Housing Law Practitioners’ Association

**Minutes of the Meeting held on 16 July 2014**

**University of Westminster**

**Costs, CFAs and Funding**

Speakers: **David Marshall, Anthony Gold Solicitors**

 **Martha Spurrier, Doughty Street Chambers**

Chair: **Sara Stephens, Anthony Gold Solicitors**

**Chair:** My name is Sara Stephens, I am a HLPA Executive member and from Anthony Gold Solicitors and I will be chairing tonight. Could I first ask if there are any questions to the Minutes of the previous meeting? If not, I will introduce tonight’s speakers. We have, firstly, David Marshall, who is the Managing Partner at Anthony Gold Solicitors. He is the Chair of the Law Society’s Civil Justice Committee so he is very well placed to talk to us about CFAs and costs and what is happening there. We then have Martha Spurrier from Doughty Street Chambers; again very well placed to talk about judicial review and costs. She was previously in-house at PLP and has worked with PLP on some of the legal aid challenges.

**David Marshall:** Thanks for inviting me to come talk about costs and funding. I am going to talk about alternative funding mechanisms in this difficult world for legal aid. We might pick up on that in questions later and also as well as the conditional fee agreements and damages based agreements, hopefully, all of the acronyms will be explained during the course of the next twenty-five minutes. We will also talk about the other side of the coin which is client’s liability to pay adverse costs if they lose, which is equally important.

Sara has already told you about me. I have written and spoken about CFAs for far too long. I am a personal injury lawyer so do forgive me about lack of knowledge about housing law although as Managing Partner at Anthony Gold obviously I do have quite a few housing lawyers I could talk to.

The first point to remember about alternative funding methods to legal aid is that you cannot just think “well this is all far too complicated, let us just do a straightforward contingency fee arrangement; I will not charge you unless we win”. There is no such thing as a common law contingency fee for contentious work. The case of *Awwad v Garaghty & Co* made that absolutely clear. If you are outside the statutory protection, so if you do not have an enforceable conditional fee agreement or an enforceable damage based agreement within the legislation, then that will be an unenforceable agreement; you would not be able to recover costs either against your client or against the other side. Veterans of the ‘costs wars’ in personal injury will recall the case of *Garrett v Halton BC; Myatt and others v NCB* which, effectively, said that - so you must stick to the statutory protections if you are to have any form of contingent funding.

The most recognisable form of contingency fee is the conditional fee agreement; that has been around since 1995. Under the Access to Justice Act 1999 success fees were recoverable from the opponent as, indeed, were after the event insurance premiums if you could get them. So it was a fairly straightforward regime to understand or explain to clients. They did not pay anything if they lost and you got everything back, all the costs including the success fees and after the event insurance premiums from the other side if you won, so it was, effectively, in most areas of litigation no fee win or lose. Things became more complicated because following the Jackson Report the Government legislated to abolish recoverability of success fees and after the event insurance premiums. That is the regime that we are in now, which is actually a more difficult one and a more nuanced one where you have to make some choices about how you want to operate conditional fee agreements. So success fees are irrecoverable now except, possibly temporarily, for mesothelioma and the Government has said they are going ahead with taking it away from that. Defamation; that will disappear as part of the Leveson Reforms. Insolvency is the only bit that is left and likely to stay because, apparently, the HMRC are totally dependent on insolvency practitioners being able to recover success fees and so that is likely to stay for at least another a three or four years ironically, I would say. The key thing with a conditional fee agreement is the success fee is an uplift applied to your base costs, your normal costs, and you specify what those circumstances are in the CFA. Normally it is winning the litigation but there could be other tests you have, like recovering certain levels of damages or getting injunctions or whatever, but generally it is winning. The maximum success fee is still 100% so you can go up to doubling your base costs if you win. There is a cap in the legislation linked to the damages that only relates to personal injury cases; it does not relate to any other form of civil litigation. In housing therefore, you would not have to have a cap unless your housing claim is a claim for personal injuries. I have a question mark because you may have a case where, for example, there are damages for damp for a child which is part of the claim. That probably becomes a claim for personal injuries and some form of cap may need to be applied. We do not really know the answer because I think there needs to be some case law as to exactly what part of the success fee is capped but do bear that in mind; even if you have a housing case there could be a personal injury element there. The other point to bear in mind is you normally cannot use conditional fee agreements for criminal cases, probably for obvious reasons, but there is a specific exception for Section 82 Environmental Protection Act claims, they are criminal proceedings but you are allowed to use CFAs but you are not allowed to have a success fee for that sort of work. So you have civil CFAs up to 100% success fee, no cap unless it is a personal injury claim and in Environmental Protection Act cases you can have a CFA but no success fee.

The only statutory requirement as to form is that the CFA is in writing; it does not even have to be signed under the statute although obviously it is good practice to get it signed so you can prove it afterwards. There is no particular form of agreement that is prescribed but you particularly want, I think, to make sure you can rely on it if things go wrong. If you have to terminate your CFA what is your basis for charging and so on? I would say that if you look back at all the ‘costs wars’ decisions that we had in personal injury the courts have pretty consistently done their best to uphold the Law Society’s model agreement, sometimes bending over backwards I would say to do so. Therefore I personally think that is a good starting point. It does need variation for housing work and especially the post-Jackson version because of the personal injury cap. Things are diverging now, I think, between personal injury and other forms of litigation. The Law Society, and I am Chair of the Civil Justice Committee but do not shoot me, is supposed to be drafting a non-personal injury version of the CFA; it should be available soon but you can, with not that much work, take the existing personal injury version and amend that for housing purposes. I not sure whether even the Law Society’s model agreement has yet been amended for the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2014 which just came in last month. But there is a very good Law Society practice note on that and even if you are not doing CFA work, if you are doing private client work, you do need to read that because there is some quite scary stuff about dealing with clients and their rights to cancel.

