**Funding employment tribunal work and other matters…**

This paper sets out our recent experience of using legal expenses insurance to fund employment tribunal work. This paper also briefly details the relevant law and sets out some related policy proposals.

**University House**

University House is one of the oldest independent advice agencies in London. We were established in 1886 as part of the Settlement Movement. We provide help and support on a wide range of social welfare legal matters. We specialise in tribunal casework and representation.

University House has a longstanding history of working with lawyers who undertake pro bono work and we have partnership arrangements with a large number of commercial law firms.

**Legal Expenses Insurance**

There are two common types of Legal Expenses Insurance (LEI): before the event (BTE) insurance and after the event insurance (ATE). This paper is concerned only with BTE and engagement with BTE by independent advice centres and Law Centres.

As well as provided on a stand-alone basis, BTE legal expenses insurance is commonly included in motor policies – and – increasingly in household policies. When it is sold as part of another policy rather than as a stand-alone product, it is often presented as a free (or low cost) addition.LEI is also now commonly included as part of packaged bank accounts and other related financial products such as credit cards. In a straw poll, some of our colleagues had as many as three different insurance policies, which included legal expenses insurance. More often than not, most people are unaware that they have such cover.

Typically, cover is provided for the legal expenses that the policyholder may incur in most personal injury, consumer, property and employment disputes, as well as for any award of the other party’s legal costs. Normally, there is a requirement that if a policyholder makes a claim for legal expenses, any legal action for which the expenses are incurred must have a reasonable prospect of success. The policyholder is also usually required to accept any reasonable offer of settlement.

When a policyholder puts in a claim under a policy of this type, most insurers will assess the dispute in-house (or perhaps with the assistance of one of their panel of solicitors), and will then determine whether there is an arguable case. If the insurer concludes that the case has little prospect of success, it may simply notify the policyholder that it is not prepared to accept the claim.

Where the case appears more complex, or seems to have a good chance of succeeding, insurers usually appoint one of their panel of solicitors to consider the matter. These panels are set up by insurers to deal with cases on commercial terms that are agreed in advance.

**The UK LEI Market**

As England and Wales continue to feel the effects of the decrease in legal aid as a result of the Legal Aid Sentencing and Punishment of Offenders Act, there is an ever-increasing pressure to rely on alternative forms of legal funding, including contingency or conditional fees, legal loans, overdrafts, and legal expense insurance.

In 2012-2013, approximately 10% of cases reviewed by the Legal Ombudsman were funded by legal expense insurance or conditional or contingency fee agreements. A survey conducted by YouGov also determined that 27% of people stated they would pay for LEI if the cost was between £50 and £100 a year. That being said, however, it has been noted that the lack of consumer education is of particular concern as the complex nature of LEI policies impedes the consumer’s means to redress. The Legal Ombudsman commissioned a YouGov survey in 2012 that revealed that at least 40% of people surveyed had LEI, 74% of which did not fully understand the financial coverage they were entitled to. Only 11% of those surveyed understood the legal services excluded under their policy terms and conditions. Chief Legal Ombudsman, Adam Sampson, recommends, “In this rapidly changing legal market, the onus is on providers to be clear what they are providing, how the funding of services works, and what protections the consumer is offered. Consumers can also protect themselves better by asking lots of questions and choosing their legal provider carefully.”

In the UK, little has been done strategically to develop LEI as an independent product. That said, LEI coverage in the UK has developed anyway largely because it is increasing used as an add-on to some other primary insurance or financial product in a competitive market where no-cost or low-cost add-ons have a marketing value. Most people have no idea whether they have access to LEI, which makes the findings of a recent MoJ survey the more surprising. According to the survey, 1 in 4 people now obtain legal assistance via insurance. This compares to 1 in 10 who do so via Legal Aid.

*Where does the market go from here?*

The most common response from lawyers and insurance professionals to our work on LEI is to suggest that if LEI really developed and its coverage and scope increased, then insurance premiums would go up. Not necessarily so. LEI is most developed in prosperous northern European countries. Yet, European LEI premiums are generally low. It must also be noted that by international standards, the UK is not a litigious society.

There is clearly a need to develop coverage. Key stakeholders have an obvious role to play in securing LEI on behalf of their renters, leaseholders, employees and members.

**LEI in Europe**

A 2010 report conducted by the European Commission for the Efficiency of Justice stated that LEI was being offered in 29 states or entities. In 2012, this number had increased to 34. In some countries, including Denmark, Finland, France and Sweden, eligibility for legal aid is directly related to the availability of LEI. The 2012 report stated that LEI is the most developed in prosperous countries, although it is worth noting that historically European LEI premiums have been low. In 2009, the European per capita premiums were a mere €13 for legal expense protection.

