



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 72

Subsidising Litigation

May 2001
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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30 April 2001

Dear Ministers

I am pleased to submit to you Report 72 of the Law Commission,
Subsidising Litigation.

Yours sincerely

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Deputy President

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Minister of Justice
Parliament Buildings
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Preface

This report was requested by the Ministry of Justice to assist it in the context of the work it is currently doing by way of review of the Law Practitioners Act 1982. The Commissioner having the carriage of the project was DF Dugdale. The researcher assisting him in bringing the project to a conclusion was Michael Josling. This report was preceded by a discussion paper (*Subsidising Litigation: NZLC PP43*) published in December 2000.

1

The historical backdrop

1 **I**N LATE MEDIEVAL ENGLAND unruly nobles whom judges were reluctant to defy frequently employed as a method of oppressing the vulnerable the systematic promotion of lawsuits, “suits fomented and sustained by unscrupulous men of power” as Lord Mustill has described them.¹ Even after the stronger central government of the Tudors had brought the barons to heel, the procuring of litigation against an enemy continued to be a popular and effective method of inflicting harm. It was to counter these evils that there were developed maintenance and its subset champerty as both crimes and as torts (that is as grounds for a civil claim).² The eventual development of a sophisticated legal system meant an end to some of the abuses that had led the courts to create these remedies.³ The requirement that the subsidisation should be unjustified provided a flexibility that over the centuries allowed the ambit of maintenance and champerty to be progressively restricted. While the principal modern significance of maintenance and champerty has been in the context of contingency fees and of the rule prohibiting the assignment of a bare cause of action, that is of a right to sue⁴ (in contemporary New Zealand terms a defamation claim for example or a claim for exemplary damages by a victim of a sexual assault), this as we shall see is not the full extent of their twenty-first century utility.

¹ *Giles v Thompson* [1994] AC 142, 153.

² PH Winfield “The History of Maintenance and Champerty” (1919) 35 LQR 50; and see note (1919) 35 LQR 233.

³ *Giles v Thompson* [1993] 3 All ER 321, 346 per Sir Thomas Bingham MR.

⁴ *Giles v Thompson* [1994] AC 142, 153.

2

Existing New Zealand law

MAINTENANCE

- 2 **T**HERE ARE IN NEW ZEALAND no statutory provisions corresponding to the common law offences of maintenance and champerty. Since the criminal law was consolidated by statute in 1893 the sole source of New Zealand criminal law has been statutory.⁵ So in New Zealand maintenance and champerty are not crimes. The consequences under New Zealand civil law of A paying or contributing to the cost incurred by B in instituting or continuing to prosecute civil legal proceedings against C or resisting civil legal proceedings brought against B by C are these: if such subsidisation by A is unjustified (a term which is elaborated upon in paragraph 6) the fact of the subsidisation is not a reason for stopping the litigation between B and C being battled out to its conclusion.⁶ But C will be entitled to claim damages against A under the tort named (a little confusingly, because of course the term has other meanings) “maintenance”. In the balance of this report we will refer to A, the provider of the assistance, as the “maintainer”, to B, the recipient of the assistance, as the “maintained”, and to C, as the “maintained’s opponent”.

CHAMPERTY

- 3 If the arrangement between the maintainer and the maintained is that as a *quid pro quo* for the maintainer’s support, the maintainer is to share in the fruits of the litigation, the technical name for this particular variety of maintenance, “a particularly obnoxious form of

⁵ The relevant provision in the current statute, the Crimes Act 1961 s 9, provides that “No one shall be convicted of any offence at common law or of any offence against any Act of the Parliament of England or the Parliament of Great Britain or the Parliament of the United Kingdom . . .”.

⁶ *Roux v Australian Broadcasting Commission* [1992] 2 VR 577, 608; *Abraham v Thompson* [1997] 4 All ER 362.

it” according to Lord Denning⁷ is “champerty”. We will need to give particular consideration to the form of champerty that can be committed where the maintainer is a lawyer or para-lawyer who performs legal work for the maintained on the basis that the maintainer’s remuneration entitlement is dependent on the outcome of the litigation. In this report we will refer to all such arrangements as ones for “contingent fees”, but it will need to be remembered that this is not a precise legal term, that the nomenclature is not settled,⁸ and that as our discussion proceeds we will need to distinguish among various classes of contingency arrangements.

THE CONTRACT BETWEEN MAINTAINER AND MAINTAINED

- 4 There is a consequence of the champertous nature of an agreement between maintainer and maintained additional to the maintainer being subject to a liability in tort. The agreement itself being in breach of public policy will by virtue of the provisions of the Illegal Contracts Act 1970 be of no effect unless a court grants relief under that statute.⁹ And as will be discussed more particularly in Chapters 6 and 7 an assignment of a bare right to litigate is generally of no effect. Were this not so there would be an obvious loophole in the protection afforded by the prohibition of champerty.

WHEN SUBSIDISATION IS JUSTIFIED

- 5 It is only *unjustified* subsidisation that constitutes maintenance and champerty.

Maintenance is directed against wanton and officious inter-meddling with the disputes of others in which the [maintainer] has no interest

⁷ *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629, 654.

⁸ See the observations of Schiemann LJ in *Awwad v Geraghty & Co* [2000] 1 All ER 608, 610:

There are three categories of reward for success: (1) where the lawyer will recover some of the client’s winnings; (2) where the lawyer will recover his normal fees plus a success uplift; (3) where the lawyer will only recover his normal fees. They used all to be described as contingent fees but, in what Judge Cook in his book on *Costs* (3rd edn, 1998) refers to as a triumph of semantics, situations (2) and (3) have in recent years been given the name of conditional fees whereas situation (1) is still described as a contingent fee. I shall keep that nomenclature for situation (1). The present case is concerned with situation (3), which I shall call a conditional normal fee case to distinguish it from situation (2), which I shall call the conditional uplift case.

⁹ Sections 6 and 7.

whatever and where the assistance he renders to one or the other party is without justification or excuse.¹⁰

The definition by the courts of the circumstances in which public policy requires subsidisation to be classified as unjustifiable has altered to reflect changing social realities:

My Lords, it is clear, when one looks at the cases of maintenance in this century and indeed towards the end of the last that the courts have adopted an infinitely more liberal attitude towards the supporting of litigation by a third party than had previously been the case.¹¹

Justification may be found in a genuine commercial interest:

Thus persons engaged in a particular trade or profession or linked by some proprietary or other legitimate common bond may lawfully associate themselves with a view to protecting, if necessary by litigation, the interests of each in the common field at the expense of all. For example, it is perfectly proper for manufacturers to combine in defending an infringement action by a patentee against one of their number, for a mutual protection society of fishery owners to support proceedings by some of its members against a factory accused of polluting a river, or for an employer to maintain an employee who had been libelled in relation to his duties. Likewise, insurance and indemnity contracts may provide a sufficient business interest. Thus, there is no objection to a manufacturer securing business from customers of a rival on terms that he would indemnify them in respect of liability arising from a transfer of their custom, or to a workers' compensation insurer [instigating] proceedings by an injured worker against a third party.¹²

Or the justification may be a charitable motive. The facts that the rule is founded on public policy and that public policy can change with the passage of time and may not be identical in every jurisdiction are neatly illustrated by the cases in which a lawyer undertakes work on the basis that the lawyer will charge a fee (but only a normal fee) if the claim succeeds and not otherwise. Such an arrangement (called acting on a speculative basis) has long been permitted in Scotland.¹³ In 1935, in the New Zealand case of *Siewewright v Ward & Others*, Ostler J regarded such an arrangement

¹⁰ *British Cash & Parcel Conveyors v Lamson Store Service Co Ltd* [1908] 1 KB 1006, 1014 per Fletcher Moulton LJ.

¹¹ *Trendtex Trading Corp v Credit Suisse* [1982] AC 679, 702 per Lord Roskill.

¹² JG Fleming *The Law of Torts* (9th ed, LBC Information Services, North Ryde, New South Wales, Australia, 1998) 692.

¹³ *X Insurance Co v A and B* (1936) SC 239.

as “consistent with the highest professional honour”.¹⁴ A similar conclusion was reached 25 years later in Australia.¹⁵ But recently in England (at a time when the law permitted certain classes of contingency fee arrangements into which the transaction under consideration did not fall) the Court of Appeal classified such an agreement as champertous.¹⁶

¹⁴ [1935] NZLR 43, 48.

¹⁵ *Clyne v New South Wales Bar Association* (1960) 104 C LR 186.

¹⁶ *Awwad v Geraghty & Co* [2000] 1 All ER 608 not following *Thai Trading Co (a firm) v Taylor* [1998] QB 781.