So in housing cases, where are we likely to be thinking about using CFAs possibly? Well I think the most obvious example are damages claims, particularly for disrepair, particularly with the difficulties about getting legal aid which perhaps we could pick up on in questions afterwards. You do need to be aware of counter-claims, if the client stops paying the rent, are you actually winning, will there be any damages to pay your success fee? So it is not quite as straightforward as a personal injury claim where that sort of thing does not really happen. I think it is pretty difficult to use them for defences and particularly in possession cases there are no funds to pay a success fee and therefore you would be doing it, effectively, for your normal costs even if you get a costs order at the end of the possession case which, I suspect, is unusual. There is a potential to use them in non-damages claims not, I think, as an alternative to legal aid because for reasons I will come on to later the clients would lose their legal aid costs protection but if you have a client who is not eligible for legal aid you can do it on a CFA. Although there are no damages to apply a success fee to if you make a Part 36 offer and beat that at a hearing you are entitled in non-damages cases to a 10% uplift, so not a huge amount and maybe not enough for the risk but there is a mechanism to gain some extra fees even in a non-damages case. I mentioned EPA cases earlier. The other point to bear in mind for clients who are not eligible for legal aid but have got some funds is that it does not have to be no win no fee. You can operate a conditional fee agreement with a no win lower fee which is similar, I suppose, to how legal aid operates actually in practice. You could say I will charge you £70 per hour if we lose and I will charge you guideline hourly rates or whatever if we win; that would be a perfectly permissible form of conditional fee agreement. Or, alternatively, a client might say well I have £2000 to put towards this litigation and you could say that is the maximum I am going to take if we lose, but if we win the case I want to be paid normal guideline hourly rates.. That, again, is a perfectly permissible arrangement so it does not have to be no win no fee; you can have no win lower fee, no win fixed fee with just a slight variation to the conditional fee agreement. The success fee is only part of the story for the client, particularly where I think in damages cases, a disrepair, quite often the costs can be relatively high compared to the damages because you are often applying for an injunction or works order as well. So if you charged a 100% success fee you could be eating up damages quite quickly, therefore clients are usually quite keen to know if you will cap your success fee or cap all your costs at a percentage of what is recovered. It is not required for housing cases, as we said earlier, unless there is a personal injury element but you may want to volunteer that because in my experience that is what clients are most interested in. They do not really care about the success fee percentage; what they want to know is how much is this going to cost me if I win? How much of my damages am I going to lose? Again, you can draft the conditional fee agreement to include a voluntary cap.

Are you charging a success fee? How will you set them up? I will talk about that in a minute. What rates will you put in there? Is there a process for an increase? Will you try and charge solicitor and client costs over and above what is recovered? A voluntary cap, do you want a no win lower fee, no win fixed fee? Does the client understand all of these arrangements? What are you doing about disbursements? What about counsel’s fees? Now there are two ways that counsel are now being funded post-Jackson; sometimes they are being funded as a disbursement, but that is as a solicitor unless you are getting the client to pay it as a disbursement and that is potentially your risk, or counsel is on a traditional CFA in which case you need to have some form of agreement and the APIL/PIBA 9 has just been published. I do not quite know what happened to versions 7 and 8! That is probably available from the APIL website, I think, and that, with some adjustments, is probably a useful basis to talk to counsel about. Also you have to think about Part 36 offers. So these are points to think about and they are all flagged up in the Law Society’s model agreement and guidance note, but it is not as straightforward as just taking it from the website and filling it out. You actually have to think and make some of these choices yourself.

This is fairly obvious, but just to remind people of the difference between the cap and the success fee so I have here a 50% success fee and a 50% cap. There is an arithmetical error on the slide I am afraid, I did change it from 25% and I made one mistake; I forgot to change the 500 to 1000 so it should say 1000 there and that does add up to 3000, it is 2000 plus 1000 not 2000 plus 500! But the idea is your base costs are £2000, the damages you recover are, say, £10,000, your fee is £3000 because it is £2000 plus 50% of the £2000 making £3000 and the client will only lose £1000 of their damages. You do not get the amount equal to the 50% cap automatically. It can be confusing to explain caps and success fees to clients so it is worth just making sure you fully understand that.

How do you set success fees? I think in housing cases it really has to be an individualised risk. Some people go for 100% in every case; I think that is probably pushing it because not every case will be fought tooth and nail. It is there to pay for the losers and the courts will have, if it goes to a solicitor and client assessment, regard to pre-April 2013 case law. I still think the best place to start is the ready reckoner which you can find in Cook on Costs which basically just sets the arithmetical formula for turning the prospects of success into the uplift you require for risk. So it is a fairly straightforward arithmetical formula but if you need some help with it is set out in detail in Cook on Costs and I think that is probably the best starting point. Courts quite like staging and clients sometimes quite like staging, so some clients might say if I settle it very quickly will I have to pay less or will I be able to pay less than if it goes all the way to a trial? So staged success fees can be something that people put in. But do bear in mind there is a market; you have to agree this with clients now. It is not something you are going to recover from the other side; it is something that you have to negotiate with your client and your client may have other ideas about what they want to pay and negotiating with you.