Germany has the largest LEI market in Europe. Its prosperity comes from two driving factors: the existence of scale fees that guarantee calculability and the large risk pool that has been accumulated over the past 75 years. The attraction of LEI is apparent in Germany as the market continues to flourish despite the requirement of selling the policy as an independent product; that is, it cannot be included as an add-on to other insurance policies. The main markets for LEI policies are higher income groups as legal aid is restricted to the poor. In Germany, 46% of all households carry LEI, which is offered by at least 50 different insurance companies that fund 3.6 million cases a year.

Sweden has already experienced substantial welfare cuts in the 1980s and 1990s, and underwent a major legal services reform in 1997. As a result, the nation has had a paradigm shift to funding legal expenses through LEI: 97% of the population carries a LEI policy. Eligibility for legal aid in Sweden is determined by a restrictive means test, but it is also denied to people who *should* have taken out LEI. In other words, individuals above a certain income level are expected to purchase a LEI policy.

**Choice of solicitor**

Legal expenses policies often give the insurer the freedom to choose which solicitors to appoint for advice and assistance *up to the time where legal proceedings start* – unless there is a conflict of interest. However, once proceedings start (when the legal “claim form” is issued) – or if there is a conflict of interest – the law (regulation 6 of the *Insurance Companies (Legal Expenses Insurance) Regulations 1990* [SI 1159]) allows policyholders to choose their *own* solicitors. These regulations are wide enough to include legal proceedings pursued and defended in tribunals – for example, employment tribunals – as well as proceedings in courts.

Insurers sometimes have no objection to using a policyholder’s own solicitor. But for commercial and quality-control reasons, insurers often prefer to use their solicitors from their *own* panel.

Often the terms of a legal expenses policy do not generally guarantee any particular firm of solicitors, any specific location or any minimum size of firm. All they promise is a *panel* firm of solicitors *prior to* legal proceedings being issued. After legal proceedings have been issued – and to comply with statutory regulations – the policyholder can choose their *own* solicitor.

**Once legal proceedings have started: next steps**

Once legal proceedings are issued – or if there is a conflict of interest – the policyholder will be entitled to choose their *own* solicitor. The policyholder’s own choice of solicitor is not bound by any terms of the insurance policy, as this is a contract made between the policyholder and the insurer. As a result, the insurer will require the policyholder’s solicitor to agree to the insurer’s standard terms of appointment. This is a separate contract entered into between the insurer and the solicitor.

Insurers’ arrangements for handling legal expenses claims have at times given rise to concerns in some quarters, and a number of these concerns were raised in a recent High Court case, *Sarwar v Alam*. Arising from the *Sarwar* case, the following statement from their website confirms the FO’s current thinking about **when is it generally advisable for insurers to agree the appointment of the policyholder’s choice of solicitor?**

*Much depends on the circumstances of the individual case, but the FO consider that, in general, policyholders making claims in connection with motor accident disputes, minor personal injury claims and routine consumer disputes are unlikely to suffer any significant prejudice if the insurer simply appoints a solicitor for them from its own panel.*

*But the FO expect insurers to agree the appointment of the policyholder’s preferred solicitors in cases that involve large personal injury claims, or that are necessarily complex (such as those involving allegations of medical negligence). The FO considers that insurers should also agree the appointment of the policyholder’s preferred solicitors in cases that involve significant boundary or* ***employment disputes*** *(especially if there is a considerable history to investigate and assess).*

*More generally, there are other circumstances where it may be unreasonable, or out of line with good industry practice, if the insurer fails to agree to the appointment of the policyholder’s own choice of solicitor. This could be the case, for example, where the policyholder’s own solicitors have already had considerable involvement in (and knowledge of) the issue giving rise to the dispute, or related matters.*

**What are the examples?**

**The following two case studies briefly detail LAC’s own experience of legal expenses insurance**

**Case study 1**

Ms A was outside our normal catchment area. Ms A had a complex race discrimination claim and had already contacted her insurers, who had refused to fund her employment tribunal claim. The matter had already been referred to one of their panel solicitors who had taken the view that her case did not have a reasonable prospect of success. The case was referred to us to see whether we could help.

After reviewing her case we took the view that her case did indeed have reasonable prospects of success. We then obtained counsel’s opinion from a pro bono partner, which agreed with our view. We then contacted her insurer and provided them with a copy of counsel’s opinion. The insurer changed their view of her case and appointed us to represent Ms A. We were provided with the insurance company’s terms of business for a non-panel firm of solicitors.

The terms of business were quite restrictive but we managed to negotiate away a number of its more problematic provisions. The case eventually settled, and on conclusion of the case we were able to negotiate a more favourable hourly rate than what was contained in the original terms of business.

**Case study 2**

Mr B was also outside our normal catchment area. Mr B had a complex disability discrimination claim. He made direct contact with us and we set about seeing whether we could help him. At first contact we asked him to trawl through his various insurance policies to see whether he had legal expenses insurance. It turned out he did so we then advised him to contact his insurance company directly to progress his case.