3

Change in other jurisdictions

ENGLISH LEGISLATION

6 **I**N 1966 THE LAW COMMISSION for England and Wales reported that maintenance and champerty as crimes were a dead letter.¹⁷ As to their efficacy as torts, the decision of the House of Lords in *Neville v London Express Newspaper Ltd*¹⁸ was that while an *unsuccessful* defendant had a right of action against one who had maintained the plaintiff's action it was necessary to prove special damage and that special damage did not include costs:

It cannot be regarded as damage sufficient to maintain an action that the plaintiff [sc in a claim against a maintainer] has had to discharge his legal obligations or that he has incurred expense in endeavouring to evade them.¹⁹

As to a *successful* defendant the Commission noted that:

In the case of *Wm. Hill (Park Lane) v Sunday Pictorial* ("Times" newspaper April 15th 1961) it was decided that where the maintained action had failed, a claim for damages for maintenance also failed, unless it could be shown that the maintained action would not have been brought or continued without the assistance of the maintainer.²⁰

The Commission concluded that:

Obviously the factor of damage is almost *impossible* of proof. In the light of the cases on lawful justification and proof of damage, our conclusion is that the action for damages for maintenance is today no more than an empty shell.²¹

¹⁷ The Law Commission (England and Wales) *Proposals for Reform of the Law Relating to Maintenance and Champerty* Law Com No.7 (HMSO, London, 1966) para 7.

¹⁸ [1919] AC 368.

¹⁹ Per Lord Finlay LC, 380; see the note by Winfield, above n 2, (1919) 35 LQR 233.

²⁰ The Law Commission (England and Wales), above n 17, para 11.

²¹ The Law Commission (England and Wales), above n 17, para 11.

The Commission's recommendation that maintenance and champerty be abolished as crimes and torts was adopted by the Criminal Law Act 1967²² but, as also recommended by the Commission, that statute carefully preserved the rule that maintenance could render unenforceable a contract between maintainer and maintained:

The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.²³

So in a jurisdiction that lacks any equivalent to New Zealand's Illegal Contracts Act 1970 section 7, a maintainer remains debarred from enforcing a champertous agreement.

- 7 Twenty or so years later, in a reversal of policy made with the acknowledged intention of providing greater access to justice while avoiding the cost to the public purse of widening eligibility for legal aid,²⁴ the United Kingdom legislature enacted the Courts and Legal Services Act 1990 section 58. This provision was by the Access to Justice Act 1999 section 27(1) replaced by new sections 58 and 58A. These sections came into force on 1 April 2000 and are set out in Appendix A. The sections permit written conditional fee agreements (that is, agreements under which the provider of the legal services will be paid the provider's fees and expenses, including an increment based on success, only in specified circumstances) in any proceedings whether in court or not,²⁵ subject to compliance with certain requirements contained in the sections, or in subordinate legislation the promulgation of which is to be preceded by specified consultation. These sections do not apply to family and criminal proceedings. There is a requirement of disclosure as a percentage of a normal fee of the amount by which a normal fee is in terms of the agreement to be increased by reason of the fact that the payment obligation is conditional, and fixing the upper limit of such a percentage (currently 100 per cent)²⁶ as one to be specified

²² Sections 13(1) and 14(1).

²³ Section 14(2).

²⁴ *Contingency Fees* (1989) Cm 571, paras 1.5 and 3.12.

²⁵ So giving statutory support to the effect of the decision in *Bevan Ashford (a firm) v Geoff Yeandle Contractors Ltd (in liq)* [1999] Ch 239, which while holding that the section in its original form did not apply to arbitration, nevertheless held that an agreement relating to arbitration, which if it had related to an action in court would have been permitted by the section, would not be classified as champertous because public policy did not so require.

²⁶ The Conditional Fee Agreements Order 2000 (SI 2000 No 823).

by subordinate legislation. Remuneration on the basis of a percentage of the recovered amount is not permitted:

There was a clear consensus that it would not be right in principle, and would be likely to have a number of undesirable side effects, for a lawyer to be permitted to undertake a case in return for some percentage of whatever damages might be received.²⁷

The current Conditional Fee Agreements Regulations²⁸ are reproduced in Appendix B.

AUSTRALIAN LEGISLATION

- 8 In Victoria, maintenance and champerty were abolished as torts by the Abolition of Obsolete Offences Act 1969, but abolition was accompanied by a provision copied from the United Kingdom Criminal Law Act 1967 section 14(2).²⁹ The Legal Practice Act 1996 permits on certain terms agreements with legal practitioners called conditional costs agreements, permitting liability for some or all costs to be contingent on success. A success uplift not exceeding 25 per cent of the costs otherwise payable is permitted. Fees calculated as a percentage of the recovered amount are not permitted. Conditional costs agreements are not permitted in Family Law Act cases. The relevant sections of the statute are set out in Appendix C. References in section 103 to “the Tribunal” are to the Legal Professional Tribunal, a body made up of a “chairperson” who must be a judge or former judge, plus lawyer and lay members and having various disciplinary and other functions.
- 9 The legislative history in New South Wales is similar. The torts were abolished by the Maintenance, Champerty and Barratry Abolition Act 1993. Section 6 of that statute is copied from the United Kingdom Criminal Law Act 1967 section 14(2). There is a similar provision for conditional costs agreements as in Victoria, but there is provision for regulations providing for variation of the maximum success uplift percentage: “Different percentages may be prescribed for different circumstances”.³⁰ There have to date been no such regulations.
- 10 In South Australia the torts were abolished in 1993. There is a similar reservation relating to illegal contracts and a further

²⁷ *Legal Services: A Framework for the Future* (1989) Cm 740, para 14.2.

²⁸ The Conditional Fee Agreements Regulations 2000 (SI 2000 No 692).

²⁹ See the account in *Roux v Australian Broadcasting Commission* [1992] 2 VR 577, 605. Section 14(2) is set out in para 4.

³⁰ Legal Profession Act 1987 (Vic) s 187(4).

reservation of “any rule of law relating to misconduct on the part of a legal practitioner who is party to or concerned in a champertous contract or arrangement”.³¹ It is not clear whether the tort is to that extent preserved. The Legal Practitioners Act section 42(6)(c) permits contingency fees subject to any limitations imposed by The Law Society of South Australia and to the power of the Supreme Court to rescind or vary a contingency fee agreement “if it considers that any term of the agreement is not fair and reasonable” (section 42(7)). A copy of Rule 8.10 and Attachment 1 to the Law Society of South Australia Professional Conduct Rules is annexed as Appendix D.

³¹ Criminal Law Consolidation Act 1935 (SA) Schedule 11, para 3(2)(c).

4

Should New Zealand abolish the torts of maintenance and champerty?

11 **A**LTHOUGH NEARLY ALL SUBMITTERS who dealt with the issue (but not the New Zealand Law Society) urged the abolition of the torts of maintenance and champerty, and although the intuitive response to such a proposal is to favour it, more careful consideration leads in our view to a different conclusion:

- New Zealand lacks the unruly barons of late medieval England to whose misbehaviour the rule of public policy on which the torts of maintenance and champerty are founded was a reaction. But New Zealand commerce does not lack unruly corporations prepared to employ ruthlessly aggressive litigious processes against business rivals, hiding behind nominal litigants if need be. This can occur where the maintainer lacks the necessary standing to litigate in the maintainer's own name³² or where as was established in one Queensland case the maintainer's motive is to dispose of a claim made against the maintainer by the maintained's opponent by assisting the maintained to procure the winding up of the opponent.³³ Although there will be situations where redress will be available to the opponent by way of a costs order against the non-party maintainer, in some fact situations the opponent may be caused loss other than costs³⁴ and the

³² For example someone who is a competitor without more does not have the standing to seek judicial review (*Quarantine Waste (New Zealand) Ltd v Waste Resources Ltd* [1994] NZRMA 526 (HC)): "Quarantine poses as a champion of the environment. Though Quarantine does not admit to it, it is in reality merely a business which seeks to minimise economic detriment from competition" (529).

³³ *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd* [1984] 2 Qd R 413.

³⁴ In the case referred to in n 33 damages recovered included the cost of refinancing when the existence of the litigation led a nervous banker to withdraw accommodation.

opponent may face procedural difficulties in proving the role of the maintainer unaided by the processes of discovery.³⁵

- We do not accept the view of the English Law Commission referred to in paragraph 6 that “the factor of damage is almost *impossible* of proof”. One would have thought that a successful defendant in a maintained action could recover as special damage from the maintainer, apart from other possible heads of damage,³⁶ costs awarded against the plaintiff that proved irrecoverable from the plaintiff, and the difference between party-and-party and solicitor-client costs.
- No great simplification of the law is achieved by following the English, Victoria, New South Wales and South Australian examples already discussed of abolishing the torts while preserving the underlying public policy issues in their application to contract legality.³⁷ Although as we noted in our preliminary paper there is no reported New Zealand case of a successful claim in tort founded on maintenance or champerty this does not establish that the tort fails by its very existence to function as a deterrent.
- A logical corollary of the conclusion that there can still be situations for which the torts of maintenance and champerty provide redress is that if those torts did not exist it would be necessary to invent them. One could imagine that where facts, similar to the Queensland case above, arise in a jurisdiction where the tort of maintenance had been abolished, the recourse of the opponent would be to the protean and amorphous tort of abuse of process. It would be more efficient to preserve the more precisely developed torts of maintenance and champerty than to abandon those torts in favour of providing a remedy by developing the tort of abuse of process.

We favour the preservation of the torts of maintenance and champerty.