We will just quickly talk about damages-based agreements; they have not been much use hence the tag, “Don’t Bother Agreements” which I did not come up with and I wish had but I cannot remember who did, otherwise I would credit them! They are not being used a great deal but the idea was that they should be more like a US style contingency fee and that is now available under Section 45 of LASPO and the Damages Based Agreements Regulations 2013. The cap, so in other words the maximum you can take out of damages for non-personal injury cases is 50%. But, unfortunately, it is a slightly odd situation; it is called the “Ontario” model and you have to set recovered base costs against your fee so although you have a DBA for 50%. [see PowerPoint slides] So that is £5000 your client might think they would always have to pay, but that is not so if you recover some costs from the other side. So if your base costs of £2000, damages of £10,000, your fee is £5000 because that is 50% of £10,000 but you are getting £2000 back from the other side, the base costs and therefore the client is just topping up to get to £5000 and will keep £7000. I can assure you the client will be astonished that they are not losing £5000 because everyone will think that they have signed up to a 50% deal. It is a rather odd situation, we have managed to bring in two forms of contingency fee and in neither of them, because of the cost shifting, the client will actually pay the percentage they think they will be paying at the end of the day. The other odd thing about DBAs under the CPR, and this is Government policy, is that the indemnity principle applies to them. I was saying earlier that sometimes costs can be quite high relative to damages in disrepair cases where you are perhaps going for works orders and so on as well, so let us say your time costs would have been £7,500 in that example, but your DBA fee was 50%; you can only recover £5000 from the other side and you will have to write off that £2,500. So it is supposed to be there for client protection but in fact it acts to the benefit of the loser of the litigation. If they have made you work particularly hard and do lots and lots work then you will be capped at the level of your DBA fee. I think what I would say is DBAs work best in non cost shifting environments which is where they started in the employment tribunal or, for example, in America where most States do not have any cost shifting and therefore, effectively, the contingency fee or the DBA is a percentage of damages. It is very understandable and these peculiarities do not come into play so in the small claims track it may be of more use.

There are other problems, I will not go into detail on these but the Regulations are challenging to understand, shall we say, and there is no real provision for termination, for example or what happens if your client is naughty and you need to terminate or what happens if the client wants to change solicitors? Can you have a no win lower fee DBA? Possibly. They are very badly drafted and that is, I think, generally, the main reason why solicitors are not really using them at the moment. The MOJ does say they are going to investigate to try and improve them.

So I have talked about funding methods; two main ones CFAs and DBAs. DBAs are not being much used; I would be interested to know if anyone here has used one maybe when we get to questions so it will mainly be CFAs but your problem is, in housing cases particularly, that is only less than half the story. First of all your client has to pay more now if they do win and, secondly, if they lose, potentially they are liable for the winner’s costs. Some of you may have noticed there was an Ombudsman’s report in January this year which indicated that there is quite a high proportion of complaints now to the Ombudsman about CFAs. Virtually all of the ones in the report were pre-Jackson CFAs where somehow, despite the incredibly good regime clients were ending up with big bills even though they had signed up to CFAs. So if that was the position pre-Jackson I suspect there is a lot of mileage for client complaints post-Jackson. So there is a potential issue there and most of it was around clients not understanding that they might have to pay the other side’s costs if they lost the case, even though they did not pay their own lawyer.

So what are the possibilities? Well the client has to pay, that is the basic position, isn’t it, in civil litigation if you lose the case under a cost shifting environment? There is after the event insurance which we will talk about in a minute. There something new called QOCS, qualified one way cost shifting but that is only for personal injury cases at the moment. There might be a solicitor indemnity. We will talk a little about the *Sibthorpe & Morris v Southwark* case. So those are the possibilities that might be there to deal with adverse costs and we do need to know what the position would be in the case. We think QOCS will work although there have been no deciding cases on it yet to see whether it does. It is rather oddly set out but, basically, orders for costs will only be enforced with the leave of the court to the extent of damages and interest. So if you lose the case, so do not recover any damages or interest in a personal injury case the normal rule will be that you do not have to pay the insurance company’s costs on the other side. If no damages, no costs order is the basic rule. Now it might apply to some housing cases and again I am afraid I have to put a question mark on it. We have talked about it quite a bit in Anthony Gold and I am afraid that until there are some decisions we do not really know what is intended by the rules. So it says, “This Section (i.e. this bit of the CPR) applies to proceedings which include a claim for damages for personal injuries.” But if there is a claim, this is under (b), “for the benefit of the claimant other than a claim to which this Section applies”, (i.e. not a person who claims) then the court can decide how much QOCS the client gets. But I think the one point that is clear is you cannot know until the end of the case whether they have QOCS protection at all or if so, how much, which is not, obviously, a very satisfactory starting point for litigation. I think the judges are worried people will just throw in lots of personal injury cases into things like housing claims just to get the benefit of QOCS which is why I suspect they have this rule here. So if you have a whole family with claims for damp and there is a child with asthma or whatever, does that give you the benefit of QOCS for the whole case or just part of the case? We do not know until there have been some decisive decisions but QOCS potentially might play a part for some housing cases.

After the event insurance, obviously pre-April 2013 I know it was challenging to obtain for housing cases but it was sometimes available and if you could get it the premium was recoverable as costs so it was very straightforward; the client did not pay if the case was lost and if you won it was claiming it back from the other side. After April 2013 the Jackson changes were that you cannot get the premium back so it has to be paid by the client out of damages and the premiums can be pretty significant. Usually if they lose, ATE premiums do not get paid but there are often policy excesses which means the client or the solicitor has to pay something towards the other side’s costs before the insurance kicks in. You often find that the premium can be quite high for the level of cover even if it is available to you and there are not many policies around. It is a client choice situation; the client has to pay for this premium if they win the case so they may decide that their landlord will not get blood out of a stone. If they are on benefits and have no assets and do not own a property because they are a tenant they may feel, well who cares, I do not mind being bankrupt. Nobody is going to bother doing that because I have got no money and my landlord will not get any money out of me. That is a perfectly valid situation for a client to think about but you obviously need to be sure that the client did understand that is the risk they were taking.

