

## TEMPLE LEGAL PROTECTION

### Response to the final Jackson Report:

#### Access to Justice Denied

Temple Legal Protection Ltd [Temple] remains committed to facilitating access to justice. As a major provider of all forms of legal expenses insurance we are well placed to assess the implications of the reforms proposed in Lord Justice Jackson's Report. The provision of legal expenses insurance facilitates access to justice and any proposal which makes it less likely that such insurance will be available or provided at affordable prices will inevitably undermine such process.

Lord Justice Jackson was charged with making recommendations "*to promote access to justice at proportionate cost*". Regrettably, Temple concludes that if his recommendations were implemented as proposed:

- access to justice for claimants will, once again, be restricted to the poor and the wealthy; therefore the Report fails in its key aim
- the overriding objective that says that dealing with a case justly includes ensuring that, so far as is practicable, the parties are on an equal footing; will not be achieved
- the principle that a successful party should keep all his / her damages, with a separate indemnity in respect to the costs incurred will be discarded;
- further uncertainty and satellite litigation will be created in an area where a now mature market was providing an efficient and fair method for financing litigation; and
- The assurances previously given to Parliament when the categories of claims for which Legal Aid was available were significantly reduced will be undermined.
- the decisive advantage in litigation will be handed to the well funded/insured defendant
- the notion that BTE insurance will somehow fill the gap left by ATE insurance is naïve and misconceived

The Jackson report recommendation to end the recoverability of success fees and ATE premiums will do nothing to reduce the cost of litigation for a successful claimant who had been able to use a Conditional Fee Agreement to bring his / her claim and had prudently taken out a policy of ATE insurance to protect his position. Indeed, such a claimant - surely a candidate in policy terms for support - will find his / her costs increased and damages reduced. Further such a claimant will be at a considerable financial disadvantage such that it will make many otherwise meritorious claims inherently unattractive.

In this paper Temple will make observations on how access to justice can be achieved at proportionate cost and will also identify its criticisms of not only the Jackson recommendations but also the approach adopted in reaching those conclusions.

## **Temple's recommendations**

Temple's main recommendation is that the principle that the claimant's damages are preserved, with costs recovered separately, should be defended. There is an important principle at the heart of the debate about recoverability of success fees and/or ATE (recoverability).

Damages are awarded in this jurisdiction on a compensatory basis; namely they are awarded in an attempt to put the claimant in the position that they would have been in had no damage occurred at all. There is no element of windfall or profit in the award of damages. In the very great majority of cases which settle, the Claimant does not recover all of their damages because a part of their entitlement is foregone to avoid the risks associated with trial and or of proving the precise extent of the entitlement to damages. Therefore in the rare cases that proceed to a trial with a finding in favour of the claimant, the claimant will simply recover what they were entitled to in the first instance.

If justice means being able to recover the compensation due for the wrong suffered, then justice is diminished if that same compensation is then itself reduced to contribute to the costs of proving the wrong. The current arrangement of recoverability of both success fees and an ATE premium from the culpable losing party is the mechanism by which those compensatory damages have been and need to be preserved.

The Jackson report's recommendations for the abolition of recoverability makes substantial inroads to this principle of justice because it proposes to replace recoverability with (i) the claimant having to pay their own lawyer's success fee of 25% from their damages (ii) to fund their own ATE premium from damages (iii) to fund any funder of their claim from their damages (iv) to pay any irrecoverable costs from their damages.

The report proposes to compensate the Claimant for this significant erosion of their entitlement by somehow increasing awards of general damages by 10%. Assuming this were achievable, which is highly doubtful, it is obvious that this will not be sufficient to compensate a Claimant for the proposed deductions that will have to come from their damages.

Furthermore such an increase in damages is only operable in the field of personal injury. Therefore the Claimant in respect of non personal injury claims must be significantly worse off if the Jackson recommendations were to be implemented.