³⁵ Though there are unreported New Zealand cases in which disclosure has been ordered. The best discussion of these and of costs against non-parties generally is in *Brookers District Courts Procedure* (Brooker’s Ltd, Wellington, 1995–) para DR 45.08. On ordering disclosure see also *Singh v Observer Ltd* [1989] 2 All ER 751 discussed in *Abraham v Thompson* [1997] 4 All ER 362, 368.

³⁶ See above n 34

³⁷ All the reported cases noted in the above footnotes 1, 6, 7 and 16 (and other reported cases that we have not cited) post-date the abolition of the tort in the jurisdiction in question. In England the Court of Appeal decisions in *Awwad v Geraghty & Co* [2000] 1 All ER 608 and *Thai Trading Co (a firm) v Taylor* [1998] QB 781 decided within two years of each other are inconsistent.

5

Should contingent fee arrangements be permitted?

THE EXISTING LAW

12 **T**HE EXISTING NEW ZEALAND LAW is that an agreement between a provider of legal services and an impecunious claimant under which the provider is to receive a fee only if the claim succeeds is not champertous if the fee is a normal one. If, however, the fee payable on success is higher than normal (whether or not calculated on the basis of a percentage of the amount recovered)³⁸ then the agreement is champertous so that without relief under the Illegal Contracts Act 1970 section 7 it is of no effect and the maintainer may be subjected to a claim in tort by the maintained party's opponent.³⁹ It is necessary to address the issue posed in the heading to this chapter because we have advised against abandoning the torts of maintenance and champerty, but it would also be necessary to address it if (contrary to our recommendation) the law was changed in the same way as it has been in England and the three Australian states referred to, that is by abolishing the torts but preserving the rule of public policy as it affects contract legality. In this chapter we use the term "augmented fee arrangements" to cover any situation in which the fee payable on success is higher than normal. The term does not therefore include such a no-win-no-fee arrangement as is discussed in the opening sentence of this paragraph.

³⁸ That is if in either of categories (1) and (2) in Schiemann LJ's classification set out in n 8.

³⁹ *Siewwright v Ward & Ors* [1935] NZLR 43 (normal fee) and *Mills v Rogers* (1899) 18 NZLR 291 (augmented fee). It is important to keep in mind that in New Zealand the results achieved are a proper factor in calculating the quantum of a normal fee (see the New Zealand Law Society, Property Law and General Practice Committee *Conveyancing Practice Guidelines* (Wellington, 1998) which apply to litigation as well as to conveyancing).

- 13 To define the issue as being whether augmented fee arrangements should be permitted no doubt gives a misleading all-or-nothing impression. In fact, between the extremes of complete prohibition and complete absence of prohibitions lie an infinite number of intermediate possibilities permitting contingent fees in respect of particular classes of litigation on particular terms. So we propose first to discuss the questions of basic principle and then to move on to a consideration of what should be the more detailed rules if fundamental objections to augmented fees be overcome.

CONSULTATION PROCESSES

- 14 By way of preface to our discussion we wish to say a word about the consultation processes we employed. We were anxious that the submission process should not be dominated by the interested professionals, the lawyers. In the hope of obtaining a consumer viewpoint we extended a specific request to make submissions on our discussion paper to both the Consumers' Institute and the Ministry of Consumer Affairs. Neither has made submissions. We have, however, been assisted by submissions from individual members of the public, from community law centres anxious to champion underdogs, from groups concerned with promoting particular classes of litigation, and by a typically level-headed and thoughtful submission from the National Council of Women of New Zealand. Submissions from law societies and from the Ministry of Justice addressed issues relating to the protection of the public.

NON-CONTENTIOUS FACTORS

- 15 In our preliminary paper⁴⁰ we listed some points that it seemed needed to be taken into account in any consideration of the pros and cons of augmented fees but that it seemed to us were non-controversial. None of these propositions was in fact challenged in any of the submissions made to us. The points we so listed are as follows:
- In comparing New Zealand with other jurisdictions certain differences need to be kept clearly in mind. In the United States of America the great bulk of litigation pursued on a contingency basis is for damages for personal injury, a class of litigation excluded in New Zealand of course by the Accident Compensation legislation. Such claims still exist in the United Kingdom and Australia also.

⁴⁰ Law Commission *Subsidising Litigation: NZLC PP43* (Wellington, 1999) para 14.

- A further difference between New Zealand and the United States of America is the absence in that republic of the almost automatic practice of awarding costs against unsuccessful claimants usual in Commonwealth countries. So the plaintiff, litigating on the basis of being liable to the plaintiff's lawyer only if the claim succeeds, risks nothing. There is moreover no New Zealand counterpart to the extensive American use of juries for civil claims and such phenomena as anti-trust law provisions for trebling damages, the wide availability of punitive damages and of class actions, and the statutory provision for attorneys' fees in certain classes of litigation.
- Eligibility for legal aid is currently set so low (so low as to exclude even some social welfare beneficiaries) that those who are neither rich nor very poor are in practice denied access to legal services. But it may be doubted whether augmented fees could ever replace legal aid totally or even substantially. About 85 per cent of civil legal aid expenditure is for Family Court work.⁴¹ Under an augmented fee arrangement, a lawyer provides services and possibly pays various out-of-pocket amounts on the basis of the chance that the claim will yield sufficient fruit to enable recouping of those costs. Lawyers like everyone else prefer to bet on what they believe to be certainties or near certainties. So while an augmented fee regime helps those who are likely to recover something, for example those claiming capital assets on marriage breakdown or (in other jurisdictions) those who have suffered personal injuries (where the success rate is in practice high) such a regime is of no use at all to defendants or to those plaintiffs whose chances of recovery are nearer to 50:50, or to those plaintiffs who want to litigate matters that will not yield any cash return at all, such as custody cases, access cases, domestic violence cases and habeas corpus applications.
- Total reliance cannot be placed on professional disciplinary rules to curb abuses were an augmented regime to be introduced, partly because of problems that law societies have in policing, but also because it is not only lawyers who might provide assistance on a champertous basis. Probably (there are no available statistics) most personal grievance claims under the Employment legislation are conducted by non-lawyer agents to whom the legislation gives rights of audience and who are remunerated on a contingency basis.

⁴¹ If expenditure on Waitangi Tribunal claims is treated as part of total civil legal aid expenditure, the Family Court proportion reduces to 78 per cent.

- An unsuccessful plaintiff suing with the aid of an augmented fee arrangement is likely to incur a substantial costs liability to the successful defendant. In the United Kingdom it is possible to insure against such risk, but it is not clear that such cover would be available in New Zealand where the average rate of success compared with the United Kingdom underwriting experience would be substantially affected by the exclusion of personal injury claims.
- Even without augmented fee arrangements, recovery is likely in practice to be reflected in the level of charging.

THE ARGUMENTS

16 In our preliminary paper we went on to list⁴² what we understood to be the arguments for and against a change in the law to permit augmented fees. We made it clear that none of the propositions listed represented the final or even the tentative view of the Law Commission. In the event, none of the submitters advanced any argument additional to the ones we listed. So the process of reasoning turns on which of the propositions are accepted and the weight that should be given to each proposition. The matters we listed were:

- Augmented fee arrangements enable litigation that would not otherwise proceed. Opinions differ as to whether this is good or bad. On one view such increase in litigation provides access to justice to those to whom it might otherwise be denied. The liability of a plaintiff to pay costs to a successful defendant will remain and be a sufficient deterrent to baseless claims. The opposing belief is that it is naive to regard encouraging legal claims as necessarily in the public interest. The cost in terms of money and executive time of a legal claim to a defendant is such that a defendant despite the availability of a good defence often finds that it makes economic sense to buy off the claimant to be rid of the matter. So to allow augmented fees is to facilitate something akin to extortion by the institution of low merit claims against deep pocket clients. In the words of a Scottish judge, it can be that “the raising of the action was done deliberately for the purpose of concussing the defendant into settling”.⁴³ Proponents of each opposing view would seek support from the experience of personal grievance claims against

⁴² Law Commission, above n 40, para 15.

⁴³ *X Insurance Co v A and B* 1935 SC 225, 251 per Lord Fleming.

employers and ex-employers (which is the only class of case in which, in apparent defiance of the law, augmented fee arrangements are common in New Zealand today).

- An advocate's responsibility is to provide a client with disinterested advice, "a clear eye and an unbiased judgment" as Buckley LJ put it.⁴⁴ If the advocate's remuneration depends on the outcome of a claim, the advocate is no longer disinterested. This reasoning as a matter of logic applies even where the contingent fee arrangement does not involve any more than normal fees, in other words where there is no arrangement for a fee higher than normal in the event of success.⁴⁵
- This problem it is said is particularly acute where the lawyer has to advise whether to settle a claim by accepting a proffered bird in the hand. The certainty of remuneration without further effort may well be permitted to override the possible benefit to the client of battling the matter out. There is a possibility of a clear conflict of interest if the lawyer (whose obligation is a fiduciary one) and the client disagree.
- The contrary view is that realism requires a rather more down-to-earth and less precious approach. Practising lawyers even in the absence of an augmented fee regime regularly confront and successfully surmount difficulties arising from conflicts between self-interest and the interest of the client, not least in the very context of advising on the acceptance or rejection of settlement proposals. Fashionable counsel may prefer to settle a potential cause célèbre rather than be publicly seen to lose it and must withstand any temptation to permit that preference to outweigh duty to the client. The judgment of any lawyer runs the risk of being influenced by the unlikelihood of further work from a substantial client if the lawyer advises rejection of a settlement offer and the matter is then fought and lost: "The solicitor who acts for a multinational company in a heavy commercial action knows that if he loses the case his client may take his business elsewhere".⁴⁶ (If the lawyer advises acceptance of the settlement and that advice is accepted no one ever knows what would have happened had the matter been fought.) Any lawyer in recommending settlement must take care not to be influenced by

⁴⁴ *Wallersteiner v Moir (no 2)* [1935] QB 373, 402.