Another possibility could be an actual indemnity from the solicitors to say if there is a costs order against you we will pay. It is clear that this is permissible in housing cases because that is what *Sibthorpe & Morris v LB Southwark* was; it was a bunch of housing cases brought against Southwark and the Court of Appeal said to allow for Access to Justice it was permissible for the solicitor to give an indemnity to his client that they would pay the costs if the case was lost. I ask ‘why?’ because potentially quite a big risk; I think in those cases they were a small number of cases and they were pretty likely to succeed but if you start taking more risky cases you could end up with quite significant risk there and you certainly need to be thinking about your duties to run your practice on a financially sound footing. We are not insurers, we do not have to keep reserves against these sorts of things. I have certainly seen in the personal injury context a firm of solicitors that for some reason, I will not say why but it was a piece of litigation I was doing, did not take out after the event insurance before April 2013 and then were called upon to pay a whole bunch of adverse costs orders and went bust, literally went bust, they all went bankrupt because they could not meet them. So it is not risk free; you do need to think about what you are doing if you are going to give these indemnities. I think the slightly better news is it is quite hard to give that indemnity by mistake; just because you are doing CFA work does not mean you are really at risk of having to do that. In the case of *Hodgson & Ors v Imperial Tobacco Ltd & Ors*, Leigh Day was acting against the tobacco companies under a CFA and when the litigation had to be dropped the tobacco companies said we want Leigh Day and I think other firms of solicitors to pay all the costs. The Court of Appeal said no, it is a legitimate form of funding; they are entitled to do that under the statute and therefore they are not going to be penalised by having to pay the other side’s costs as a funder when the litigation failed. That was effectively upheld in *Myatt & Ors v National Coal Board* because it said if you step outside the statutory protections; if you have an unenforceable conditional fee agreement yes, probably you are going to have to pay all the costs if the case is lost but not if you are inside the statutory protections. I have given the High Court reference but it did go to the Court of Appeal so there is a Court of Appeal upholding that decision in *Germany v Flatman/Barchester-Healthcare v Weddall*, which was where the solicitor decided to pay the disbursements with the client during the course of the litigation; it then lost and the defendants said that because the solicitor had paid the disbursements they were funding the action and therefore should be liable to pay all of the adverse costs. The Court of Appeal said no, that was not necessary, the solicitor was acting under a lawful funding arrangement.

Explaining it all to the client, a careful file note is essential, particularly if the client is going to take the risk, for example, that they will pay the adverse costs if the case loses. They are perfectly entitled to take that view rather than buying insurance but I think you need to be protected at the end that they do not have remorse that they made that decision. There are very few people operating DBAs so I would not worry too much about that but you do need to look at before the event insurance. We will perhaps pick up on legal aid in questions because I think that is a more complicated question and sometimes, if they have a very strong case, the client might decide they want to pay privately, because why should they pay a success fee if they have such a strong case and they have funds they might be prepared to do that; perhaps unusual but I have occasionally had clients who have said that.

So to conclude, CFAs are viable as a replacement for legal aid or private funding for damages cases, disrepair particularly. Think about how you will fix your success fee and perhaps how you are will apply a voluntary cap so the client knows that all of their damages will not be eaten up in solicitors costs because I think that is both a disincentive to them starting the case and also can cause you to have complaints at the end of the day. I would start with the Law Society’s model agreement; it is a good starting point and it is pretty obvious which parts you have to take out, really. You can also use it for non-damages cases but the CPR does not give you much of an uplift, but perhaps no win lower fee and no win fixed fee might be a more attractive solution for clients who have some money and are not eligible for legal aid but want to limit their liability. EPA cases you can also use CFAs for but you must not charge a success fee on those. I am not really very keen on DBAs, subject to the MOJ perhaps changing the Regulations shortly and in non-costs shifting environments, so if you have a small claim, for example, then it may well be something, particularly as the general limit has gone up to 10 and will perhaps go up to 15 in due course. There are some quite big claims potentially in small claims; I know there is the housing exemption and so on but that is something to bear in mind there. Do remember your adverse costs advice because actually that is possibly the most important part of it as far as the client is concerned. You should be able to come up with a contingent fee agreement that means they do not have to pay you if they lose, but what will happen about the other side’s costs?

**Chair:** Thank you, David, and over to Martha.

**Martha Spurrier:** What I propose to do is just give a very brief update on some of the challenges to the legal aid cuts that are going through the courts at the moment but mainly talk about the remuneration regulations that have come in April that make permission applications for judicial review at risk. So I started off with the good news that yesterday the Divisional Court handed down the judgement in the residence test case, I am sure you are all well aware of it, finding really on every ground that it was unlawful and reducing it to ashes. It is a very powerful judgment; I am sure it will be appealed if it is not rendered academic because the political whisperings behind the scenes are that the Government will now try and put the residence test in primary legislation and insulate it from challenge. So I think we certainly have not seen the back of it but this is at least a good step in the right direction and certainly, I think, if there were to be this test in primary legislation it would be very interesting to see how Parliament deals with something that has been declared unlawful by the courts. I have put in the note at paragraph 6 a link to the draft legislation just really for the sake of completeness. You will be aware that it passed in the Commons a couple of weeks ago and it is still scheduled for a vote in the House of Lords. We assume it will be withdrawn but we have not had any confirmation – I have just heard that apparently it has been withdrawn today, I did not realise that, I have been in court. There is also draft guidance that has been published by the MOJ which I would have put in this note if they had lost the litigation which sets out how providers are to go about proving that their clients meet the residence test. Hopefully it will be redundant and never used but it is something to look out for if we do end up being stuck with this test. All I will say is that it is absolutely clear from that guidance just how onerous it really will be for providers to try and work out whether clients meet the residence test or do not. There is plainly a risk that people will inadvertently start operating quite discriminatory practices, namely if you are white and speak with a British accent we will make an assumption that you are eligible but we start getting a little nervous in urgent cases where there are question marks over your lawful residence. That is one of the real concerns and that was a concern that was canvassed in the litigation and certainly something that the judges were very alive to.