It is not understood how this can be coincident with the aim of promoting access to justice at proportionate cost or why the burden of seeking to restrict costs should fall so heavily upon the claimant who is after all, the injured party.

In Temple's view, access to justice at proportionate cost can best be achieved through furtherance of more predictability; better control on costs at an earlier stage through costs management conferences; an extension of the fixed costs regime for smaller claims and much wider use of cost capping in more than simply "exceptional" cases.

## **Temple's concerns about the Jackson report**

### **General concerns**

1. The Jackson report has assumed that the claimant who has retained lawyers (by which we mean solicitors and/or counsel) under a "no win no fee" CFA and obtained ATE cover has no personal interest in the amount of costs being incurred. This, in turn, leads to a claimant behaving in an unreasonable way, particularly in respect of offers made to him by a defendant, on the fallacious understanding that the claimant has "nothing to lose".

There are two powerful restraints governing a claimant's behaviour which the Jackson report completely ignores. First, lawyers do not want to do work for which they will not be paid. Therefore it is simply not in the lawyers' interests to advise the rejection of reasonable offers. CFAs invariably

provide for lawyers to be able to revert to a conventional retainer where the claimant rejects their advice.

Secondly, ATE insurers will not support cases where appropriate offers have been made which if not bettered at trial would mean that the premiums would not be recovered. Lawyers on a no win – no fee agreement and ATE insurers who carefully manage their exposure to risk are professionals whose influence helps to reduce costs, not increase them. They are knowledgeable and financially interested gate-keepers.

It is, of course, open to claimants to pursue their claims, against the advice of their lawyers to accept any given offer. However they will have to do so on the basis of a conventional retainer without the benefit of ATE insurance. In our experience, claimants simply do not act in that way. Therefore it is wholly incorrect to indicate as the Jackson report does that CFAs and ATE promote unreasonable behaviour on the part of claimants.

2. The current costs regime set out in Part 45 CPR for fees and success fees was the product of evidenced based negotiations between those acting for claimants and defendants. Temple is concerned that, in contrast the Jackson report frequently relies on uncorroborated anecdote taken out of context apparently included to support a pre-ordained conclusion.

The principle conclusion of the Jackson Report must be that the recoverability of success fees and ATE result in disproportionately expensive litigation presumably without creating adequate access to justice for claimants or perhaps too much access to justice! However there is scant evidence to demonstrate this prejudice within the report.

Detailed scrutiny of the statistics provided generally shows this not to be the case. Statistics have been provided by one insurer only and have been considered uncritically for example, has the behaviour of the defendant insurer contributed to the allegedly excessive costs? Furthermore this is evidence from just one insurer. There has been no attempt to put these costs in the wider context of the profitability of the liability insurance market over the past 10 years.

Moreover, Temple is concerned that the Jackson report has repeatedly failed to distinguish between the experience of the now established and stable field of personal injury litigation with other areas of litigation. The better course of action would have been to build on research (such as the Fenn & Rickman report that under-pinned the Part 45 negotiations) to widen the categories of case which have fixed levels of recoverable costs; fixed success fees and more use of staged ATE premiums.

With the introduction of fixed costs and fixed success fees introduced by CPR Part 45 for most categories of personal injury litigation the true picture now is that:

- 100% success fees are only recoverable on solicitors' fees for those cases that go as far as trial;
- The vast majority of cases will attract success fees at either 12.5% or 25%;
- Competition in the market and the Courts' active encouragement of staged premiums and success fees has led to significant reductions on the levels of ATE premiums paid in the majority of cases.

### **Concern about inequality of arms**

Second to its attack on the principal of 100% compensation, the other main disadvantage of the Jackson proposals is that they would frustrate the ambition of placing parties on an equal footing.

Temple is concerned that if a claimant with a meritorious case faces the prospect nonetheless of losing both 25% of his damages plus the costs of insuring against the risk of failure, then that claimant is going to be even more cautious when it comes to considering offers to settle.