⁴⁵ As to this see *Awwad v Geraghty & Co*, above n 8, 623 per Schiemann LJ.

⁴⁶ *Thai Trading Co (a firm) v Taylor* [1998] QB 775, 790 (CA) per Millett LJ.

the fact that settlement will free the lawyer to do something else. One result of large city firms pricing themselves out of the market for small knockabout cases in the District Court, is that many who call themselves litigation lawyers in fact have very little experience on their feet in court with a consequent shyness about getting involved in court appearances. This can lead to an over-readiness to settle which must in the client's interests be overcome.

- A conflict between duty and interest is common enough in other commercial contexts. Consider for example a commission agent entitled to a commission calculated as a percentage of the price urging a seller to accept a particular offer, \$x, rather than hold out for \$x+\$y. From the seller's point of view the additional \$y that the seller hopes to get may be important. From the agent's point of view on the other hand the percentage of \$y that the agent will get if the higher price is achieved may be not such a large amount as to make it sensible to risk losing the sale. This is an everyday situation in real estate transactions.
- There are situations in which an advocate's duty to the court and to the administration of justice overrides the advocate's duty to the advocate's client. The advocate must for example abide by certain ethical rules difficult in practice to police. The temptation to breach such rules is greater if the lawyer has a financial interest in the outcome:

The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses.⁴⁷

The lawyer's direct interest in the outcome might lead him to indulge in undesirable practices designed to enhance his client's chances, such as coaching witnesses, withholding inconvenient evidence or failing to cite legal authorities which damage his client's case.⁴⁸

But there are many callings in which persons can be led into misbehaviour (insider trading for example) by hope of gain. There is no reason to believe that lawyers have a greater propensity to stray from the straight and narrow path than those in other walks of life.

⁴⁷ *In re Trepca Mines Ltd (No 2)* [1963] Ch 199, 220 per Lord Denning.

⁴⁸ *Contingency Fees*, above n 24, para 3.

- Contingent fees shift certain financial risks from litigant to lawyer. The lawyer is likely to increase the lawyer's fees to balance the assumption of such risks:

The lawyer is able to spread those risks over a number of cases and is therefore in a better position to bear them.⁴⁹

On this premise, one economic consequence of a regime of contingency charging is that the lawyer's other clients are subsidising the contingency fee clients. The New Zealand legal profession abandoned the belief that cross-subsidisation was a legitimate method of charging when it accepted that a swings-and-roundabout approach was not a sufficient justification for the now long abandoned regime of scale charging for conveyancing. On the other hand such an argument carried to its logical extreme would mean the outlawing of all *pro bono* work, and in any event the proportion of work done on a contingency basis is likely to be so slight that the feared economic consequences are unlikely.

THE INDUSTRIAL RELATIONS EXPERIENCE

- 17 Before discussing our conclusions it is perhaps helpful to those considering this matter to set out in more detail than in our preliminary paper what seemed to have been the effects on personal grievance claims under Part III of the Employment Contracts Act 1991 of the fact that a substantial proportion of them were conducted on behalf of the employee by a representative (usually a non-lawyer) remunerated on a contingent fee basis.⁵⁰ (That Act has of course been replaced as from 2 October 2000 by the Employment Relations Act 2000. We are told that it is too soon to comment usefully on the effect of contingent fee arrangements on the working of the new statute. There is, however, a concern that the intention of section 125, making reinstatement where sought the primary remedy, may be defeated by reinstatement not being sought because it does not yield a fund from which the representative can extract his agreed entitlement.) The reason for giving such attention to

⁴⁹ *Contingency Fees*, above n 24, para 3.15.

⁵⁰ Because of the significance of contingency fee arrangements in the conduct of personal grievance claims we ensured that our preliminary paper was referred with a request for submissions to the New Zealand Trade Union Federation, the New Zealand Council of Trade Unions and to the New Zealand Employers' Federation Inc. The matter was referred to the Employment Law Institute which has as its members both lawyers and lay advocates. Of the above, only the Employers' Federation responded.

personal grievance claims is that it enables assertions as to the likely consequence of permitting contingent fees to be measured against what actually happens in the one area of New Zealand dispute resolution in which contingent fees play a significant part. What we are told is that where the only effective issue is as to quantum contingent fee arrangements tend to obstruct successful mediation because the fact that it will cost the employee no more to battle out the matter at a hearing than if the matter settles has the consequence that there is no real incentive for the employee to compromise on any basis allowing a discount for hearing costs avoided. We are also told that there is a tendency for lay representatives to withdraw from involvement if mediation fails, because to conduct a contested hearing for the remuneration agreed upon is uneconomic, the employee being thus compelled to change horses at a difficult stage of the proceedings. On the other hand the Employers' Federation, while noting some employer concern that cases lacking in substance are taken in the hope "that the employer will pay to have the claimant go away, that being the least expensive way to deal with the matter", concludes that:

There does not at present appear to be any particular difficulty with the way contingency fees are operating although, as noted earlier, they may represent some encouragement to those working on this basis to take on claims that are not well substantiated.

The view of the Chief Judge of the Employment Court is that "I do not see contingency fees as a major problem".

THE BROAD PRINCIPLE

- 18 We have approached the matter in this way. There needs to be clear justification for any restriction of the freedom of providers of legal services and those to whom those services are provided to contract upon whatever terms they can agree. Since at least the 1935 decision in *Sievwright*⁵¹ it has been lawful for a legal practitioner to accept a retainer to represent a client in litigation on terms that the practitioner is entitled to a normal fee, but only to the extent that the litigation yields a sufficient amount to cover it. An arrangement along the same lines save that the practitioner's entitlement on success is for an amount in excess of a normal fee is in our view justifiable only to the extent that such excess however calculated is a fair premium for the risk run by the practitioner of doing the work for nothing plus compensation for not receiving payment on

⁵¹ See above n 39.

account. Such a premium should not be a share of proceeds because such a method of calculation necessarily yields capricious results (because the amount of a fee calculated on that basis bears no necessary relation to the amount of work done by the practitioner). We favour, subject to the qualifications discussed below, a statutory provision declaring to be lawful a contract of retainer providing for the practitioner's remuneration entitlement to be contingent on success, such an entitlement to be a normal fee plus an uplift to reflect the risk of non-payment run by the practitioner and the disadvantage of not receiving payment until the job is ultimately calculated.⁵²

19 We understand and do not lightly dismiss the argument that such an arrangement by giving the practitioner a financial stake in the litigation demotes him from the position of disinterested adviser. But once you permit a practitioner to enter into a *Sievwright* sort of arrangement, or acknowledge that the result to the client is properly to be taken into account in assessing a normal fee,⁵³ you have already allowed the practitioner to have a stake in the proceedings. Indeed in any litigation the practitioner already has a stake of sorts in that success is likely to improve his standing and make it more likely that he will get future work from his own client or others attracted by his prowess.⁵⁴ The same answers apply to the suggestion that practitioners with a stake in the outcome may be tempted to bend the rules,⁵⁵ and the same answers apply to the suggestion that a practitioner with a stake in the outcome is put in an impossible position of conflict in relation to settlement proposals.⁵⁶

20 As to the argument that our proposal would result in a flood of meritless claims, the liability for costs of an unsuccessful plaintiff will in our view deter plaintiffs from reckless claims. And legal practitioners are unlikely to take on cases on a speculative basis unless there is a reasonable prospect of a successful outcome. There remains the problem of the defendant for whom it makes better economic sense to settle than fight even a meritless claim. But this is not a contingent fee problem. It exists whatever the basis of a plaintiff's lawyer's remuneration.

⁵² On the two factors that the uplift may reflect, compare the English Rules of the Supreme Court, Ord 62, r 15A(b)(i) and (ii).

⁵³ See n 39.

⁵⁴ See the observation of Millett LJ quoted at n 46.

⁵⁵ See the observations quoted at n 47 and n 48.

⁵⁶ Discussed under the third and subsequent bullet points quoted in para 16.

