Legal Aid, Sentencing and Punishment of Offenders Act 2012

Bar Council briefing on the Conditional Fee Agreements Order 2013 and the Damages-based Agreement Regulations 2013

Introduction

1. The Conditional Fee Agreements Order 2013 (CFA Order) and the Damages-based Agreements Regulations 2013 (DBA Regulations) have previously been debated in the Lords and are now subject to a Motion to Approve debate in the Commons on 11 March 2013. Before that debate the Bar Council wishes to repeat the concerns about both the CFA Order and the DBA Regulations raised before the Lords' debate.

2. The current drafting of the CFA Order and DBA Regulations is not fit for purpose. As presently drafted, they will deny access to justice, burden court time with satellite litigation. That will lead to limited use of Damages-based Agreements (DBAs). It is to be noted that that such denial and burden are not going to be limited to the Bar Council. The overall consequences when put together with the concerns voiced recently by Lord Neuberger, the President of the Supreme Court, threaten the very working of the judicial system.

3. **Given that there is insufficient time for the Government to withdraw and re-table the CFA Order and DBA Regulations, the Bar Council calls on the Government to table an Amendment Order to come into effect as close to the 1 April 2013 as possible.** While we appreciate that statutory instruments cannot be amended at a Motion to Approve debate, this briefing highlights the problems with the current drafting of the CFA Order and DBA Regulations and should inform any Amendment Order.

4. The manner and speed with which regulations relating to Lord Justice Jackson's wide package of recommendations are being made are wholly unsatisfactory. Issues of public policy require and deserve proper and detailed attention. Further, legislation and rules relating to changes as far reaching as the Jackson reforms should be clear months, not weeks, in advance of implementation. This is so that bodies such as the Bar Council, practitioners, barristers' chambers and software suppliers are not left with uncertainty and can undertake the necessary planning and preparation for implementation.

Access to justice

5. In terms of the abolition of the limit on the cap, in larger and more complex cases (for example serious brain injuries resulting from clinical negligence), the limit to past losses will mean that the risks of taking on such litigation (which is complex, difficult to predict, time

consuming and involves significant disbursement) will not be properly compensated by the level of the CFA. Practitioners will simply not be able to take on such cases; and this will mean that Claimants will not get to Court at all. So the perverse result of the limit is that instead of protecting the damages recoverable by the worst hit Claimants, the reform means that those claimants will get no representation and thus no damages at all. It was for this reason that Lord Justice Jackson amended his view, in his speech in February 2012 and said that the 25% should be of all damages (as it in fact had been prior to 2000) in appropriate cases. [1]

6. In the same way, the cap for contingency fees in DBAs should be exclusive of VAT and the percentage cap should apply to all damages rather than inclusive of VAT and excluding future pecuniary loss as set out in the DBA Regulations.

Potential satellite litigation

7. There is an ambiguity in the CFA Order as to whether the success fee payable to counsel can be recovered between the parties where a solicitor enters a CFA with their client before 1 April 2013, but counsel (or, if counsel is already assigned, additional or substitute counsel) enters into a CFA with the client's solicitor after 1 April 2013. This situation will result in the seemingly unintended situation where the client will be able to recover the success fees for their solicitor but not the success fee for counsel.

8. The Bar Council's view is that where a solicitor has entered into a CFA prior to 1 April 2013 which falls within the scope of Article 6 of the CFA Order and section 44(6) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and counsel enters into a CFA for the same case after 1 April 2013, counsel's CFA will be dealt with under the current pre-LASPO regime, notwithstanding that counsel's CFA is entered into after 1 April 2013.

9. It is possible that the provisions could be interpreted in a different way and that if Counsel's CFA is not entered into before 1 April 2013, it will fall under the new LASPO regime with the consequent effect that the success fee would not be recoverable. This would lead to a number of perverse and unfair consequences for clients and legal representatives. Removing this ambiguity will prevent unnecessary satellite litigation and ensure court resources are not used to remedy issues that could have been more efficiently resolved by Parliament.

10. Another cradle of satellite litigation is the way in which the DBA Regulations seek to protect the client from having to pay more than the damages-based fee (reg 4); this is addressed below.

[1] "The Personal Injuries Bar Association (PIBA) and the Bar Council have recently sent to me forceful submissions that the 25% cap should apply to ALL damages, as it did before April 2000. I can see the sense of allowing that dispensation in appropriate cases, provided that the success fee is only payable by the client, as it was pre-April 2000."

Hybrid agreements and termination

11. The DBA Regulations do not allow for hybrid agreements which are agreements where solicitors are able to agree that they should receive some costs if the defined "win" does not occur rather than none at all. In CFAs the law permits hybrids (or discounted CFAs) so that lawyers can discount their rates in lost cases but charge normal rates plus a success fee if they win. As currently drafted DBAs do not allow similar flexibility. The current policy of disallowing hybrid agreements for DBAs goes against Jackson LJs original recommendations and will mean that DBAs will be seldom used by commercial firms.

12. Moreover, a solicitor will be in breach of the DBA Regulations if they charge their client something other than the straight payment, but is required to certify for *inter partes* costs claims purposes that the client is in fact liable to him for costs calculated on an hourly rate basis (but capped at the payment level). Rather than simply providing that credit must be given for any costs recovered from an opponent, Regulation 4 creates a convoluted regime that, in essence, means that monies can be recovered from an opponent only if and to the extent that the indemnity principle is set aside. In view of the fact that the CPR appears actually to *strengthen* the indemnity principle, it is difficult to see how costs can be recovered. Moreover, that same wording makes it almost impossible to recover costs relating to interim hearings.

Drafting error

13. The CFA Order, Article 1(2) gives a definition of the Courts and Legal Services Act 1990 as "the 1990 Act" but the remainder of the Order simply refers to it as "the Act". Clearly, the courts can construe legislation that has already taken effect but there remains an opportunity to correct this (and other deficiencies) via an amendment order and this opportunity should be taken.

For further information please contact
Mark Stratton, Policy and Remuneration Officer
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Direct line: 020 7600 1405
Email: mstratton@barcouncil.org.uk