

## CPR and Litigation Funding post-April 2013

### Key Statutes and Authorities

- Conditional Fee Agreements Order 2013 (CFA Order 2013);
- Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO);
- Damages-Based Agreements Regulations 2013 (DBA Regs 2013);
- s. 58AA(3) Court & Legal Services Act 1990;
- CPR 3 & PD 3E;
- CPR 44-48 & PD 44-48

### Introduction

The Jackson Report recommendations were implemented on 1<sup>st</sup> April 2013.

This Note covers the main changes and their potential impact.

### FUNDING CHANGES

#### Conditional Fee Agreements (CFAs)

- If a CFA dates from 01/04/2013, success fees will generally not be recoverable from the losing side (*s. 44 LASPO*).
- Success fees in new CFAs are only claimable from the client's damages, subject to limits
- This could include situations where the Solicitors are instructed on a pre-existing CFA, but Counsel is instructed under a new CFA
- CFAs can become DBAs (see below)

#### When can success fees still be claimed from the other side? (CFA Order 2013, art. 6)

- Diffuse mesothelioma;
- Breach of privacy/defamation;
- Insolvency proceedings

#### What is the success fee limited to? (art. 3-5)

- First instance PI claims: 25% of damages, excluding future losses & money due to the DWP;
- Other cases & PI appeals: 100% of damages

#### Pre-existing Collective CFAs (art. 6(1)(b))

Old rules will apply if work is done before the changes come into force.

#### Damages-Based Agreements (DBAs)

DBAs are defined as "An agreement... which provides that the recipient is to make payment... if the recipient obtains a specified financial benefit... and the amount of that payment is to be determined by reference to the amount of the financial benefit obtained" (*s. 58AA(3) Court & Legal Services Act 1990*)

This could cover CFAs that provide for a higher success fee/hourly rate if the damages exceed a certain figure.

#### General requirements (DBA Regs 2013)

Any DBA must be in writing and state (*reg. 3*):

- The work that it relates to;
- When costs are payable; and
- How the level of the charge has been calculated

Effectively these are the same as for a valid CFA.

#### Limits on their use

Costs awards cannot exceed the sums due under the DBA itself (*CPR 44.18(2)*).

A DBA cannot be used when:

- It would be a "hybrid DBA", e.g. part-DBA/part-standard retainer;

- *s. 57 Solicitors Act 1974* (non-contentious business agreements) applies (*reg. 1(4)*)

## Employment cases

Any pre-existing DBA is still governed by the *DBA Regulations 2010* (*reg. 2*).

The 2013 Regulations state that:

- Client must be told of their rights to approach ACAS; of other potential funding methods; how much costs are likely to be; and anything else they request (*reg. 5*)
- Amendments to cover further claims must be in writing and signed by both the client and solicitor (*reg. 6*)
- DBA charge limited to 35% of damages (including VAT, but excluding Counsel's fees and disbursements) (*reg. 7*)

These copy the requirements of the 2010 regulations.

An employment DBA can be terminated (*reg. 8*) by:

- A client if it is more than 7 days before the Tribunal hearing;
- The Solicitor if "the client has behaved or is behaving unreasonably"

Effectively, a client is more restricted, and a solicitor is less restricted, than under any other type of retainer.

If the DBA is terminated, the solicitor can charge for the work done.

## Non-employment cases (*reg. 4*)

At first instance, the DBA charge is subject to a limit (including VAT, but excluding any CPR 45 fixed costs and disbursements):

- PI cases: 25% of damages:

- Non-PI cases: 50% of damages, including Counsel's fees

## Possible issues

- The lack of "hybrid DBAs" goes against the recommendations of the DBA working party;
- Possibly higher-value and/or riskier claims being made;
- Not available to Defendants, given the definition of a DBA, unless counterclaiming
- Regulations are unclear over whether disbursements can be claimed

## ATE insurance

ATE premiums taken out from 01/04/2013 are generally irrecoverable from the other side, unless it is incurred to cover experts' fees in a clinical negligence case (*s. 46 LASPO*).

## OTHER CHANGES

### Costs Budgets (*CPR 3, Section II*)

This is just a brief overview of issues relating to Costs Budgets. For full details, Please see our "**ESTIMATES OF COSTS AND COSTS BUDGETS**" Guidance Note.

Budgets apply to most Multi-Track proceedings issued from 1<sup>st</sup> April 2013, and to all claims from 22<sup>nd</sup> April 2014, unless valued at over £10 million (*CPR 3.12(1)*).