21 Finally we would note on the issue of basic principle that although we have preferred to arrive at our answer by our own process of reasoning, we have in fact arrived at essentially the same destination as every submitter who addressed the topic. The majority of submissions favoured the removal of restrictions on contingent fees simply in order to improve access to justice at a time when so few are eligible for legal aid. The Law Commission prefers not to put the reasons for its recommendation on that basis. The law change that we propose will in practice exclude:

- all defendants;
- plaintiffs whose claims are not so clear-cut as to entice lawyers to take the risk of handling them on a contingent fee basis;
- plaintiffs claiming redress that is not financial redress; and
- plaintiffs likely to fall at the hurdle of a successful application by the defendant for security for costs.⁵⁷ (Impecunious plaintiffs are likely to be required to furnish security unless able to establish a reasonable probability that the plaintiff's financial straits result from the very acts of the defendant on which the claim is founded.)⁵⁸

So the change will improve access to justice, but our guess is that it will do so only slightly.

SAFEGUARDS

22 This last consideration, the minimal nature of the likely increase in volume of litigation resulting from our proposals, seems to us highly relevant to the question of what is the most practical way of providing safeguards. In measuring the proposals that follow against the English and Australian provisions that we discuss in chapter 3, it is important to take into account the very great difference the absence of personal injury claims makes to the New Zealand scene. The Law Practitioners Act 1982 section 142 provides that while the provisions of a contract of retainer are relevant to determining whether legal costs are fair and reasonable, they do not determine that issue. In other words an unfair contract of retainer can be overridden. It seems better to rely on a provision of this sort than on

⁵⁷ High Court Rules, r 60.

⁵⁸ The exception referred to has its origin in an observation by Bowen LJ in *Farrer v Lacy Hartland & Co* (1885) 28 Ch D 482, 485 adopted in New Zealand in a line of cases commencing with *G Richardson Ltd v Tuakau Sands Ltd* [1974] 1 NZLR 365.

over-prescriptive rules governing the formation of the contract of retainer. It is our understanding that the proposed Law Practitioners and Conveyancers Bill will impose fairly elaborate disclosure provisions applicable to every contract of retainer so that in this report we can confine ourselves to matters peculiar to a retainer on contingent fee basis. It seems to us that the disclosure requirements particular to contingent fee arrangements should be:

- a precise definition of the “success” that would trigger the practitioner’s entitlement to payment; and
- an identification of the proportion of the total fee that constitutes the “success uplift”, the amount payable to the practitioner in recognition of the risk the practitioner has run in accepting the retainer on a contingent fee basis and of the delay in his receiving any payment.

Parliamentary counsel may find Regulations 2 and 3 of the English Conditional Fee Agreement Regulations 2000 set out in Appendix B provide a helpful model.

- 23 In our preliminary paper we invited submissions on such issues as whether there should be a prescribed form of contract, whether the amount of success uplifts should be capped, and whether there should be a cooling-off provision to enable clients to have second thoughts. Submissions discussed these and other protection methods including a suggestion of a requirement that the client before entering into the augmented fee contract receive independent advice. We have given careful thought to these submissions, but prefer the simplicity of the regime indicated in the previous paragraph, under which the major reliance is placed on an entitlement for cost reviewers to override the terms of augmented fee arrangements that seem to them unfair.
- 24 Assuming that, as under the existing statute, the new legislation imposes the cost review obligation on law societies as a matter of professional self-regulation, some parallel provision will have to be made in respect of lay advocates under the Employment Relations Act 2000. A solution may be for the review power to vest in an officer of the Employment Relations Authority or the Employment Relations Court, such officer to have a power where appropriate to delegate the determination of reviews to a suitably qualified appointee. For the sake of completeness it may be thought necessary to make corresponding provisions in other circumstances where non-lawyers have rights of audience.⁵⁹ We have, however, no evidence that a

⁵⁹ The other relevant statutory provisions are the Taxation Review Authorities Act 1994 s 16(3)(a), the Resource Management Act 1991 s 275, and the Accident Insurance Act 1998 s 145(1).

practice of charging on a contingent fee basis exists in any of them, and it might be simplest to legislate only for lawyers and for lay advocates under the Employment Relations Act 2000, leaving the rest governed by existing law.

EXCEPTIONS

- 25 Some classes of litigation will exclude themselves from the contingent fee regime because the outcome does not yield a fund from which the fees can be paid. Others (such as most claims under the statute that at the time of the writing is intended to be rechristened the Property (Relationships) Act 1976) exclude themselves because in situations where a claimant has some entitlement and the only issue is as to quantum there is no risk that the claimant's lawyer will not be paid and therefore no uplift premium properly payable. For these and other reasons we would exclude from the proposed regime (as in England and the Australian jurisdictions referred to) proceedings in the Family Court and criminal proceedings, and we would also exclude immigration cases (which in any event are unlikely to yield cash) on the pragmatic ground of the particular vulnerability of clients in those cases.

SUMMARY OF THIS PART

- 26 We recapitulate the recommendations in this part of this Report in summary form as follows:
- (1) The statute replacing the Law Practitioners Act 1982 should make it clear that with the exceptions and subject to the formal requirements set out below, a contract to retain the services of a lawyer is not an illegal contract and does not subject the lawyer to liability under the torts of maintenance or champerty, by reason only of the fact that the lawyer's entitlement to remuneration is dependent on the outcome, if such remuneration is:
 - no more than the remuneration that would be payable if the entitlement to remuneration were not contingent ("a normal fee"); or
 - a normal fee plus an amount ("a success uplift") to compensate the lawyer for the risk of not being paid at all and for the disadvantages of not receiving payments on account. A success uplift may not be calculated as a proportion of an amount recovered.

- (2) Excluded from this provision should be criminal proceedings, immigration cases, and all proceedings that could be brought within the jurisdiction of the Family Court and appeals therefrom.
 - (3) Such a contract of retainer in addition to such disclosures as may under the new legislation be required in all contracts of retainer must define with precision the circumstances in which the success uplift is payable and disclose the apportionment of the total amount payable between normal fee and success uplift.
 - (4) The cost review processes of the new statute should permit the terms of such a contract to be adjusted in the client's favour on the grounds of unfairness.
 - (5) Where non-lawyers have by statute a right of audience on behalf of parties to proceedings consideration should be given to whether there is a need to provide comparable provisions in the statute conferring such right of audience.
-

6

Difficulties in insolvency situations

27 A LIQUIDATOR OR AN ASSIGNEE in bankruptcy is commonly hampered in pursuing claims by a lack of funds to do so.⁶⁰ Possible solutions if the claim is not to be simply abandoned are:

- for creditors to fund the litigation and to provide an indemnity against the probable application by the defendant for security for costs. As the law now stands every creditor is entitled to share *pro rata* in the proceeds of the claim whether or not the creditor has contributed to the costs. We have recommended to the Ministry of Economic Development that as part of the insolvency law review there be enacted in New Zealand an equivalent to section 564 of the Australian Corporations Law allowing as an exception to the principle of *pari passu* distribution a priority in the distribution of the proceeds to creditors who have contributed to the recovery cost,⁶¹
- if the law is changed as we have recommended in chapter 5 of this report, for such a contingency fee arrangement as there is contemplated to be entered into. But the liquidator or assignee will still need to seek from creditors an indemnity in respect of costs should the claim fail and also in respect of any application by the defendant for security for costs should such an application succeed,⁶² and

⁶⁰ It is suggested to us by the Joint Insolvency Committee of the New Zealand Law Society and the Institute of Chartered Accountants of New Zealand Incorporated that “In some instances the directors of the company may have deliberately left the company with no funds in order to deter an incoming liquidator from pursuing them”.

⁶¹ Law Commission *Priority Debts in the Distribution of Insolvent Estates: NZLC SP2* (Wellington, 1999) paras 188–196. This recommendation is endorsed by the Ministry of Economic Development in its discussion document *Insolvency Law Review: Tier One* (Wellington, 2001) 88–89.

⁶² There is some reluctance to make an order for security for costs against a liquidator (*Cory-Wright and Salmon Ltd v KPMG Peat Marwick* [1993] 2 NZLR 701).

- for the right of action to be sold. We discuss this topic in the next paragraph.

28 As an application of the prohibition of maintenance the law forbids trafficking in litigation, the assignment of a bare right of action, the treatment of a right to litigation as a marketable commodity.⁶³ A right to sue (except in respect of claims of a personal nature) will either be part of the bankrupt's property that passes to the assignee,⁶⁴ or part of the company's property in respect of which a liquidator has rights and obligations. But commonly the assignee or liquidator lacks the funds to prosecute the claim, and wishes to sell it. In the case of claims existing at the commencement of the bankruptcy or liquidation, the problem has been solved by judicial legerdemain. In *Seear v Lawson*⁶⁵ (a case of bankruptcy) and *Re Parkgate Waggon Works Co*⁶⁶ (a liquidation) it was held that the statutorily conferred power of sale of the cause of action overrode the general prohibition.⁶⁷ As Robert Walker J has put it:

What has happened is that since 1880 the court has repeatedly held, and Parliament in successive reviews of the insolvency legislation must be taken to have accepted, that the statutory powers of sale conferred on liquidators and trustees in bankruptcy may be validly exercised without any breach of the rules of public policy covering maintenance and champerty.⁶⁸

The same view has been expressed in Australia:

This view was debatable when it originated, and susceptible of more detailed consideration and exposition; conferral of a power to do something does not necessarily overcome all problems of the legality of agreeing to perform it, and supposed illegality would usually require detailed consideration of the intended effect of the statutory authorisation. However it has become well established that dispositions of rights of action under powers in statutes dealing with bankruptcy and liquidation are effective.⁶⁹

⁶³ *Trendtex Trading Corp v Credit Suisse* [1982] AC 679.

