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03 Jackson reforms further details revealed

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In January 2013 three draft Statutory Instruments (SIs) were laid before Parliament which implement key aspects of the Jackson reforms to civil litigation.
In particular, these SIs outline the new arrangements which are to govern Conditional Fee Agreements (CFAs) and Damages Based Agreements (DBAs) entered into on or after 1 April 2013 and amend the rules relating to offers to settle.

This note summarises the impact of the draft SIs on commercial litigation in England and Wales. For a general overview of the proposed reforms please see our recent bulletin "Dispute funding in England from 2013 – the implications of the Jackson reforms".

The Conditional Fee Agreements Order 2013 ("the Order")

An important objective of the Jackson reforms is to limit what Lord Justice Jackson considers to be the spiralling costs of civil litigation brought about in part by the rise of CFAs and After the Event insurance (ATE). As a result the Order replicates the provisions of the previous legislation but additionally restricts the recovery between the parties of success fees for CFAs entered into on or after 1 April 2013. Similarly, the successful party will not be awarded the premium of any ATE policy taken out on or after 1 April 2013.

The reforms are not retroactive however, and so success fees under CFAs entered into before 1 April will still be recoverable even if proceedings are issued after this date. For collective CFAs (CFAs used in collective redress actions – or 'class actions' as they are more commonly known in the USA), litigation services must have been provided by 31 March 2013 for the old regime to apply.

CFAs in insolvency cases are exempted from the application of the new regime for the time being.

The Damages-Based Agreements Regulations 2013 ("the Regulations")

What is to replace CFAs? The answer is DBAs, more commonly referred to as contingency agreements. Under a DBA a lawyer agrees to charge a percentage of the damages that the client is awarded or recovers. This approach has been common in America for some time. It is not wholly new to this jurisdiction though – lawyers have been able to use them in employment matters for a number of years now.

The Regulations thus implement a significant development in the way that civil litigation may be funded in England & Wales moving forward.

In commercial litigation at first instance (other than in employment matters), the maximum payment that a lawyer may take as a percentage of the damages recovered (including VAT) is 50% (other thresholds apply in personal injury and employment litigation). This threshold does not apply to appeals given the additional risks for a lawyer representing clients in such proceedings.

The Regulations do not appear to provide for 'partial' or 'hybrid' DBAs (i.e. where the litigation is partially funded by the traditional method, usually by the application of a lower hourly rate, and partially by reference to a percentage of damages). This omission has surprised some commentators. It remains to be seen whether the courts will interpret the omission as a ban on such funding arrangements.

Offers to Settle

In essence The Offers to Settle in Civil Proceedings Order 2013 introduces a further sanction for a defendant who does not accept a claimant's offer to settle and then fails to beat this. Such measures exist to encourage litigants to settle their dispute out of court given the significant costs at stake.

In addition to the current sanctions, the new regime introduces an additional award worth 10% of the damages awarded. Where the claim is non-monetary in nature, the sanction equates to 10% of the costs awarded.

Where the value is greater than £500,000, the award will be 10% of the first £500,000 and 5% of any figure in excess of this up to a maximum limit of £75,000. These provisions will apply to any offer made on or after 1 April 2013 and place an even greater incentive on defendants to accept an offer to settle which appears reasonable.

Comment

There has been a rising chorus of criticism attacking the late disclosure of details surrounding much of the Jackson reforms. Commentators have warned of chaos, increased costs to clients and 'satellite' litigation given the delay in publishing the draft SIs. Despite this pressure, the government appears intent on pressing ahead with the planned implementation date of 1 April 2013.

Although presented as a complete package by Lord Justice Jackson, there are a number of inherent illogicalities in the implementation of the reforms. For example, the decision to place a threshold for damages in DBAs at first instance, but not continuing that threshold on appeal will likely generate perverse situations. A claimant who had been successful on 80% of his case may suffer a net loss if he successfully appealed the 20% reduction in his claim if the appeal entitled his lawyer to increase the percentage of his recovery from damages. More perversely, a successful claimant may see his damages eaten up if his opponent appeals.

In February 2013, the government finally published The Civil Procedure (Amendment) Rules 2013 ("the 2013 Rules") which introduce a number of new Civil Procedural Rules, many of which relate to reforms by Lord Justice Jackson. The details of the 2013 rules will form the basis of our next article. Although the 2013 rules reveal an additional degree of detail it should be noted that further information is still awaited. As such, with only a matter of weeks until the all-important date of 1 April 2013, a series of significant questions regarding the practical detail and implementation of the reforms remain unanswered.

Time will tell whether the critics of the reforms are proved right. What is not in issue is that the reforms will lead to significant 'satellite' litigation. For the prudent potential litigant, this is best avoided.

If you require advice on any of the matters raised in this paper, please get in touch with any of our lawyers listed below or your usual Shepherd and Wedderburn contact.

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