Take the following examples:

Example A: a personal injury claim where the damages for pain, suffering and loss of amenity are likely to be £15,000; damages for past care and past loss of earnings likely to be £30,000 and future losses amounting to £20,000. This gives the claim a total value of £65,000.

Under the present system the claimant's costs incurred in pursuing such a claim might amount to £45,000, including disbursements of £5,000. The success fee of 100% on the solicitor's profit costs would add a further £40,000 to the amount recoverable from the defendant. Further, an ATE premium for such a claim going as far as trial would be in the region of £3,000 – £4,000.

If Jackson's proposals are implemented then the claimant would be at risk of a liability for the £5,000 disbursements if his / her claim proves unsuccessful. This is a risk against which the claimant is presently insured. If the claimant is cautious, the unrecoverable cost of obtaining such ATE insurance would still be say £2,500. The "pot" available for payment of the success fee due to the claimant's lawyers would be 25% of the damages for PSLA and other past losses: 25% of £40,000 is £10,000. Leaving aside consideration of whether such a cap on the success fee would deter solicitors from acting on a no win – no fee basis, the "winning" claimant in this example would have his / her damages reduced by £12,500 (almost entirely extinguishing the value of the PSLA award) to cover the cost of the success fee (£10,000) and ATE premium (£2,500).

Example B: In this example we have a SME business suing for faulty equipment in a claim for damages totalling £60,000. The legal costs for taking such a claim to trial might equate to £50,000 on each side. An ATE policy providing £70,000 of cover (appropriate to take into account own disbursements and an allowance for the defendant's underestimate of its won costs) would be some £950 at the initial stage but rising to £40,000 approx. by the time of trial. The unrecoverable success fee of 25% of damages would reduce the damages recovered by £15,000. This combined with the cost of unrecoverable ATE insurance that a SME would be well advised to take out in the event of losing the claim and finding itself liable for the defendant's costs, would make the economics of the risk / benefit analysis of the proposed claim impossible to sustain.

The Jackson report's recommendation that the winning party should have to pay his lawyer's success fees out of part of his damages would immediately introduce a conflict of interest between lawyer and client in determining the proportion of damages from which the success fee could come. Common experience is that cases are usually settled on a lump sum basis. If success fees are capped at being no greater than 25% of the damages (excluding those for future care or other future losses) will the client be confident that he / she knows what part of the damages can be available for this deduction?

Further, the proposal that the cost to the majority of claimants of ending recoverability can be mitigated through a 10% increase in damages for pain, suffering and loss of amenity is naive. If the appropriate award today for PSLA is £12,000 Jackson supposes that in future defendants will offer £13,200 for the same injuries. When assessing the sufficiency of a £12,000 offer for those injuries in future, will the claimant's advisers really be able confidently to advise that the amount allowed for PSLA is £1,200 too low? More importantly, what incentive does the Jackson model contain to make it sensible to assume that defendant's insurers will increase their offers by the stipulated 10%? The answer is none.

In any event, the 10% increase in PSLA to offset the cost of ending recoverability will not be of benefit for the most seriously injured claimants who will lose up to 25% of their PSLA award and past damages to help finance the successful pursuit of their claim for "adequate compensation".

Similarly, what of the high cost but low value cases such as those where the costs of investigation may be high but the case on causation proves weak? Lawyers facing the prospect of only being able to apply their success fee to 25% of a small pot will not be rushing to represent such claimants. Moreover, the costs of an irrecoverable ATE premium taken out to protect against the risks of having to bear the costs of one's own disbursements will be a significant deterrent making it more likely that such a claimant will not even embark on the exercise. This clearly fails to facilitate access to justice.

### **Concern about ignorance of the benefits and effects of ATE**

Consideration of the benefits of ATE should not be confined to the personal injury market. It has developed as a product to support litigation in a wide category of cases, many of which do not necessarily have much pure financial value.