So moving on then, I have just done a very whistle-stop tour under Hopeful News, because we have not had decisions yet, of the other challenges to the legal aid changes. I think these are all of them, all of the main ones. So the first which is good news is there was a win in the exceptional funding challenge. This was a group of five immigration cases where exceptional funding had been refused, primarily on the basis that the Lord Chancellor’s position was that Article 8 could never give rise to a right to legal aid even of itself and that it was only under Article 6 that you could ever get legal aid. The purpose behind that was to exclude immigration cases altogether because they said family will fall under Article 6, so you can get your exceptional funding that way but immigration does not fall under Article 6 because your immigration status is not a civil right. So then they wanted to exclude immigration cases really by the back door and it always looked like a fudge in the Guidance and that has now been confirmed beyond doubt by Mr Justice Collins. I have set out the name of the case in paragraph 8. The only thing to note about that case is that it started its life partly as a challenge to these individual legal aid refusals but also a challenge to the whole exceptional funding scheme. You might be aware of the work that the Public Law Project has been doing around exceptional funding and some of the very shocking statistics that have come out in the first year of the operation of the scheme, namely almost no applications and of those pretty much no grants. So PLP are building up a systemic challenge to the system on the basis that the forms are too complicated, it’s a bar to Access to Justice and all those grounds that you can readily imagine. That was hived off in the end because this just became an enormously unwieldy piece of litigation and it was clear that the individual cases needed to be decided quite quickly. So it is likely, although nothing is fixed, that that systemic challenge will be heard in the autumn so that is one to keep an eye out for.

You will also note that in the residence test judgement the forms themselves are explicitly criticised. James Eddy had to concede during the hearing that, frankly, to suggest that someone who was not lawfully resident and was not eligible for legal aid as a result could sit down and fill out an exceptional funding application form was, frankly, laughable. So it is hoped that that will give the LAA a steer to perhaps make the form at least a bit more workable for people. There is then also a challenge to the removal of prison law almost entirely from legal aid. That challenge was refused permission to proceed by the Divisional Court in an absolutely horrible thirty page now reported judgement but the good news is that Lady Justice Arden granted permission to appeal a couple of weeks ago and it looks like, although we cannot really work it out, the Court of Appeal are reserving the substantive hearing to themselves because we have been asked for a three day listing. So, again, hopefully, in the autumn we will get a listing and that will get ventilated.

Then, finally, and that is really, really at the baby stages, rights of women, again represented by the Public Law Project, have issued a judicial review challenging the evidence gateways for victims of domestic violence to get legal aid. In short, the argument here is that the Regulations that set out those gateways are ultra vires of the statute because at the very last minute lots of women’s groups successfully campaigned to widen the definition of domestic violence in the Act to include non-physical forms of domestic violence such as psychological abuse and financial abuse. The Regulations do not really reflect at all that amended definition and so they require you, for example, to have a report from a doctor proving that you are a victim or that you have been to a refuge and Rights of Women’s argument is that in fact there will be lots of victims of domestic violence who the doctor will not be able to say either way because they will be being financially abused, for example. So that challenge has been issued and a permission decision is awaited.

So then I have called this the Bad (but also maybe hopeful) News and it is at paragraph 14. This is the Regulations that have been brought in putting permission work at risk so you will be aware of this being trailed right at the beginning of all these slew of consultations that we have had. It started off that you just would not get paid for your work on a permission application unless permission was granted. It was refined to include a discretion that the Legal Aid Agency has to pay you in certain circumstances where your case does not reach the permission stage at all. But if you do reach the permission stage and you are refused no payment, end of the line. I have set out the Regulation at paragraph 15, it is Regulation 5A, and it is inserted into the (Remuneration) Regulation. It is absolutely tiny, as you can see, and really all it does is provide that very short, non-exhaustive list of criteria for the LAA to have regard to when they are considering whether to exercise their discretion. The purpose of this Regulation the Government says is that they think that legal aid is being used to fund crap cases and they think that forcing providers to be more at risk financially will make them think more carefully about the merits of the case at the outset and they will stop bringing all these weak cases. So it is very much based on a kind of financial incentive model and I will come on to say a little bit about why it is that actually that model is entirely inappropriate in judicial review and that, actually, the effect of these Regulations is probably not going to be to stop weak cases but it may in fact be to stop some very strong cases.

Just on one point of clarification, I imagine you all know this because the email was actually sent to your organisation, I have appended it to the back of my talk. There is some confusion about interim relief applications and whether they are still funded. The Government said very clearly that they would remain funded, the Regulations were then published and did not say anything about interim relief and everyone was very confused. The LAA then said no, it is still our intention to fund them and they provided their fairly sort of convoluted explanation in an email. There is still, I think, justifiable nervousness around this. It is very odd that it is not on the face of the Regulations and it is really not clear how on earth you are supposed to work out what part of your judicial review application is the interim relief bit and what is the substantive bit. I mean, when I draft grounds normally my interim relief section is about four paragraphs but that does not necessarily mean that they should say I get four out of my thirty paragraphs paid for or whatever it is. So I think that will be something that we just have to watch and see how the LAA deals with it. I was at a conference at the weekend and there were a couple of High Court judges who said very confidently oh well, why do you not just say here is my interim relief application and put in your twenty page grounds of judicial review and then put in a separate document saying for grounds of judicial review see my interim relief application. Nice an idea as that is, I would really caution against doing that because I do think the LAA will see through it immediately. It is pretty obvious what this Regulation is for; they are not just going to let you get paid just by sticking in mad interim relief applications. But anyway, the judiciary seem to think that was a good idea.

So, as I say, if you do not get to the permission stage for whatever reason then you can apply to the LAA to have the discretion exercised in your favour. There are some concerns. Firstly and obviously, the exceptional funding regime has been a very clear indication of how the LAA exercise their discretion in general about funding; very restrictive, very inaccurate often, but also there are concerns particularly to these Regulations. One is that there is no right of appeal to an independent funding adjudicator so you are only ever going to be stuck in the internal review system and the adequacy of that system, certainly in my experience, is it is very, very poor. The second problem is that there are no time frames that bind the LAA so your work will be at risk from the beginning and it could then trundle on at risk with you not knowing whether you are going to be paid for months or years while you wrangle with the LAA about whether or not they are going to exercise their discretion. Again that is something that was raised by a lot of respondents to the consultation that it was introducing lack of clarity upon lack of clarity but to no avail; there remained nothing in the contract or in the Regulations imposing any deadline on the Legal Aid Agency.

