BALANCE

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Contingency Fees - Greater Access to Justice?

Introduction

In March 1994, the *Trade Practices Commisson Study of the Legal Profession* recommended reforms of the then current regulations on contingency fees. Yet to date, only South Australia and New South Wales have introduced legislative guidelines on the ways in which contingency fees are used.

Contingency fees have been said to allow flexible, competitive charging and greater access to justice for clients who may otherwise find litigation cost prohibitive. They may encourage lawyers to take on more of the risks of running litigation, but also to reap more of the rewards.

Yet such fees raise a number of concerns, not least the so-called potential for increased litigation, conflict of interest and client exploitation. These concerns have created a stigma which has deterred many practitioners from charging on a contingent basis.

So, despite being part of the legal landscape in a number of overseas countries and the subject of legislation in parts of Australia, contingency fees are still the exception rather than the rule.

This month *Balance* is raising the whole issue of contingency fees and their relevance to Northern Territory practitioners.

John Neill, partner with Ward Keller, writes on the use of contingency fees and argues that current Northern Territory legislation, whilst not prescriptive, can still accommodate any practitioner wishing to charge on a contingent basis.

"HEADS WE DO IT - TAILS WE DON'T..."

To most people including many lawyers, the concept of 'contingency fees' means that a lawyer will act on a speculative basis and if successful, will take a share of the proceeds of the litigation. The legal term for taking a share of the proceeds is "champerty" and a lawyer who engages in this activity in Australia is guilty of professional misconduct. Such an agreement is void and unenforceable. The position is different however where a lawyer acts on a speculative basis but does not take a share of the proceeds.

Contingency fees of either kind can assist in funding litigation, but there are arguments to the contrary. It has been alleged that increased use of contingency fees will lead to increased litigation, to the detriment of our legal system and society generally. I believe that these fears are unfounded, because the risks inherent in working on a contingency basis should discourage any competent practitioner from running any except worthwhile cases. At the same time the increased use of contingency fees will enable people of limited means to have access to the law in appropriate cases.

The English common law has always prohibited contingency fee arrangements between solicitors and their clients. If the agreement properly inter-

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preted means that the solicitor will not charge a client professional costs except in the event of a successful outcome, then the agreement is void and the solicitor is not entitled to charge any fees, irrespective of the outcome.

Cost Indemnity Principle

The rationale behind this state of affairs is the cost indemnity principle. It has always been the law that costs are recoverable, whether by a party or by a solicitor from his client, to indemnify the receiving party.

The English Courts have held that in order to establish the necessary indemnity, a client must be liable to pay his solicitor in any event. Where the liability to pay the solicitor is contingent upon the happening of some event (such as a successful outcome) then the indemnity is not made out and no obligation exists for the client to pay the solicitor Gundry v Sainsbury [1910] IKB 645.

The English Courts have in recent times continued to uphold this principle - British Waterways Board v Norman (unreported) 11/11/93 and Customs and Excise Commissioners v Vaz [1195] STC 14 (21/11/94).

Australian Law Diverges

In Australia, the law appears to have diverged from the English position, at lease since the decision of the High Court in Clyne v NSW Bar Association (1960) 104 CLR 186. In that case, the High Court quoted with approval the words of Ostler J in the New Zealand case of Sievwright v Ward (1935) NZLR page 43 as follows:

"I think further that, whether the solicitor does this without any prior agreement either that in any case he shall be repaid such cost and disbursements, or that he should be paid only out of the proceeds of the suit, and that if there are no proceeds the solicitor will bear the loss, the result is the same: the solicitor would be guilty of no wrong. To hold otherwise would be against the public interest"

In Sheehan v Sheehan [1991] FLC 78,519, Fogarty J. expressed the view:

"It does not appear to me possible to distinguish the lines of English cases from the Australian authorities culminating in Clyne's case, and it appears that there has been fundamentally different development in this area. The difference is that an agreement by a solicitor to be paid his costs in the event of success but not otherwise is treated in England as champerty and therefore maintenance is illegal, whereas in Australia it is not".

A little further on, Fogarty J. continues:

"In my view the law to be applied in Australia is as described by the High Court in Clynes's case, that is, an agreement to be paid proper legal costs in the event of success but not in the event that the litigation is unsuccessful is not champerty or maintenance and is not contrary to public policy. Critically for this case I conclude that it does not constitute an objection to a bill of costs in respect of such litigation. This view appears to be inconsistent with the English cases referred to above but I conclude that the English and Australian law on this issue has diverged"

Territory v Interstate Legislation

Although there is no legislation in the Northern Territory specifically directed to either contingency fees or solicitor/client charge-out rates, readers are reminded of Sections 129 & 130 of the *Legal Practitioners Act* and of the inherent jurisdiction of the Supreme Court in such matters in any event.

Section 129 specifically permits formal agreements for costs between legal practitioners and their clients, for amounts to be specified in the agreement, and Section 130 permits the Supreme Court to interfere with such agreements (1) on application by a person who has entered into such an agreement with a legal practitioner, and (2) where the Court is satisfied that the agreement is not fair and reasonable.

By comparison, in New South Wales and South Australia, legislation exists permitting contingency fees to be calculated on the basis of the lawyers normal fee plus an extra percentage uplift. Such an uplift is in itself a bone of contention. Consider the recommendation made by the *Trade Practices Commission* in 1994 for a 25% uplift, compared to the 100% uplift currently set and used in South Australia and New South Wales.

I do not support the introduction of legislation in the Northern Territory similar to that currently in place in New South Wales and South Australia. A lawyer should enter into a formal written agreement with the client which clearly states the rate which the lawyer will charge for the work and the circumstances which will constitute a "successful" outcome, and entitle the lawyer to be paid at all. There is no need in light of Section 130 of the Legal Practitioners Act for legislation specifically to prescribe any limit on the uplift percentage of the lawyers fees and indeed such may have a counter- productive effect, nullifying the "access to justice" benefit of contingency fees if the extra return to the lawyer is made too small as to outweigh the risks of litigation.

Summary

In summary therefore, it appears that legal practitioners anywhere in Australia, in the absence of legislation to the contrary, are entitled to enter into an agreement with a client whereby payment is contingent upon the happening of some event (presumably some form of defined successful outcome) and that such an agreement will not amount to maintenance or champerty and the legal practitioner will be able to tax the clients costs against the unsuccessful other party at the end of the matter. Further, the legal practitioner will be able to recover costs at the agreed rate against the client, if that becomes an issue.