CHANCERY BAR

THE CHANGES TO THE COSTS REGIME WHICH TAKE EFFECT ON 1ST APRIL 2013: A NOTE FOR CHANCERY BARRISTERS

Introduction

1. As from 1st April 2013, various significant reforms to the law and rules relating to civil costs will come into effect. The changes are intended to give effect to many of the recommendations set out in Sir Rupert Jackson's Review of Civil Litigation Costs 2010.

2. This note is intended to give an overview of these changes to the extent that they might impact on members of the Chancery Bar Association. It is important however to note that this is not intended to be an exhaustive or comprehensive guide.

Conditional Fee Agreements: Success Fees and After the Event Insurance Premiums no longer recoverable.

3. Section 44 of the Legal Aid Sentencing and Punishment of Offenders Act ("LASPO") makes various amendments to section 58 and 58A of the Courts and Legal Services Act 1990 (the provisions which legalise Conditional Fee Agreements or "CFAs"). The requirements for validity in respect of CFAs (save for those relating to personal injury cases) remain the same as does the maximum recoverable success fee. A CFA: must be in writing; must not relate to proceedings which cannot be the subject of a CFA (basically crime and family law cases); if it provides for a success fee, this must

be stated as a percentage; must not provide for a success fee over the maximum allowable which is 100%. Any failure to comply with these requirements will render the CFA void.

4. The new section 58A (6) provides however that a costs order made in proceedings may not require payment by the other party of any part of the success fee. This alters the present position.

5. There are new additional requirements and a new lower maximum success fee for CFAs relating to personal injury cases (section 58 (4A) and (4B) and Articles 5 to 8 of The Conditional Fee Agreements Order 2013).

6. Save for the exceptional cases noted below, by section 44(6) of LASPO this new regime applies to all types of CFA which are entered into on or after 1st April 2013.

7. However (and despite the additional definition of "success fee" added by the new section 58(2)(c)) given the explanation of the meaning of section 58(2)(b) in GLOUCESTER V EVANS [2008] 1 WLR 1883, it would seem that one will still be able to recover any increase payable under a discounted CFA which provides for a lesser fee or hourly rate to be payable in the event of failure.

8. Section 46 of LASPO introduces a new section 58C of the 1990 Act which prevents recovery of any premium for an after the event insurance policy (defined as a "costs insurance policy"-a "policy insuring against the risk of the party incurring a liability in those proceedings"). This again reverses the present position.

9. There are a number of important exceptions to these amendments. By Article 4 of The Legal Aid Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013 sections 44 and 46 (as explained above) are **not** brought into effect in relation to CFAs in the following types of cases:

    (i) proceedings relating to a claim for damages in respect of diffuse mesothelioma;

    (ii) publication and privacy proceedings;

    (iii) proceedings in England and Wales brought by a person acting in the capacity of—

        i. a liquidator of a company which is being wound up in England and Wales or Scotland under Parts IV or V of the Insolvency Act 1986;

        ii. a trustee of a bankrupt's estate under Part IX of the 1986 Act;

    (iv) proceedings brought by a person acting in the capacity of an administrator appointed pursuant to the provisions of Part II of the 1986 Act;

(v) proceedings in England and Wales brought by a company which is being wound up in England and Wales or Scotland under Parts IV or V of the 1986 Act; or

(vi) proceedings brought by a company which has entered administration under Part II of the 1986 Act

Thus success fees and ATE insurance premiums will continue to be recoverable in these types of proceedings. The exception in relation to certain types of insolvency related cases appears to be largely for the benefit of HMRC, one of the largest creditors in insolvencies. The current plan is that these exemptions will go, and the new regime will apply to these cases, as of 1st April 2015.

Damages-Based Agreements

10. Section 45 of LASPO amends the current section 58AA of the 1990 Act and effectively makes lawful in most civil litigation US style contingency fee agreements (now to be known in polite society as "Damages-Based Agreements" or DBAs). These have been lawful in employment cases since 2010 and since before that date for solicitors acting in Tribunals.

11. DBAs are to be lawful for all proceedings in which a CFA is lawful.

12. A DBA is defined in section 58AA(3) as:

"an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that—

(i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and

(ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained"

"Payment" is defined as including:

"a transfer of assets and any other transfer of money's worth (and the reference…to a payment above a prescribed amount, or above an amount calculated in a prescribed manner, is to be construed accordingly"

Thus henceforth a solicitor or barrister can provide that he or she will be paid: only if the claim succeeds; by a percentage of the sum recovered.

13. In order to be lawful a DBA must comply with various conditions:

(i) It must be in writing;

(ii) It must not relate to proceedings in respect of which a CFA would not be lawful;

(iii) It must not provide for payment above a prescribed amount or above an amount calculated in a prescribed manner;

(iv) It must comply with requirements set out in regulations;

(v) The person providing the services (i.e. the lawyer) must himself comply with requirements set out in the regulations.

14. The relevant regulations are The Damages-Based Agreements Regulations 2013. These are not exactly a triumph of the draftsman's art! They basically identify and provide different provisions for three different types of DBA (or rather for DBAs in relation to three different types of proceedings): personal injury cases; employment matters; all other civil claims in which DBAs are permitted. "Employment matter" is defined as a matter that is, or could be, the subject of proceedings before an Employment Tribunal.