So in terms of the impact and this is set out, and really these are just top of head thoughts, at paragraph 21 as to how we have tried to frame the challenge. But I think the main concern is that actually the effect of these Regulations will be to stop particular types of meritorious cases being brought and that, ironically, in many situations those cases will be on behalf of individuals who are least able to represent themselves because they will be the most complex cases. They will be the novel points of law and they will be the most disadvantaged clients who are the most demanding. So, ironically, you have the situation where even though under Section 10 of LASPO, those people who are supposed to be funded by the back door these Regulations will effectively make it very difficult to keep acting for those kinds of clients and in those kinds of cases. The first and obvious point and it is so well recognised now it has been in so many judgements that legal aid providers just act on extremely tight margins now and so shouldering risk is just not something that providers, particularly small specialist providers, can do. The Government in their consultation document estimated that the work on a permission application cost £1300 because obviously when you apply for emergency legal aid that is the limit on your certificate. So they lifted that figure and they stuck with that throughout and it is absolutely insane because everyone in this room will know that it is routine to spend £5000 on your work on a permission application but in big cases I have seen bills that are £20-25,000 at that stage. For a small firm doing a handful of judicial review a year the loss of £25,000 on one case can be just devastating.

Secondly, judicial review and this goes back to what I was saying about it just simply being inappropriate to have this level of risk at the outset in judicial review proceedings. It is a front-loaded process so already, and again very different from private law claims, you are looking at putting much more work at risk than you would be in other types of litigation. Also there are certain features of judicial review litigation which mean that contrary to what the Government thinks, the claimant provider is actually not best placed to make a merits assessment and, again, so obvious and so numerous are the examples but some are disclosure. One of the points made by the Government in their response to our pre-action letter was well, there is a duty of candour in judicial review so once you have sent your pre-action letter which you are funded to do, you will get everything that you ask for which is just simply not right. The duty of candour, as far as I am concerned, is ignored by most defendants. The statutory regimes for getting information are usually useless in judicial review because you do not have time to pursue them. It is only when you actually get into the formal stages and when your work will then become at risk that you might get disclosure which could completely blow your case out of the water and for good reason, but you never knew and you never ought to have known. So that is one of the problems.

Another problem is the short time limits, particularly in urgent cases where you are having to make merits assessments very, very quickly in the absence of all the information that you might otherwise want. You do not may be have very much time with the client, you do not have a translator, all those practical issues which mean that even though your merits assessment is a good faith one it might actually not be the best one; that if you had three months to make it you might come to a different view.

There is also an obvious problem which is the difficulty of assessing the merits of a case where it raises a novel point of law and, obviously, borderline cases are out now anyway but if you have a 55% case because it has not been run before, realistically are you going to risk? I do not know, I think probably in a lot of situations you are not going to take that risk. It is particularly difficult in situations where you are talking about human rights claims where you have to exhaust domestic remedies because there will be situations where you have to run to lose it so that you can take it further up. People will not want to do that now because all of that work will then, by definition, be unpaid. They will know that they will not get permission; they will know it from the outset.

I have alluded already to the particular types of clients who I think will lose out. Any client that just requires more time, probably most of your clients but any client from this kind of dream client that the LAA and Government seem to have in mind will require you to do more work at the permission stage, at the application stage, and, again, more work will therefore be at risk.

There is obviously again in judicial review always the risk that the application will become irrelevant or it will be rendered academic. Sometimes that is as a result of what your client does; they go completely AWOL. Sometimes it is a third party so it is routine, for example, that you will have an immigration detention, judicial review and then a decision of the Home Office will make it academic. It does not mean that it was not meritorious at the beginning, it does not mean, necessarily, that you should not be paid but, obviously, you will probably not get to the permission stage or you might get to the permission stage and the judge might say I have taken the view that this is academic and so permission is refused. In those circumstances, obviously, no payment whatsoever.

There is also the issue that procedural bars, separate entirely from the substantive merits of the decision, will get in the way. So delay is an obvious one which makes it very, very difficult to predict how the judicial review permission decision is going to go. You might have a situation where you think you have brought your claim promptly but the court takes a different view or the defendant is able to produce evidence of prejudice that you just did not anticipate that they would and, again, you might have been absolutely right that it was a 90% prospects claim but you lose at the permission stage because of the delay argument. Obviously we have at the moment in the Criminal Justice in Courts Bill this new provision to say that where a decision is highly likely to have been the same, absent the conduct complained of, then the court must refuse relief. So again, it is another procedural bar which the defendant can raise at the permission stage which might knock you out on grounds that you could never have anticipated.

Then there is also the actions of the court which is that they can order a rolled-up hearing or they can order an oral hearing before they have made their permission decision and, again, it is just heaping work on providers which will all be at risk.