The advantage of the present system for recoverability is that it places the ATE insured claimant, with lawyers acting on a CFA, on a level playing field with what are, most commonly, insured defendants. No longer is it possible for insurers recklessly to pursue a “*deep-pockets defence*” as a claimant is now better able to resist the intimidation. How would a libelled claimant such as Robert Murat or a freedom of information campaigner such as Heather Brooke be able to embark on protecting their rights without being able to recover the costs of insuring against the possibility of defeat?

The Jackson’s report references to the “super claimant” intimidating the nervous defendant into making offers so as to avoid a four-fold penalty for costs is also flawed. In the first instance, one must remember that in the majority of cases claims are only brought against properly culpable defendants. No win - no fee is an efficient incentive for weeding out after investigation those cases that do not have sufficient prospects for success. Thus, it is right and proper that the culpable defendant bears its own costs. Similarly, it is right so as to ensure full compensation that the claimant’s costs are paid by the losing party who caused the harm or committed the wrong. That at least disposes of half of the feared costs penalty. The 100% success fee forming part of the balance is usually only applicable in those cases that are actually contested through to trial. Similarly, an ATE premium equivalent to the amount of a defendant’s costs is only going to be incurred in the later stages of contested litigation.

The defendant facing an insured claimant but believing he has a good defence can, under the present system, litigate knowing that if proved right his costs will be met by the ATE insurance. If that confidence in the defence proves well-founded then access to justice will have been achieved against an unreasonable claimant and fairness requires that the loser pays.

In virtually all negligence or product liability litigation the defendant is insured. The claimant or SME disadvantaged by a shoddy service or a shoddy product would be left to bear much of the cost of establishing the harm yet the defendant will often be indemnified itself from the costs of unsuccessfully defending the claim. Thus it was wrong for the Jackson report to assume that it is often only claimants who are oblivious to the costs of the litigation. How often in personal injury or professional negligence cases are insurers handicapped in their investigation of a claim by an uncooperative client who feels the claim is of no concern to them, the insurance to cover the liability already having been purchased? The usual consequence of such a situation is not an early and pragmatic admission of liability, thereby saving costs, but a policy of obstruction and evasion designed to try and distract from the weakness of the insurer’s position.

### **Concern about ignorance of ATE in practice**

Temple’s experience is that the behaviour of the NHSLA and the media does not appear to have changed as a result of feeling “blackmailed” by the recoverability of success fees and ATE premiums. Our own figures for staged premiums since 2003 show that there has been no discernible change to the stage at which compromise of the claim is reached. For Jackson to believe that defendants are actually afraid to defend good cases when there is an ATE policy does not reflect our statistics or experience. In truth defendants are more reluctant to find themselves defending cases with a meritorious defence but where the claimant has no funds or no ATE. It defies belief that a defendant who believes that they have a good case would not seek to defend, win and recover their own costs from an insured claimant. Ending recoverability of even staged premiums would permit any temptations for blackmail to be available to a defendant who can increase the financial pressures facing a claimant by delaying settlement offers until close to trial, at which time the claimant costs risks are at their highest.

The anecdotal “evidence” contained within the Jackson report bears little scrutiny. Tales of £38,000 ATE premiums for a slip / trip case worth £5,000 must be exceptional. Moreover, such a premium would be unlikely to survive a reasonableness challenge on detailed assessment when one considers the wide availability of staged policies that could have insured such a claim for premiums of under £5,000 at most.

The suggestion that these reforms would bring about a significant reduction in costs paid by the NHS and Local Authorities is unsupported by any proper cost benefit analysis. Indeed, the report is itself littered with assumptions rather than true statistics. The data from NHSLA analysed at section 9 of Chapter 2 omits the most important point of reference, namely the total value of the damages paid out in the 109 cases reviewed. The figures also contain assumptions as to the proportion paid for solicitors’ success fees. Anyway, of those 109 cases £2,571,974 was claimed for success fees and ATE and £1,711,000 was paid. He has extrapolated those additional liabilities to assume an annual figure paid of £15,600,000 for success fees and £6,643,000 for ATE premiums. In the financial year 2009 the total amount paid out for Claimant’s costs was £103,632,000 of which £22,653,000 for additional liabilities constituted 21.43%.