⁶⁴ Insolvency Act 1967 s 42(2)(b).

⁶⁵ (1880) 15 Ch D 426 (CA).

⁶⁶ (1881) 17 Ch D 234 (CA).

⁶⁷ The current relevant New Zealand statutory provisions are the Insolvency Act 1967 s 72 and the Companies Act 1993 Sixth Schedule.

⁶⁸ *Re Oasis Merchandising Services Ltd* [1995] 2 BCLC 493, 504–505 (HC).

⁶⁹ *Re William Felton & Co Ltd* (1998) 16 ACLC 1294, 1297–1298 per Bryson J. The line of cases was followed in New Zealand in *Stone v Angus* [1994] 2 NZLR 2025 and treated as correct by the House of Lords in *Stein v Blake* [1996] AC 243, 257.

It is clear on the authorities that an assignee or liquidator can sell a right of action on terms that entitle the assignor to a share of the ultimate fruits of the litigation.⁷⁰

- 29 But the authorities draw a clear distinction between a claim extant at the commencement of the bankruptcy or winding-up, which is assignable, and the exercise by the assignee or liquidator of a statutory right, which is not.⁷¹ The rationale for the distinction is that a liquidator or assignee has no entitlement to assign or fetter by contract his mode of exercise of powers that are his by virtue of his office. (There can be difficulty in deciding on which side of the line a particular claim falls. In *Re Nautilus Developments Ltd*⁷² where the claim was extant at the commencement of the liquidation, but proceedings were brought not by the company but by the liquidator under the powers conferred on a liquidator (and others) by the Companies Act 1993 section 301, the High Court upheld the validity of a funding agreement which the Court construed as an assignment.)
- 30 So a right of action owned by the bankrupt or the company at the commencement of the bankruptcy or liquidation does not present a problem. The assignee or liquidator is free to assign the right of action without any question of maintenance or champerty arising. In *Nautilus* the High Court suggested that it would be prudent for assignees or liquidators to obtain Court approval to such an arrangement. While it is indeed always open to a liquidator or an assignee to obtain the comfort of a court direction, there is no legal obligation so to do.
- 31 The gap in the law then is confined to the exercise by liquidators or assignees of powers to seek monetary redress where the company or the bankrupt did not own a right of action at the commencement of the bankruptcy or the winding-up. Obvious examples are proceedings to set aside transactions voidable on various grounds, and claims against directors on such grounds as reckless trading. In the Law Commission's view provision should be made in the current review of insolvency legislation being undertaken by the Ministry of Economic Development for funding arrangements for such suits to

⁷⁰ *Guy v Churchill* (1889) 40 Ch D 481; *Ramsey v Hartley* [1977] 1 WLR 686; *Re Oasis Merchandising Services Ltd* [1998] Ch 170, 179; and *Norglen Ltd v Reeds Rains Prudential Ltd* [1999] 2 AC 1, 11.

⁷¹ In *Re Ayala Holdings Ltd (No 2)* [1996] 1 BCLC 467, 483; in *Re Oasis Merchandising Services Ltd* [1998] Ch 170, 179 (CA).

⁷² [2000] 2 NZLR 505.

be lawful, subject to the approval of the High Court, which must be satisfied that creditors have been consulted and that the discretion of the assignee or liquidator in relation to the conduct of the proceedings is not in any way fettered by any term of the funding arrangement. The statutory provision should make it clear that neither the personal liability for costs of the liquidator or assignee nor the defendant's entitlement to seek security for costs is affected. It should be a term of any consent that the funding arrangement is disclosed to the defendant.

- 32 In respect of the first class of claim identified in paragraph 29, the defendant or intended defendant has standing to challenge the decision of the Official Assignee to assign the claim and would similarly have standing to challenge the Official Assignee's decision if the law were changed as we suggest in the previous paragraph.⁷³ Because of the difference in the wording of the statutes it is doubtful whether the defendant or intended defendant would have similar standing where the decision is that of a liquidator. The defendant or intended defendant should have a right to challenge the assignment decision of either an Official Assignee or a liquidator, if only because recent cases suggest that the possibility of rights of action that are frivolous and vexatious being assigned or disclaimed by assignees in bankruptcy or assigned by liquidators is not fanciful.⁷⁴ The new insolvency legislation should confer such a right on the defendant. Where it is necessary to obtain the leave of the court to the assignment, the simplest way to do that is to require the application for such leave to be on notice to the defendant or intended defendant.

⁷³ As an aggrieved person within the meaning of the Insolvency Act 1967 s 86 (*Edmonds Judd v Official Assignee* [2000] 2 NZLR 135 (CA) doubting *obiter* the earlier unreported decision in *Gay v Bruns* (18 June 1999) Court of Appeal, Wellington, CA 193 and 194/98. This same case discusses the issue of whether abandonment exists alongside the Insolvency Act provisions for disclosure.

⁷⁴ The cases are collected in the *Edmonds Judd* decision referred to in the previous footnote.

Assignment of proceeds

- 33 **O**UR INQUIRY SUGGESTS THAT there are at least two Australian-based firms operating in New Zealand which are prepared to fund litigation on the basis of the purchase of a share in rights to litigate of the type described in the previous Chapter. We are further told that these funders would like to purchase other rights to litigate if the law so permitted. It is indeed suggested that this already occurs *sub rosa*. So we need for the sake of completeness to answer the question of why, if as we suggest in paragraph 31 liquidators and assignees are to be permitted to enter into what would otherwise be champertous agreements with leave of the court, the law should not permit the court to approve similar arrangements on the application of any would-be litigant. Indeed perhaps the court already has power to validate such an agreement if illegal under the Illegal Contracts Act 1970 section 7 though we have no knowledge of this provision being used to validate contracts in advance.
- 34 It needs to be remembered that the law draws a clear distinction between the assignment of a bare right to litigate and the assignment of the fruits of an action, the latter being an assignment, necessarily equitable, for valuable consideration, of future property.⁷⁵ An assignment in the latter class is enforceable provided that the terms of the assignment do not give the assignee any right to interfere in the conduct of the action or even to insist that it be pursued. Such a right would make the assignment champertous and void.⁷⁶ The affront to public policy is the bargaining away by the assignor of the assignor's right to conduct and if appropriate to compromise the assignor's claim. So there is no inconsistency between the law change that we propose in paragraph 31 and the existing legal position as it applies to other potential plaintiffs. The law change that we propose, assuming that our recommendation that it be a term of any court approval that the conduct of the

⁷⁵ *Glegg v Bromley* [1912] 3 KB 474 (CA).

⁷⁶ Above n 75, 484, 490.

litigation by the assignor or liquidator not be fettered, really does no more than permit the court to confer on liquidators and assignees (who are officers of the court), in respect of presently unassignable powers, a right to assign the fruit of the exercise of such powers. This right would not differ essentially from that which other potential plaintiffs presently enjoy.

APPENDIX A

Courts and Legal Services Act 1990 (United Kingdom) sections 58 and 58A (as substituted by the Access to Justice Act 1999 section 27)

58 Conditional fee agreements

- (1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.
- (2) For the purposes of this section and section 58A—
 - (a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and
 - (b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances.
- (3) The following conditions are applicable to every conditional fee agreement—
 - (a) it must be in writing;
 - (b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and
 - (c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor.
- (4) The following further conditions are applicable to a conditional fee agreement which provides for a success fee—
 - (a) it must relate to proceedings of a description specified by order made by the Lord Chancellor;
 - (b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and

- (c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor.
- (5) If a conditional fee agreement is an agreement to which section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies, subsection (1) shall not make it unenforceable.

58A Conditional fee agreements: supplementary

- (1) The proceedings which cannot be the subject of an enforceable conditional fee agreement are—
 - (a) criminal proceedings; and
 - (b) family proceedings, apart from proceedings under section 82 of the Environmental Protection Act 1990.
- (2) In subsection (1) “family proceedings” means proceedings under any one or more of the following—
 - (a) the Matrimonial Causes Act 1973;
 - (b) the Adoption Act 1976;
 - (c) the Domestic Proceedings and Magistrates’ Courts Act 1978;
 - (d) Part III of the Matrimonial and Family Proceedings Act 1984;
 - (e) Parts I, II and IV of the Children Act 1989;
 - (f) Part IV of the Family Law Act 1996; and
 - (g) the inherent jurisdiction of the High Court in relation to children.
- (3) The requirements which the Lord Chancellor may prescribe under section 58(3)(c)—
 - (a) include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made; and
 - (b) may be different for different descriptions of conditional fee agreements (and, in particular, may be different for those which provide for a success fee and those which do not).
- (4) In section 58 and this section (and in the definitions of “advocacy services” and “litigation services” as they apply for their purposes) “proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.
- (5) Before making an order under section 58(4), the Lord Chancellor shall consult—
 - (a) the designated judges;
 - (b) the General Council of the Bar;
 - (c) the Law Society; and
 - (d) such other bodies as he considers appropriate.
- (6) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee.

