thing to be introduced into Hong Kong it may not just
21 focus on PI cases.

22 CHAIRWOMAN: Subject to what Stewart thinks, I think I
23 heard him say that he is really for contingency fees. I may be
24 wrong. He has left so I cannot check.

25 MR LUDWIG NG: As I just said, for a contingency fee to

1 work we need to abolish the loser pays principle first. That is
2 a big step in our civil litigation system. We need to abolish
3 the indemnity principle. I personally favour a contingency fee
4 system but I don't think our civil justice reform would go that
5 far at this stage.

6 MR WARREN: You also said you favoured freedom of choice
7 for the clients. Those two statements are mutually
8 contradictory. How does supporting a contingency fee favour
9 freedom of choice for the client?

10 MR LUDWIG NG: I favour total freedom. I don't favour
11 restricted freedom which only steers the lawyer to a tense life,
12 tighter finance and higher risks.

13 MR WARREN: The very rationale for opposing contingency
14 fees in most jurisdictions has been that it takes the freedom of
15 decision-making away from the client.

16 MR LUDWIG NG: I'm not too sure of the reasons why a
17 contingency fee is favoured. The practical reality is that I
18 don't think the loser pays principle could be abolished any time
19 now so it is out of the question in Hong Kong.

20 MR ANDREW JEFFRIES: I wouldn't favour something that got
21 rid of the loser pays. I think it is a good system of keeping a
22 control on speculative and nuisance litigation, and it keeps some
23 measure on it. I think it would be a step too far to get rid of
24 that.

25 CHAIRWOMAN: One last question, because it is already past

1 8 o'clock.

2 MR MARTIN HEATH (Clyde & Co.): Are you saying that it is
3 simply not practical politics to get the legislation for
4 contingency fees through?

5 MR LUDWIG NG: I don't know. You are asking me to
6 speculate.

7 MR MARTIN HEATH: You are saying you favour them but you
8 think that the proposal is too radical.

9 MR LUDWIG NG: I don't think it is possible.

10 MR MARTIN HEATH: You don't think it is possible? You mean
11 it is not practical politics to try to get the legislation?

12 MR LUDWIG NG: Frankly, I think we will be wasting our
13 resources trying to fight for that now.

14 MR MARTIN HEATH: Is that a yes?

15 MR LUDWIG NG: Yes, I think so.

16 CHAIRWOMAN: Please remember to sign out and please let us
17 have your ballot paper.

18 Thank you very much, ladies and gentlemen, for coming.

19 [8.10 pm Members' Forum adjourns]

20 [11 March 2004]

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