None of these figures suggest disproportionate costs when put in the context that in the same year the total damages recovered for Claimants amounted to £312,454,000. Further the cost to claimants’ lawyers of those cases that fail or are discontinued is not known.

Returning to consideration of ATE alone, even if one adopts the figure of £6.6m for outlay on ATE premiums by the NHSLA, this amounts to just 1.6% of the NHSLA’s annual spend (damages and combined claimant/defendant costs) A price of just 1.6% to give fair access to justice is patently reasonable. We suggest that it is a price worth paying. Particularly in the context of what the Jackson report recommends to replace it, namely, the introduction of a means test and/or one way costs shifting.

More importantly, what the report omits is the amount of costs that have been paid to the NHSLA by the ATE insurers (approx £5m), such that the net spend by the NHSLA is just £1.6m (in stark contrast to the £100m figure quoted in the Times newspaper on Friday 15<sup>th</sup> Jan 2010)

The Medical Defence Union (the “MDU”) claims that it is not unusual for them to pay ATE premiums in the region of £50,000.00. However this is contradicted by the appendix to the report which state that the average premiums are £10,000.00. Temple’s own figures show the average premium for clinical negligence cases is around £8,400.00. It is highly exceptional to recover a £50,000 ATE premium.

We suggest that proper scrutiny of the Jackson report shows that the changes proposed will not on the face of it save money in litigation costs. They will simply limit the number of cases brought by adding cost fear, risk and uncertainty to any potential claimant, thus deterring many from bringing otherwise meritorious claims. The underlying problem here is that these proposals will change the dynamics of litigation to the significant detriment of claimants.

It is also alleged in the report that it is difficult for a defendant to challenge ATE premiums as there is no competition in the ATE insurance market. Jackson’s assessment is wrong – we do win and lose business from/to competitors because of price. If a premium is regarded as too high solicitors will be reluctant to accept the quote because of the difficulty it will cause in either the settlement or cost negotiations. There are over 40 ATE insurance providers (see Litigation Funding tables), who all actively compete for business. Market pressures mean that Temple have to constantly review their premiums, one example of this is that despite House of Lords approval for the recovery of our £350 RTA premium (Callery v Gray), we have introduced a £90 initial RTA premium

Defendants / paying parties complain that they have difficulty in finding evidence in challenging the reasonableness/level of premiums. Temple has given evidence in the First Assist test cases about the unreasonableness of premiums charged and are happy to do so if asked. Given that we have already publicly been critical of some premiums, it is very surprising that we have not been approached to do so in more cases. After consulting with some of our competitors, it is apparent that they are not being asked either.

Another area regarding competition is that there is nothing to prevent any of the liability insurers from creating their own ATE products and offering them widely to the market. If they really thought that the ATE insurance market made high profits, we have no doubt that they would enter this market. It is worth noting that two major liability insurers, Brit and Allianz are both major players in the personal injury ATE markets. If this ATE was as bad as is being made out then both of those companies would not participate.

The report states that an “overwhelming majority” is against the recovery of ATE premiums. This statement is contradicted by the report itself that shows that recoverability is supported by the Law Society, Trades Unions, the Association of Personal Injury Lawyers, the Personal Injury Bar Association, the Association of Victims of Motor Accidents and the Legal Expenses Insurers Group. These organisations are better placed to provide a fair assessment of how to achieve access to justice than liability insurers and their professional advisers.

