Are DBAs on the Horizon for Good This Time?

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Cost is one of the reasons that many are shut out from access to the English Courts. The absolute cost is relative: from the moment an individual or business cannot afford the cost of fighting their corner, justice is not done. Over time, many attempts have been made to change the court rules on costs to remedy this issue, none being successful.

Jackson

In the last attempt, Lord Justice Jackson was commissioned to undertake a fundamental review of civil litigation costs and published his final report in January 2010. In it he recommended the abolition of the recoverability of Conditional Fee Agreement (CFA) Uplifts and After the Event Insurance (ATE) premiums from Defendants. These arrangements allowed strong claims to be brought as the claimants didn't pay and weren't exposed to risk on their own costs, adverse costs or the insurance premium - the Triple Lock - when they won the case. Recognising that he was recommending the removal of a powerful tool for access to justice Jackson also recommended, in bold terms, that solicitors should be entitled to enter into contingency fee arrangements with their clients - the so called 'no win no fee'.

Post-Jackson

Unfortunately, the implementation of the Jackson report - largely through the LAPSO Act of 2013 - abolished the recoverability of CFA uplifts and ATE Premium. Rather than introducing straight forward contingency arrangements, it introduced a complex and uncertain Damages Based Agreement (DBA) regime. The two main issues with DBAs are: (a) the "credit" that needs to be given for recovered costs; and (b) the confusion about whether "hybrid" DBAs can be used - that is allowing the solicitor to mitigate its risk by being part paid as the case progresses.

DBA

An official report recognised that DBAs are "rarely used": solicitors acting on risk are still using CFAs. In the post- Jackson world, the CFA uplift and the ATE Premium has to be recovered from the damages award. The alarming result is that immediately a whole raft of good claims become financially unsustainable, firmly shutting the court doors for claimants.

A prime example being the dramatic lack of claims that might have been brought against banks arising from their many misdemeanours during the financial crisis. The expected tsunami of litigation never came - not because there were not many good claims, but because they simply couldn't be practically financed and run. It is not unreasonable to conclude that access to justice has been seriously compromised within the English Court.

Light at the end of the tunnel

At long last an attempt is on hand to try and resolve this problem. Under the hand of Professor Rachael Mulheron and Nick Bacon QC a new draft set of DBA Rules have been published which remedy the issues of credit for costs and allow Hybrid DBAs.

> *"If the Ministry of Justice can be persuaded to adopt these rules, I firmly believe, that once again it will be possible to bring more meritorious claims before the courts – even for claimants without deep pockets. With Brexit, general elections and trade deals to negotiate, it is key that the government does not lose sight of the domestic agenda. It is our duty as lawyers to make sure we do everything within our power to make that happen."*

We, at Hausfeld, are committed to assist in gathering evidence, coordinating with other lawyers and offering feedback to those driving - and welcoming input on - the review process into the draft DBA regulations.

Access to Justice - or at least some measure of it - will be restored.