Mr B later returned to us stating that a panel solicitor had determined that his case did not have a reasonable prospect of success. We reviewed the matter and took the view that the panel solicitor was wrong. We then obtained counsel’s opinion from a pro bono partner. Counsel agreed with our view and we supplied a copy of counsel’s opinion to the insurer. The insurer changed their view on the case and appointed us as Mr B’s solicitors.

We were provided with the insurer’s terms of business for a non-panel solicitors firm. This particular insurance company’s terms of business turned out to be fairly straightforward and we did not need to ‘negotiate’ anything away.

**What are we learning?**

**Overview**

We have changed our protocols as a result of the above two cases. All our advisors, at first contact with a client who has a potential tribunal claim, are now exploring whether the client has LEI cover. Why? In a time of financial constraint this approach provides both the client and an independent advice centre such as us with access to a significant financial resource. Insurance cases are able to fund disbursements such as expert reports and counsel’s fees and we are able to charge the insurance company for our work at commercial rates.

**Can local councils and housing associations play a role here?**

Most councils and housing associations negotiate block insurance agreements on behalf of their tenants and leaseholders, and typically use the same insurance company as recommended by the National Housing Federation. The standard scheme for such household insurance does not include cover for legal expenses. We believe it should. We also believe it should include funeral expenses cover, as part of a package of measures ensuring community resilience. There is poor take up of the present standard insurance scheme, with some Housing Associations reporting take up of only 4%.

It is a policy objective of social landlords to have their tenants insured, but they are presently failing to achieve this policy objective. They need to adopt a new model to achieve their aims. We believe the best way forward is for social landlords to use their purchasing power to obtain insurance for all their tenants at knocked down prices. This insurance should include LEI and other products such as basic funeral cover, in order, to help create resilient communities. Alternately, we believe there is a strong argument for including such insurance as part of a tenant’s rent.

We are not talking here about LEI as it is presently commercially available. Present day LEI provides those who are covered with a minimum of £50,000 of support with legal costs. What we are advocating is a stripped-down version of LEI which has a focus on social welfare law. The most common matter our sector deals with is disability benefit appeals to the First-tier Tribunal. Even if the matter was within scope, we would struggle to spend more than a few thousand pounds on a disability benefit appeal.

There are significant numbers of tenants in social housing who do not have any insurance. According to Fair Finance, 50% of households in the bottom half of the income scale do not have any insurance.

Tragically, social tenants who neither have LEI or home contents insurance are often forced to purchase next to useless product insurance from sub-prime lenders. Hire purchase companies, for example, tend not to provide access to their overpriced HP goods unless the "customer" has home contents insurance, knowing full well that most of their customers do not have such cover. They then sell them their 'own' overpriced insurance.

***Insurance and Legal Aid?!***

Even before the relatively recent Legal Aid cuts, Legal Aid practitioners were aware of its limitations. Civil Legal Aid does not exist outside of metropolitan areas to any practical degree. Insurance, on the other hand, genuinely does have the potential to be universal. If you have access to a policy then it does not really matter if you are in Camden or Cornwall.

It is worth remembering that a large number of local authorities and housing associations are committed to the Access to Justice Agenda.

***Can this apply elsewhere?***

Yes. If an employer obtained LEI for all its employees then that employer could potentially factor in substantial savings going forward. How? For example, if one of their employees is hurt in an accident caused by a third party, the employee with LEI could obtain compensation which could finance their recovery and their eventual return to work. Safeguards? Well, it should not be beyond the wit of the employer to negotiate a block LEI contract for its employees which excluded the employees from taking actions against them as the employer.

This same model could work for other bodies including membership organisations.

**Other LEI issues**

There is the need to develop the scope of LEI and also to develop an industry standard. Most LEI policies we have seen cover just consumer, employment, property and personal injury disputes, but we have also seen policies which cover matters that potentially may go before any tribunal or court. It would obviously be preferable if all LEI policies covered all civil legal matters.

Going forward, we should try to develop both the coverage and scope of LEI in order to provide a universal umbrella of LEI support. LEI in the UK has developed organically. Imagine what could be achieved with LEI if key stakeholders, including government, actively engaged with it.

**Complying with regulation**

There are a wide variety of different types of business undertaking LEI work. For advice centres and Law Centres with legal aid contracts, page 8 of the Application for Civil Legal Aid Certificate requires the client to be asked questions about whether they have insurance including LEI.

Clients who have cases which are funded by LEI will have higher expectations and are more likely to complain to the Legal Ombudsman if they are dissatisfied with the service received. Therefore, it is recommended that client care and complaint procedures are reviewed to ensure that they are robust and comply with relevant regulations.

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