Jackson’s position on recoverability of ATE and CFA success fees is also not supported by any of the considerable number of reviews carried out on ATE or CFA’s over the last 10 years (‘equality of arms’ is a phrase that was penned by the Civil Justice Council in their reports).

### **Concern about qualified one way costs shifting**

Qualified one way cost shifting in personal Injury cases simply turns the clock back to the old Legal Aid system with all of its significant drawbacks. There will have to be some other arbitrary or complex machinery designed to select claimants who qualify for this benefit. Such machinery will add significant cost either through the need to have appropriate regulation and policing in force or through satellite litigation.

Jackson appears to assume that attempts at recovery by defendants will be few and far between. However, the low value of applications under s. 11 Access to Justice Act 1999 against legally aided claimants reflects the fact that by definition such claimants have few assets and little income. If the test of whether or not to lift the shield of qualified costs shifting is simply having regard to the “*financial resources of all the parties to the proceedings*” and their “*conduct*” then how many more applications will be made, based upon allegedly unreasonable behaviour, against claimants who have equity in their homes against which a costs order could be enforced?

If legal costs and claims are at a relatively predictable level then good behaviour is encouraged to prevent and avoid loss and injury. If the balance is tipped towards the defendant then the behavioural changes would be bad for the public.

If the suggested reforms are implemented, an individual claimant will be under immense pressure to accept an under value offer for fear of any costs awards made as a result of their (unreasonable) rejection. This will completely negate the 10% raise in damages (even if it could be achieved) and in fact will lead to liability insurers making lower offers of settlement.

Temple believes that this Government should be justly proud of providing a system where a claimant can bring the claim for free; on a level playing field and that both the claimant and the defendant have the benefit of independent expert advice.

Jackson is of the opinion that the contingency fee arrangement works well in other legal systems. However, the level of damages is much lower in this country. Temple believe that the only way a contingency fee arrangement could ever be considered fair is if the contingency fee was only paid out of monies that were paid by the Defendant in addition to the restitutionary part of the damages.

Temple also believes that a claimant should be able to receive 100% of their damages without having to pay others such as third party funders or solicitors on contingency fee agreements. Damages are awarded to put a party in a position that they would have been in had they not suffered damage. It is not an extra or additional sum and should not be available to pay for its own recovery. This is particularly applicable where the claimant is awarded compensation for damages for repairs, for example. In claims for “special damages” – compensation for financial loss in fact

suffered – the Jackson proposal means that claimants (often small businesses) will not recover anything like the full extent of the loss that they have suffered which is very likely to transfer in good cases not being pursued, which, in turn, is justice denied..

Qualified cost shifting creates uncertainty and huge new risks for the vast majority of the population. Under the current system everyone has fair access to justice regardless of means but under the new proposals only the very poor or the very rich will be able to afford justice. In addition, the very rich will benefit even more because they will not have to sign contingency fee agreements because they will pay privately whereas the vast majority of ordinary people will have no option but to sign away 25% of their damages (if they are indeed prepared to run the significant cost risk of taking legal action).

There is a risk that these reforms will return us to the “claims direct” days whereby a disproportionate amount was taken out of claimants’ damages and excessive premiums were charges by insurers in return for cover, again to be deducted from the damages.

Jackson’s proposed reforms discriminate against anyone who is of modest means. The question might fairly be asked, why should a claimant have to pay more for access to justice just because they are fortunate enough to have a job and not be on benefits? Our experience is that the old style CFA’s did not work well; that was why they were abolished.

### **Concern about inadequate understanding of the role of BTE**

Temple, who is itself a provider of BTE, does not believe that BTE can properly be the answer to the problems addressed by Lord Justice Jackson. He separates BTE into two types: -

Type 1 – The type of BTE which gets added to household policies and covers a range of disputes.

Type 2 – The type of BTE insurance which is added to car insurance and is specifically for personal injury

The distinction made by Lord Jackson is incorrect. Both these types are virtually the same thing and will not be a suitable replacement for ATE.