So they have not been enforced very long, these Regulations but I think a number of points are trickling through already and, as I say, I have partly drawn these from how the challenge is being put. The first is that it seems that a lot of firms have taken a view that actually what they will have to do is impose a higher merits test than is permitted in their contract and in the other Regulations that form the LASPO statutory scheme. I make no criticism of that but it is plainly contrary to the scheme and contrary to the contracts because the bottom line, and what Parliament intended, was that if you have a litigant who has a strong case, 51% strength, and is financially eligible they should be able to bring a claim for judicial review. So there is no lawful basis on which a solicitor can say, well actually we only take 70% merits cases because we cannot be exposed to the financial risk. So one of the arguments that we are making in the claim is that the effects of the Regulations will be to frustrate the intention of Parliament in that regard because firms will impose internal risk assessments, effectively, which will force up the merits criteria and certainly I know that two firms have done that. They now have a written policy which requires people to go through a checklist to work out whether in spite of the merits of the claim the financial risk of bringing it is too great and that includes issues like the vulnerability of the client. What follows from that, and this is at paragraph 25, is that some meritorious cases will be turned away. It is the same point really but, again, we have evidence of three claims now where the solicitor has said this is a meritorious case, three months ago I would have taken it but I am not taking it now because it is too financially risky. One thing that might happen which might be positive is that the judges might start thinking more carefully about the permission threshold. Another uncertainty of judicial review, of course, is that the permission threshold is so fluid and although it is meant to be arguability it really is not. Often you will get what feels like a very substantive decision because the judge has thought, well, yes, it is arguable but I absolutely know it is not going to win at substantive hearing so what is the point in granting permission? It may be that if we can get the message across to the judiciary that these Regulations are so damaging it may be that they start applying an arguability test and that, actually, more judicial reviews get permission than before which would be, in my view, immensely satisfying, although I always now worry that Grayling would fight back with something even nastier so it may not be a good thing.

There are obvious problems with the Legal Aid Agency discretion. I have already said that there are real concerns about how the Legal Aid Agency makes decisions anyway and their restrictive approach to funding but there are particular concerns about the criteria. For example, one of them is that they will look at the information that the provider knew or ought to have known and that just seems to me that the devil is in the detail with that criteria. There is also an issue about whether or not you have been refused a costs order by a court. It seems to me that if a court has said we are not going to let you have your costs it is very, very unlikely that the LAA will depart from that and grant them anyway. There have not, I do not think, been any decisions although I have not checked for a few weeks. Obviously the way that the discretion has been operated will become clearer over time. I think that one point that is really important is, and it is a bit of a plea really, but it is just to keep records of your decision-making processes and also your interaction with the LAA. One of the key issues in the exceptional funding challenge was that at PLP we kept a very clear paper trail of all our dealings with the LAA and they are so unbelievably unreasonable in writing that the court was genuinely quite shocked, I think, by some of the things that they said and the quality of their decision-making. So if there is to be any chance of getting rid of these Regulations I think gathering the evidence from the outset is really important.

The other point that I have put there is that I think there will be a change in relationship between solicitors and counsel. I think this is particularly something that will affect the junior bar. I certainly feel that it is one thing doing a judicial review that is stressful enough in itself, but when the person instructing you might go bankrupt if you get your merits assessment wrong that is a whole other level of pressure and I think the likelihood is that solicitors will instruct much more experienced counsel. They probably will not want to instruct new and junior people for very obvious reasons. There will also be new sensitivities; there will be times when counsel thinks that the merits are good and the solicitors do not think that the merits quite get there and you can just imagine the kinds of wrangling now about when you should be renewing to an oral hearing and all those sorts of issues. When you should be renewing to the Court of Appeal, those will have a whole new angle on them because of these Regulations and they will not actually be much to do with the case itself.

So I have tried then just on a practical note to set out some strategies to minimise the risk and I do not pretend for a second that it takes the risk away or mitigates the damage that these Regulations will do. An obvious one is using investigative help as much as you can although, again, I think it is really important to be careful that you meet the criteria for investigative help because the LAA know this is coming, we have already heard from them that they are thinking of revising the criteria for investigative help. It would be the natural next step if they want to really try and choke judicial review for them to do that so I think it is important not to put everything on an investigative help application because I do not think it will get you anywhere.

It is important to keep careful records and explain all the way along why it is that your merits assessment is what it is, why it is that you are still on investigative help, why it is that you have decided to issue. Even if you do not write it down I think it has to be clear in your mind if only because when you come to try and ask the LAA to exercise their discretion that will be key information. I know that a couple of firms have created a template aide memoire form for all of their practitioners setting out all the different factors that they think will be relevant to the exercise of the LAAs. What they are asking their employees to do is as they go along with any judicial review is to just tick the boxes and put comments so that you then have the material if and when you do not get permission. So, for example, if your case settles you have got the material to hand to make your application very swiftly.

The other point is potentially considering amending the way that you do pre-action correspondence to identify exactly what the information is that you want, why it is that you want it and saying explicitly that you will not be in a position to adequately assess the merits of the claim or something to that effect unless you have that information. The purpose of doing that is twofold. One, it shows the LAA that you have absolutely tried to get it and, two, it shows that the duty of candour is pretty hollow and so again it might end up being something that you can use as leverage when you are negotiating for your costs.

I think another point, again it is very obvious, is to have in place very clear decision making processes internally so that junior fee owners, and I say this as a junior barrister who is very nervous about screwing these things up and losing people a lot of money, are not in a position where they are making decisions about running judicial reviews that then have huge financial implications for firms. I think to that end, even though the dynamic between counsel and solicitors may change, I do think involving counsel at an early stage is probably quite valuable, partly because they can get paid if they are still on investigative help so you can ask them to do an advice which can very easily be transformed into grounds; they do not have to spend too many hours on it. But also because it will just be more than one brain on the problem, more likely that you will explore every avenue and then more likely that you will be able to satisfy the LAA that you have done so.

Lastly I would just reiterate my plea for you to keep your evidence of all the bad things that may or may not happen.

So the challenge was issued a few weeks ago, we have the acknowledgement of service today and have not read it yet. It is brought on behalf of a group of solicitors and Shelter and, as I have alluded to, the central argument really is that the Regulations are ultra vires, that the Lord Chancellor does not have the power to remove payment for a part of judicial review given that judicial review is supposed to be in scope for legal aid and that he certainly does not have the power to create, in effect, a higher threshold for bringing good cases. So watch this space for a permission decision.

