Jackson Reforms: agony or ecstasy?

Costs Radical changes to the funding of litigation take effect from 1 April 2013. These may lead to more choice for those using legal services and greater risks and rewards for their lawyers, writes Simon Hartley

From 1 April 2013 damages-based agreements (DBAs) or "contingency fee" agreements will be permitted in all civil disputes. DBAs are a type of "no win, no fee" arrangement – the lawyer is only paid if the case is successful and receives nothing if it is not. If the claim succeeds the lawyer receives a percentage of the claimant's damages as their fee.

This article looks at these and other rules that will come into play and some of the uncertainties which may limit the take-up of the new funding options.

DBA general principles

There is a general cap on recovery of 50% of the damages, which does not apply to appeals. It includes counsels' fees and VAT but not experts' fees or other disbursements.

Costs will still be recoverable from the losing party on the usual hourly rates-plus-disbursements basis. The claimant's lawyers have to give credit for any costs and disbursements awarded against the other party and the claimant pays the difference from its damages. A party may not recover by way of costs more than the total amount payable under the DBA. This risk may make DBAs unattractive to solicitors in low-value claims or where high costs will be incurred.

Defendants cannot use DBAs, nor can they be used where no money is recoverable.

Risks for lawyers and clients

A potential conflict of interest may arise between lawyer and client. While solicitors are not required to point clients in the direction of independent legal advice, they need to advise on all the forms of funding available and their respective advantages and disadvantages. If they do not, solicitors may face professional negligence claims and possible allegations of misconduct should the form of funding work to their clients' detriment.

It appears, under the Damages-Based Agreements Regulations 2013, that if the defendant is unable to pay the damages awarded, no costs will be recoverable under a DBA, creating a serious risk for lawyers.

Another major uncertainty is what is to happen if the client or lawyer wants to end the DBA before the case concludes, or the claimant wishes to discontinue the claim.

Uncertainties relating to DBAs may lead some to take a wait-and-see approach. DBAs may be attractive where there is almost certainly going to be a high level of damages recovery, but a DBA may not be in a client's best interests in those circumstances. Staged DBAs, with the percentage increasing as the case proceeds, may address that, although the regulations do not provide for interim payments under DBAs.

Discounted DBAs – hourly rates while the case runs, with a share of damages on success – would have been popular but are not expressly provided for and appear potentially unenforceable.

Future of CFAs

Next month the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ends the recoverability of most after-the-event insurance (ATE) premiums from a losing party. ATE protects against the risk of paying opponents' fees but at a cost seen by Jackson LJ as unfair on the losing party. Likewise, uplifted success fees under most conditional fee arrangements (CFAs) signed after 1 April 2013 will also be irrecoverable. CFAs will still be permitted but success fees will be payable by the client regardless of the costs recovery between parties. The maximum uplift for non-personal injury cases is 100% of standard rates.

CFAs have the advantage of being tried and tested and are, therefore, less likely to give rise to disputes. Discounted CFAs (no win, small fee) may prove popular. Combining arrangements may be advantageous but could prevent the recovery of some cost elements.

Settlement

The settlement rules have been amended. Under the Offers to Settle in Civil Proceedings Order 2013, a defendant who does not accept a claimant's reasonable offer and fails to beat that offer at trial will have to pay an extra 10% of damages, or an extra 10% of costs in non-damages cases. This sanction tapers for claims over £500,000 to a maximum of £75,000.

Costs budgets and management

A new proportionality test has been introduced to standard-basis costs (although not costs payable on an indemnity basis). Costs will be disallowed if they appear disproportionate, even if both necessary and reasonable. Costs are proportionate if they bear a reasonable relationship to the sums in issue, the value of any non-monetary relief, the litigation's complexity, any additional work generated by the paying party and factors such as reputation and public importance.

The changes are accompanied by a simplification of costs assessment in relation to costs under £75,000 including VAT and the introduction of costs management orders to most high-value or complex cases outside the Commercial Court. Chancery Division and Technology Court cases are excluded if the sum disputed is more than £2m.

Both parties will be required to prepare detailed costs budgets, even if the defendant is unlikely to recover costs, to be exchanged with 28 days of a defence being filed. Failure to serve a budget can limit costs to the court fee. These budgets include experts' fees to trial. Courts are to approve or adjust budgets if not agreed at the first case management conference by making cost management orders – effectively capping costs.

Parties are obliged to revise their budgets as cases develop. If they are going to be exceeded, the court needs to know in advance. Where standard costs are assessed courts will only depart from the budgets with good reason. It will be more important for experts to watch their costs and provide advance warning if original budgets will be exceeded.

Property litigation impact

While specific reforms will affect areas such as personal injury more extensively, these rapidly introduced changes will impact on property litigation. Difficulties may arise in complex lower-value cases. However, if the problems with DBAs can be resolved they may stimulate growth in the litigation market, leading to its Americanisation in England and Wales.

While the Jackson Reforms create risks for the legal profession, there are opportunities for lawyers with strong risk-management procedures and the ability to move beyond rough estimates to legal project management: efficiently identifying variables and controlling costs.

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