Jackson has a fundamentally misplaced faith in the ability of BTE insurance to fill the gap left by the effective abolition of ATE. The cover provided by BTE is largely illusory. At present BTE policies are given away for practically nothing; the providers of the insurance make their money from referral fees and other add-ons and kick backs from medico-legal fees (which seem to meet with Jackson’s approval).

As it is, the BTE Insurers struggle to make any money because their product is seriously underpriced – witness the retirement of Capita from this arena. This is partly due to the fact that almost the entire premium is diverted away from the fronting insurer to the broker who sells the insurance (the public typically pay £20-30 but less than £1 goes to the insurer).

More significantly, there are often very tight restrictions placed on a policy holder should they wish to utilise their policy. The BTE provider will often dictate which firm of solicitors and what experts to use. BTE insurers have no incentive to accept claims under their policies to support litigation because of its marginal profitability. Therefore their policies are hedged about with numerous exclusions and they will generally do their best to try and ensure that no claim is entertained under the policy. The prospects required for an insurer to consent to an action are often much higher than an action funded by a CFA/ATE simply because of the different risk reward benefits.

There is no prospect of obtaining BTE cover for defamation or other unusual types of action such as judicial review, originating applications or injunctions. Most BTE policies exclude any form of clinical negligence cover.

Regardless of the cover provided by BTE, it is often not sufficient because it covers both own costs, own disbursements and the risk of opponents’ costs and the policy provides a very low limit

say, normally £50k to £100k. Frequently an insured is left in the invidious position of going to trial knowing that their policy limit will be exhausted in paying their own costs, leaving no indemnity in the event that the case is lost. Once it has been “used up” it is impossible to obtain extra top up BTE cover (currently the only extra cover that can be provided is ATE insurance).

Jackson states that with BTE insurance the many policyholders pay for the few policyholders that actually make a claim and that ATE insurance does not do this. This is in fact incorrect as ATE insurance works in exactly the same way. There may be fewer ATE policies in numerical terms but the many pay for the few.

Out of the premium paid on a BTE policy, 95% will not go towards a claim fund but is paid away in brokerage, referral fees etc.

BTE is subject to a merits test and will not automatically pay out once a potential claim arises. If a claimant spends £10,000 investigating a claim or on expert fees, the BTE policy will not pay for this expense if it is discovered that the case does not have sufficient merits. ATE insurance would pay for this.

If referral fees are no longer permitted, the BTE providers will be looking to take a percentage amount from any damages awarded to the claimant. In this way one can see that a greater use of BTE insurance could potentially lead to conflicts of interest. Also, it will become more common for BTE providers to take over ownership of legal firms to make money to replace of referral fees.

If BTE policies are priced at “realistic” levels, i.e. a few hundred to thousands of pounds, no one will buy them. This is what market performance has demonstrated over the years.

### **Summary**

Over the last 6-7 years, various parties have worked together and achieved a working system that encourages good behaviour on both sides in that both are supported to pursue justice where the case is strong and persuaded to avoid court action where the case is dubious.

The current system does not encourage or support speculative litigation; there are considerable financial disincentives for lawyers or ATE insurers to support such claims.

The present system encourages settlement and agreement early on without disadvantaging claimant or defendant. Our objective should be to streamline this process so that it stays fair and is as economical as possible; not to make access to justice disproportionately risky and expensive for the claimant.

When the Jackson report is properly scrutinised it becomes apparent that the changes proposed will not save money in litigation costs. They will simply limit the number of cases brought by adding cost fear, risk and uncertainty to any potential claimant, thus deterring the masses from bringing claims. The underlying problem here is that these proposals will change the dynamics of litigation to the significant detriment of claimants.

The clock will be turned back to the days when access to justice is only available to the very poor and the rich which is precisely what the introduction of recoverability of success fees and ATE premiums was designed to avoid.

Temple Legal Protection Ltd  
1 March 2010

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