**Chair:** Thanks to both our speakers tonight. I would like to invite questions now.

**Jan Luba QC, Garden Court Chambers:** Let us start with a terrific paper from Martha, which took me back to a time long ago where I was the lawyer at CPAG and we ran a test case strategy and every time we won something they changed the rules so that they got what they wanted in the end. This is a particularly bad time, I think, for us to win legal aid cases. The Courts Bill is going through Parliament at the moment and every time you lose something, and I am sorry to put the dampener on a terrific win this week, but they can tweak primary legislation relatively quickly. There is a Bill under way at the moment the long title of which will allow them to do anything, which is frustrating. It is important that you have won the point, it is important that we win all these points but the reality is this is the policy agenda and if they do not get it this way they will get it some other way. I just wanted to see whether you agreed with that proposition, because I do not want people to go home from here thinking we have won that, now we are all safe. I think the position is to the contrary.

I also want to pick up one point as a potential for future development here. We have been remarkably quiet as practitioners about letting the Legal Aid Agency, to give it its current name, to take away rights of appeal. All the different rights of appeal that we used to have under the legal aid system are being stripped away by one by one by one. Perhaps the biggest change that we let go almost without a whisper was taking away the right of appeal for refusal on grounds of not meeting the financial eligibility test, which they took away. We now have this new one where, again, if they do not give you legal aid for running the permission costs there is no right of appeal. They very generously say we will consider representations and we will review internally, otherwise known as we get somebody higher up to say no as well. When we say you cannot get away with this they say, well don’t worry, if you do not like our decision you can judicially review it! Which of course begs the question, how on earth do you get legal aid to judicially review a decision about eligibility when you will not be eligible on their basis to satisfy the qualifying conditions to get legal aid to bring the judicial review? It is all nonsense and even if you could, nobody will run it because of the permission risk. So might it be worth revisiting the question of whether the right of internal review meets the requirements of Article 6 in these cases and whether we could say the traditional view, internal review plus judicial review which is Article 6 compliant, falls apart when you cannot access the judicial review bit? Just a thought for the areas we might gather together.

Lastly, how do we do it? Let us say in one of the cases, people in this room have a housing contract but do not hold a public law contract. In the course of their housing work the Legal Aid Agency makes an adverse decision to be challenged by way of judicial review, but if they do not hold a public law contract they have to send the client to some other firm or other provider to do the work. Is there some way around that?

**Martha Spurrier:** I agree it is a nonsense. I think that the infinite loop of judicial review that you get into is a real problem; it was something that we ran in the residence test. We said that you cannot say they will get exceptional funding. Nobody gets exceptional funding and then you have to judicially review them to get it but they cannot judicially review without having exceptional funding so they will have to get exceptional funding for their judicial review of the exceptional funding decision. I think the same does apply in relation to these Regulations. I do think that it would be interesting to explore whether it is Article 6 compliant. It is not an argument that I have seen run in any of these cases so yes, for what it is worth, I think that does sound interesting.

I agree also that people should not be optimistic. I think it certainly is this Government’s policy to pass these measures no matter what. There really have not been very many wins and when you think about the number of consultations, the number of responses, all of them really have opposed everything and we have had so few concessions. Grayling’s resolve seems to harden and harden. It was amazing to me that it was Dominic Grieve who lost his job yesterday; that seemed to me a pretty clear signal that, actually, Grayling is here to stay and the Government endorses what he is doing and certainly my conversations with the Labour Party have not been any more illuminating. They have said if you can find us something to revoke that will not cost us any money then get in touch. They talked before about being interested in revoking the residence test until the European elections when they suddenly got very wise to the fact that that would probably lose them a lot of votes. So I think it is a pretty bleak picture in that regard.

I agree that your other point regarding contracts is a problem that we are seeing already, with people who do not have public law contracts having to farm out their judicial reviews to other firms. I think that a way forward may be for organisations like this and all the practitioner organisations to come together and identify the strategic points that are coming up, then maybe agreeing a way of bringing a judicial review which does not just involve parcelling everybody off to another firm but has a more kind of collaborative approach. But short of that, under the contracts as they stand at the moment, I do not think there is a solution to that.

**Chair:** Thank you again to both the speakers. I have a brief Legal Aid Working Group update. Well timed when talking about CFAs tonight, as you many of you know we are having an ongoing battle with the Legal Aid Agency saying that cases are suitable for a CFA when they are clearly not and making decisions that homelessness judicial reviews should be refused because they can be done under a CFA. The LAA listened to us, thank you to everybody who completed the survey because there were over 80 responses and over half of them were from housing practitioners. They did listen; they now understand what a CFA is, which is a good starting point, and have accepted that they will not be suitable for most non-damages based cases. I am meeting with them in a couple of weeks and hopefully we can agree a way forward so that making applications will be slightly easier.

We have now been guaranteed that the CCMS system is free from dangers in terms of mixing up client details so the Law Society is not worried about that any more. However, Resolution has just done a survey of their members who have been using the system for a while and it is still extremely shockingly bad, despite the LAA says that statistics are taken out of context and that, actually, everyone is really happy with the system.

The Consumer Contract Regulations were mentioned by David in his talk, so just to remind you, they do apply to legal aid cases as well so if you see clients out of the office you need to be worried about that. The Law Society has said that, with LAPG support and HLPA support, they should not apply to legal aid cases and the LAA said they would back us on that so, hopefully, we can see if some exemptions can be made but at the moment you need to be aware that they do stand.

The National Audit Office has criticised the LAA on court assessed costs where there is an assessment of a bill because it is worth over £2,500. For that reason, they have been reviewing 11 cases a month and will continue to do that. That will mean that if your case is looked at you could be asked to pay back some money that has been paid to you. They have said that they will not back down from that because the NAO has made it very clear that they will be looking at both discretionary and non-discretionary items, so the amount of time spent on something for example.

On a slightly positive note we have been meeting with Labour and if there is any hope that they will get in at the next election they do seem willing to give some commitments, hopefully, to legal aid. They are willing to listen to what we are saying so we will continue with those meetings and put pressure on.

Thanks to everyone for coming, the next meeting will take place on 17 September on the topic of *Housing Money Claims: Deposits and Disrepair*.