- (7) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a conditional fee agreement (including one which provides for a success fee).
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APPENDIX B

The Conditional Fee
Agreements Regulations 2000

LEGAL SERVICES, ENGLAND AND WALES

THE CONDITIONAL FEE AGREEMENTS REGULATIONS 2000

<i>Made</i>	<i>9th March 2000</i>
<i>Laid before Parliament</i>	<i>10th March 2000</i>
<i>Coming into force</i>	<i>1st April 2000</i>

The Lord Chancellor, in exercise of the powers conferred on him by sections 58(3)(c), 58A(3) and 119 of the Courts and Legal Services Act 1990 and all other powers enabling him hereby makes the following Regulations:

Citation, commencement and interpretation

1. – (1) These Regulations may be cited as the Conditional Fee Agreements Regulations 2000.
- (2) These Regulations come into force on 1st April 2000.
- (3) In these Regulations–
“client” includes, except where the context otherwise requires, a person who–
 - (a) has instructed the legal representative to provide the advocacy or litigation services to which the conditional fee agreement relates, or
 - (b) is liable to pay the legal representative’s fees in respect of those services; and“legal representative” means the person providing the advocacy or litigation services to which the conditional fee agreement relates.

Requirements for contents of conditional fee agreements: general

2. – (1) A conditional fee agreement must specify–
 - (a) the particular proceedings or parts of them to which it relates (including whether it relates to any appeal,

- counterclaim or proceedings to enforce a judgement or order),
 - (b) the circumstances in which the legal representative's fees and expenses, or part of them, are payable,
 - (c) what payment, if any, is due–
 - (i) if those circumstances only partly occur,
 - (ii) irrespective of whether those circumstances occur, and
 - (iii) on the termination of the agreement for any reason, and
 - (d) the amounts which are payable in all the circumstances and cases specified or the method to be used to calculate them and, in particular, whether the amounts are limited by reference to the damages which may be recovered on behalf of the client.
- (2) A conditional fee agreement to which Regulation 4 applies must contain a statement that the requirements of that Regulation which apply in the case of that agreement have been complied with.

Requirements for contents of conditional fee agreements providing for success fees

3. – (1) A conditional fee agreement which provides for a success fee–
- (a) must briefly specify the reasons for setting the percentage increase at the level stated in the agreement, and
 - (b) must specify how much of the percentage increase, if any, relates to the cost to the legal representative of the postponement of the payment of his fees and expenses.
- (2) If the agreement relates to court proceedings, it must provide that where the percentage increase becomes payable as a result of those proceedings, then–
- (a) if–
 - (i) any fees subject to the increase are assessed, and
 - (ii) the legal representative or the client is required by the court to disclose to the court or any other person the reasons for setting the percentage increase at the level stated in the agreement,
- he may do so,
- (b) if–
 - (i) any such fees are assessed, and
 - (ii) any amount in respect of the percentage increase is disallowed on the assessment on the ground that the level at which the increase was set was unreasonable in view of facts which were or should have been known to the legal representative at the time it was set,

that amount ceases to be payable under the agreement, unless the court is satisfied that it should continue to be so payable,

and

(c) if—

- (i) sub-paragraph (b) does not apply, and
- (ii) the legal representative agrees with any person liable as a result of the proceedings to pay fees subject to the percentage increase that a lower amount than the amount payable in accordance with the conditional fee agreement is to be paid instead,

the amount payable under the conditional fee agreement in respect of those fees shall be reduced accordingly, unless the court is satisfied that the full amount should continue to be payable under it.

- (3) In this Regulation “percentage increase” means the percentage by which the amount of the fees which would be payable if the agreement were not a conditional fee agreement is to be increased under the agreement.

Information to be given before conditional fee agreements made

4. – (1) Before a conditional fee agreement is made the legal representative must—

- (a) inform the client about the following matters, and
- (b) if the client requires any further explanation, advice or other information about any of those matters, provide such further explanation, advice or other information about them as the client may reasonably require.

(2) Those matters are—

- (a) the circumstances in which the client may be liable to pay the costs of the legal representative in accordance with the agreement,
- (b) the circumstances in which the client may seek assessment of the fees and expenses of the legal representative and the procedure for doing so,
- (c) whether the legal representative considers that the client’s risk of incurring liability for costs in respect of the proceedings to which agreement relates is insured against under an existing contract of insurance,
- (d) whether other methods of financing those costs are available, and, if so, how they apply to the client and the proceedings in question,
- (e) whether the legal representative considers that any particular method or methods of financing any or all of those costs is appropriate and, if he considers that a contract of insurance is appropriate or recommends a particular such contract—
 - (i) his reasons for doing so, and
 - (ii) whether he has an interest in doing so.

(3) Before a conditional fee agreement is made the legal representative must explain its effect to the client.

- (4) In the case of an agreement where—
 - (a) the legal representative is a body to which section 30 of the Access to Justice Act 1999 (recovery where body undertakes to meet costs liabilities) applies, and
 - (b) there are no circumstances in which the client may be liable to pay any costs in respect of the proceedings,
paragraph (1) does not apply.
- (5) Information required to be given under paragraph (1) about the matters in paragraph (2)(a) to (d) must be given orally (whether or not it is also given in writing), but information required to be so given about the matters in paragraph (2)(e) and the explanation required by paragraph (3) must be given both orally and in writing.
- (6) This Regulation does not apply in the case of an agreement between a legal representative and an additional legal representative.

Form of agreement

5. – (1) A conditional fee agreement must be signed by the client and the legal representative.
- (2) This Regulation does not apply in the case of an agreement between a legal representative and an additional legal representative.

Amendment of agreement

6. – Where an agreement is amended to cover further proceedings or parts of them—
 - (a) Regulations 2, 3 and 5 apply to the amended agreement as if it were a fresh agreement made at the time of the amendment, and
 - (b) the obligations under Regulation 4 apply in relation to the amendments in so far as they affect the matters mentioned in that Regulation.

Revocation of 1995 Regulations

7. – The Conditional Fee Agreements Regulations 1995 are revoked.

Irvine of Lairg, C

9th March 2000

EXPLANATORY NOTE

(This note is not part of the Regulations)

Section 58(1) of the Courts and Legal Services Act 1990 provides that a conditional fee agreement is not unenforceable if it satisfies certain conditions. These include conditions to be specified in Regulations under section 58(3) of that Act. Regulations 2 and 3 specify those conditions. Regulation 2 applies to all conditional fee agreements. Regulation 3 sets out further requirements applying only to agreements which provide for success fees.

Section 58A(3) enables the conditions which may be prescribed for conditional fee agreements to include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made. Regulation 4 imposes such a requirement and specifies what information is to be given. It does not apply where the agreement is between legal representatives.

Regulation 5 requires that agreements other than those between legal representatives must be signed by the client and the legal representative.

Regulation 6 provides for similar requirements to apply as respects amendments of agreements.

These Regulations replace the Conditional Fee Agreements Regulations 1995, which are revoked.

APPENDIX C

Legal Practice Act 1996 (Victoria) sections 96–99 and 101–103

96 Making costs agreements

- (1) A costs agreement may be made—
 - (a) between a client and a legal practitioner or firm retained by the client; or
 - (b) between a client and a legal practitioner or firm retained on behalf of the client by another legal practitioner or firm; or
 - (c) between a legal practitioner or firm and another legal practitioner or firm that retained that practitioner or firm on behalf of a client.
- (2) A costs agreement must be written or evidenced in writing.
- (3) A costs agreement may consist of a written offer that is accepted in writing or by other conduct.

97 Costs agreements may be conditional on success

- (1) A costs agreement may provide that the payment of some or all of the legal costs is contingent on the successful outcome of the matter to which those costs relate.
- (2) An agreement referred to in sub-section (1) is called a “**conditional costs agreement**”.
- (3) A conditional costs agreement may relate to proceedings in any court or tribunal, except criminal proceedings or proceedings under the Family Law Act 1975 of the Commonwealth.
- (4) A conditional costs agreement—
 - (a) must set out the circumstances that constitute a successful outcome of the matter; and
 - (b) may exclude disbursements from the legal costs that are payable only on the successful outcome of the matter.
- (5) A legal practitioner or firm must not enter into a conditional costs agreement unless the practitioner or a partner of the firm has a reasonable belief that a successful outcome of the matter is reasonably likely.

98 Uplifted fees are allowed

- (1) A conditional costs agreement may provide for the payment of a

premium on the legal costs otherwise payable under the agreement on the successful outcome of the matter in respect of which the agreement is made.

- (2) The premium must be a specified percentage of the legal costs otherwise payable, and must be separately identified in the agreement.
- (3) A legal practitioner or firm must not enter into a conditional costs agreement under which a premium, other than a specified percentage not exceeding 25% of the costs otherwise payable, is payable on the successful outcome of any matter involving litigation.

Penalty: 100 penalty units.

99 Contingency fees are prohibited

- (1) A legal practitioner or firm must not enter into a costs agreement under which the amount payable to the legal practitioner or firm under the agreement, or any part of that amount, is calculated by reference to the amount of the award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.

Penalty: 100 penalty units.