They are "an estimate of the reasonable and proportionate costs (including disbursements) which a party intends to incur in the proceedings". VAT and additional liabilities are excluded.

- If a budget isn't filed (unless a party is a Litigant-in-Person) they are treated as only budgeting for Court fees (*CPR 3.14*);

- On the Standard Basis, the Court will “have regard” to the last approved budget, and won’t allow extra costs without “good reason” (CPR 3.18)

Under *Practice Direction 3E, para 7*:

- Up to £1,000 or 1% of the Budget can be claimed for preparing it. Other costs management costs can’t exceed 2%;
- Court can only comment on costs pre-dating the Budget;
- Budgets can be revised if justified by “significant developments”;
- Interim application costs are “additional” to the budget, if “reasonably” not included;
- If the Budget is under £25,000 only page 1 needs to be completed

If the Court doesn’t make an Order under *PD 3E, CPR 44 PD 3* applies, effectively replicating the rules that applied to costs estimates under the old *Costs Practice Direction*.

### Extra awards for Claimants (CPR 36.17(4)(d))

If the Claimant at least matches their offer at trial, the damages will be uplifted:

- Awarded up to £500,000: 10% uplift
- Up to £1 million: 10% uplift up to £500,000 + 5% uplift on remainder

There is a maximum uplift is £75,000.00.

The award is in addition to any potential award of Indemnity Basis costs and enhanced interest.

### Qualified One-Way Costs-Shifting (CPR 44, Section II)

In PI or fatal accident claims, losing Claimants will generally not be liable for the Defendant’s costs, if their CFA dates from 01/04/2013.

Defendant’s costs orders can be enforced without the Court’s permission if the:

- Costs don’t exceed their liability to the Claimant (CPR 44.14(1)); or
- Claim was struck-out because of misconduct, had no reasonable grounds, or was abuse of process (CPR 44.15)

The Defendant needs the Court’s permission to enforce a costs order if a claim is found to be “fundamentally dishonest” (CPR 44.16).

### Provisional Assessment (CPR 47.15)

This applies to Detailed Assessment requests made since 01/04/2013 for costs up to £75,000:

- Assessment costs are limited to £1,500.00 + VAT + Court fees
- Parties have 21 days to request an oral hearing;
- Party requesting an oral hearing is liable for the costs, unless they beat the provisional figure by 20%

At any point the Court can decide that Provisional Assessment should not apply. If so, the case will carry on as a Detailed Assessment (CPR 47.15(6)).

### Proportionate costs (CPR 44.3(5))

Costs will be proportionate “if they bear a reasonable relationship” to:

- Sums in issue;
- Value of any non-monetary relief;
- Complexity of the claim;
- Additional work caused by the paying party’s conduct; and
- Other factors, e.g. reputation or public importance

This does not apply to work done before 01/04/2013, or at all if the case was issued before 01/04/2013. In these situations *Lownds v Home Office* [2002] EWCA Civ 365 and old-CPR 44.4(2)(a) still apply (CPR 44.3(7)).

The Court also has the power to:

- Reduce reasonably incurred costs if they are disproportionate (*CPR 44.3(2)(a)*);
- Limit appeal costs if they are limited at first instance (*CPR 52.9A*)

## Small Claims Track (*CPR 27*)

The limit is increased to £10,000 in non-PI or housing disrepair (*CPR 27.1*) and in Intellectual Property (*CPR 63.27*) claims.

## Costs in the Patent County Court (*CPR 45, Section IV*)

The individual costs-limits on work done have increased.

However, the overall totals for the costs of liability and damages disputes remain at £50,000.00 and £25,000.00 respectively.

## Claims for costs by HMRC (*CPR 45, Section V*)

A fixed scale applies where HMRC can claim their costs in the County Court.

## Claims under the Aarhus Convention (*CPR 45, Section VI*)

This concerns Judicial Review applications in relation to environmental policy.

It applies unless the:

- Claim Form doesn't mention the Convention;
- Convention doesn't actually apply; or
- Claimant opts-out

A party's costs liability is limited to:

- Individual Claimant: £5,000;
- Other Claimants: £10,000;
- Defendants: £35,000

If the Defendant denies that it applies and the Court rules it:

- **Does apply**, the Claimant's costs of that hearing will "normally" be assessed on the Indemnity Basis;
- **Does not apply**, there is no order as to costs for that hearing (*CPR 45.44(3)*).

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### Disclaimer:

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