...

- (2) Sub-section (1) does not apply to the extent that the costs agreement adopts an applicable scale of costs of a court or tribunal.

101 Effect of costs agreement

- (1) Subject to this Division and Division 4, a costs agreement may be enforced in the same way as any other contract.
- (2) To the extent that it provides for legal costs to be paid according to a practitioner remuneration order or scale of costs of a court or tribunal, a costs agreement is subject to assessment under Division 5.
- (3) The procedure in Division 1 of Part 5 may be used to resolve a dispute over an amount claimed to be payable to a legal practitioner or firm under a costs agreement unless the practitioner or firm has commenced proceedings for recovery of the disputed amount.

102 Certain costs agreements are void

- (1) A costs agreement that contravenes any provision of this Division is void.
- (2) Subject to sub-section (3), legal costs under a void costs agreement are recoverable as set out in section 93(b) and (c).
- (3) A legal practitioner or firm that has entered into a costs agreement in contravention of section 97(5), 98(3) or 99 is not entitled to recover any amount in respect of the provision of legal services in the matter to which the costs agreement related and must repay any amount received in respect of those services to the person from whom it was received.

- (4) If a legal practitioner or firm does not repay an amount required by sub-section (3) to be repaid, the person entitled to be repaid may recover the amount from the practitioner or firm as a debt in a court of competent jurisdiction.

103 Cancellation of costs agreement

- (1) On application by a client, the Tribunal, constituted by the registrar or deputy registrar, may order that a costs agreement be cancelled if satisfied—
 - (a) that the client was induced to enter into the agreement by the fraud or misrepresentation of the legal practitioner or firm; or
 - (b) that the legal practitioner or firm has been guilty of misconduct or unsatisfactory conduct in relation to the provision of legal services to which the agreement relates; or
 - (c) that the agreement is not fair and reasonable.
 - (2) The Tribunal may adjourn the hearing of an application under this section pending the completion of any investigation or charge in relation to the conduct of the legal practitioner or firm.
 - (3) If the Tribunal orders that a costs agreement be cancelled, it may make such order as it thinks fit in relation to the payment of legal costs the subject of the cancelled agreement, taking into account the seriousness of the conduct of the legal practitioner or firm.
 - (4) The Tribunal may order the payment of the costs of and incidental to a hearing under this section and, for that purpose, sections 162 and 164 apply accordingly.
-

APPENDIX D

The Law Society of South Australia Professional Conduct Rules 8.10 and Attachment 1

CONTIN-
GENCY
FEE

8.10. Provided that the practitioner complies with the provisions of sub-paragraphs (a) and (b) hereof, a practitioner, in any matters other than criminal and matrimonial matters, either at the commencement of a practitioner's retainer from the client or after initial investigation of the matter, may agree that in the event of the action being unsuccessful the practitioner either will not charge the client or will charge only the disbursements or some defined amount or proportion of disbursements and that in consideration therefore, in the event that the client's action is successful, the practitioner would be entitled to charge a solicitor-client fee which constitutes up to double the fees to which the practitioner would otherwise be entitled if those fees were charged according to the scale contained in the Sixth Schedule to the Rules of the Supreme Court.

(a) (i) a practitioner shall only enter into a contingency fee agreement where in his or her professional judgment the client's claim has some prospect of success but that the risk of the claim failing and of the client having to meet his or her own costs is significant;

(ii) the practitioner should prior to the signing of the contingency fee agreement inform the client of the client's right to obtain independent legal advice and of the right to have the contingency fee agreement reviewed by the Supreme Court pursuant to Section 42(7) of the Legal Practitioners Act and of the right to have the fees charged reviewed by the Conduct Board under [S]ection 77A of the Legal Practitioners Act and the agreement should specifically record this.

IN WRITING (b) Any contingency fee agreement:

(i) must be in writing and in plain English and set out clearly the terms of the agreement, and be signed by the client;

- FORMAT (ii) should generally be in the form of Attachment 1 to these Rules and contain at least the terms contained in that agreement;
- COOLING OFF (iii) must contain the provision that the client shall have a cooling off period of five clear business days from the signing of the contract during which he or she may, by giving notice in writing to the practitioner, terminate the contingency fee agreement.
-

THE LAW SOCIETY OF SOUTH AUSTRALIA

SAMPLE STANDARD CONTINGENCY FEE AGREEMENT

THIS CONTINGENCY FEE AGREEMENT is made the
1993, BETWEEN:

(the solicitor)

AND

(the client)

RECITALS:

- A. The client wishes to engage the solicitor to provide legal services to the client in conducting an action (describe generally nature of action) hereinafter called “the action”.
- B. The client wishes those services to be provided on a basis that the client will not be obliged to pay for the same (or alternatively shall not be obliged to pay for legal professional costs and only an obligation to pay for out of pocket expenses) in the event that the action is unsuccessful. [Here describe what will constitute an unsuccessful action, eg: no recovery, or recovery of less than a certain amount or the different degrees of success which will lead to different consequences as to the client’s liability to pay for out of pocket expenses.]
- C. The solicitor is willing to provide the requested service on the basis requested by the client on condition that in consideration for agreeing not to charge the client for such services in the event that the action is unsuccessful, the solicitor shall be entitled to charge the client fees comprising up to (insert percentage) of the amount which would otherwise be payable for the professional legal costs of the action under the scale of costs formally applying (Scale of costs provided for by the Supreme Court Rules Fourth Schedule), together with disbursements and out of pocket expenses. This agreement records that condition and some of the other terms of the engagement of the solicitor by the client for the action.

- D. The solicitor has advised the client, among other matters:
1. of the client’s entitlement to seek independent legal advice as to entering into the agreement;
 2. of the existence of a five day cooling off period;
 3. of the client’s right to apply to the Supreme Court of South Australia under Section 42(7) of the Legal Practitioners Act to seek to rescind or vary this agreement if it is asserted that a term of the agreement is not fair and reasonable;
 4. of the client’s right to have the amount of the fees charged reviewed by the Conduct Board under Section 77A of the Legal Practitioner’s Act;
 5. of the probability that if the client’s claim fails the client may well be liable to pay the party and party costs of the other party or parties to the action,
- and the client by signing below hereby acknowledges the receipt of such advice.

SIGNED:

IT IS AGREED as follows:

1. The client engages the solicitor to act as the client’s solicitors in the action.
2. In the event that the client does not obtain judgment in the action there shall not be liability to pay any costs or disbursements to the solicitor (alternatively “there shall only be liability to pay to the solicitor out of pocket expenses and not moneys for professional costs” or other arrangements made for disbursements).
3. In the event that the client does obtain judgment in the action, there shall be liability to pay to the solicitor, in addition to out of pocket expenses, legal costs calculated at (insert percentage) of the amount which would otherwise be payable under the [applicable] scale, (but the solicitor shall only be entitled to claim against the client for the amount, if any, received in respect of the judgment).
 - (a) if the client recovers more than \$
the applicable percentage is %.

(b) if the client recovers more than \$
the applicable percentage is %.

4. The client is entitled, within five clear business days of the signing of this agreement, to terminate the same by notice in writing delivered to the solicitor.
5. In the event that the client whether lawfully or unlawfully or the solicitor lawfully, terminates the engagement of the solicitor prior to the conclusion of the action, this agreement shall remain in force, and if the action subsequently concludes in favour of the client, the client shall then be liable to pay the solicitor the fee for work done by the solicitor calculated in the manner set out in this agreement, but should the action not conclude in his favour the client (shall not be obliged to pay the solicitor for work performed/only obliged to pay disbursements as the case may be), subject to any contrary agreement between the client and the solicitor.
6. (Any other clauses agreed with the client.)

DATED this day of 19

SIGNED (by the client)

 this day of 19

WITNESS:

SIGNED on behalf of (the solicitor)

by

WITNESS:

Note: *The form of the agreement may be adapted to meet individual circumstances, and the agreement may be supplemented by other terms, but the substance of the recitals and the rights of the client set out above must not be prejudiced thereby.*

APPENDIX E

List of makers of submissions

ASH (Action on Smoking and Health)

Auckland District Law Society's Working Group on Contingency Fees

Christchurch Community Law Centre

Employment Court Judge Graeme Colgan

A Dumbleton, Chief of the Employment Relations Authority

Dunedin Community Law Centre

Foreign Currency Borrowers Association Incorporated and Foreign Currency Borrowers Litigation Group Incorporated

Alyse Foster

Employment Court Chief Judge TG Goddard

PW Harpham

Colin Henry

Joint Insolvency Committee of the New Zealand Law Society and the Institute of Chartered Accountants of New Zealand Incorporated

Ministry of Justice

National Council of Women of New Zealand

New Zealand Employers' Federation Incorporated

New Zealand Law Society

Nga Ture Kaitiaki Ki Waikato Community Law Centre

Gregory G Thwaite

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- NZLC R4 Personal Injury: Prevention and Recovery (Report on the Accident Compensation Scheme) (1988)
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- NZLC PP33 Defaming Politicians: A Response to *Lange v Atkinson* (discussion paper) (1998)
- NZLC PP34 Retirement Villages (discussion paper) (1998)
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