15. By regulation 3 all DBAs must specify:

    (i) The claim or proceedings or parts of them to which it relates; and

    (ii) The circumstances in which the legal representatives fees will become payable; and

    (iii) The reason for setting the amount of the payment at the level agreed.

16. By regulation 4, all DBAs, save for those in employment matters, must not require the client to pay more than the difference between the agreed payment and the amount of costs (including disbursements and counsel's fees) recovered from the other side.

17. The regulations stipulate three different maximum recoverable payments for DBAs as follows:

    (i) In personal injury cases, the maximum is 25% of certain damages;

(ii) In employment matters the maximum is 35% of the sums ultimately recovered (which figure excludes any counsels' fees).

(iii) In all other cases the maximum is 50% "including VAT…of the sums ultimately recovered by the client". This figure includes "any disbursements incurred by the representative in respect of counsel's fees".

The 25% and 50% limits for personal injury and other non-employment matters only apply at to cases at first instance.

18. Regulations 5 to 8 provide further requirements in relation to DBAs in relation to employment matters.

19. Given the wording of regulation 4, it is thought that a "discounted DBA" (that is one providing for payment of some fees win or lose with a percentage uplift in the event of success) is not lawful, although the position is far from clear.

20. By the new CPR Part 44.18, where costs are assessed in favour of a party whose claim was funded by a DBA, they are assessed pursuant to CPR Part 44.3, that is ignoring the DBA and as if that party had a "normal" retainer. It is difficult to see how a lawyer who has agreed at the outset to be paid by way of a percentage of sums recovered could (or should) justify his fees by reference to hours spent and an

hourly rate. It is also difficult to see how a litigant who is DBA funded is to comply with the new costs-budgeting regime (see below).

21. A paying party will not have to pay more than the lower of: the costs assessed pursuant to CPR Part 44.18; the payment agreed under the DBA.

New model CFA and DBA

22. The Chancery Bar Association hopes to publish a new model CFA and a model DBA for use by its members before 1st April 2013. These will be accessible via a link on the Association's website.

Changes to CPR Part 36

23. Pursuant to section 55 of LASPO and The Offers to Settle in Civil Proceedings Order 2013, an amendment will be made to CPR Part 36. A new Part 36.14(3) (d) will be added. This provides for an extra sanction against a losing defendant (including a defendant to a counterclaim) where judgment against him is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer. In addition to facing indemnity costs and interest on damages and costs at up to 10% above base rate, he will now have to pay an "additional amount" not exceeding £75,000.

24. The "additional amount" is calculated as follows:

(i) In a claim which is or includes a money claim, it is 10% of the amount awarded up to £500,000 and 5% of any amount between £500,000 and £1 million.

(ii) In a claim where only non-monetary relief is claimed, it will be 10% of the sums awarded by way of costs up to £500,000 and 5% of any sum awarded in costs between £500,000 and £1 million.

25. These provisions will apply to any Part 36 offer made on or after 1st April 2013 (see The Civil procedure (Amendment) Rules 2013 regulation 22 (7)).

Costs Budgeting

26. New provisions will be added in CPR Part 3.13 to 3.18 to provide for "costs management". These provisions are to apply to all multi-track cases commenced in a county court, Queens Bench Division and the Chancery Division on or after 1st April 2013. They do not apply automatically to cases in the Admiralty or Commercial Courts. Nor do they apply automatically to cases in the Chancery Division or TCC where, at the date of the first case management conference, the sums in dispute in the proceedings exceed £2,000,000, excluding interest and costs. There is a new Practice Direction 3E.

27. Essentially these provisions provide that each legally represented party must file and exchange costs budgets (in a prescribed form) at an early stage. These must be

dated, verified by a statement of truth and signed by a senior legal representative of that party. The budget must set out the costs which the party envisages it will spend on the litigation.

28. This will allow the court to make a "costs management order" pursuant to the new CPR Part 3.15 which order will control the amount of costs which the party can recover if it is successful. There is provision for amendment to previously filed or agreed budgets.

29. A "Budget" is defined in the Glossary as: "An estimate of the reasonable and proportionate costs (including disbursements) which a party intends to incur in the proceedings". By CPR 3.13 each represented party must file and exchange a budget by the date specified in the notice of proposed allocation served by the court under the new CPR Part 26.3(1) or, if no date is otherwise specified, seven days before the first CMC.

30. The "teeth" in the measure are as follows:

    (i) A party who fails to file and exchange a costs budget will be deemed to have filed one limited to the amount of court fees only (Part 3.14).

    (ii) When assessing costs on the standard basis, the court will "have regard to the receiving party's last approved or agreed budget" and

will "not depart from such…budget unless satisfied that there is good reason to do so" (Part 3.18).

31. There is already Court of Appeal authority on what is "good reason" for departing from the budget-see HENRY V NEWS GROUP [2013] EWCA Civ 19.

32. Further section 3.2 of the Costs Practice Direction provides that if there is a difference of 20% or more between the costs claimed by a receiving party on detailed assessment and the costs shown in a budget filed by that party, the receiving party must provide a statement of the reasons for the difference with his bill of costs.

33. Given that any budget must include the level of disbursements, including counsels fees, it is envisaged that barristers and their clerks will with increasing frequency be asked to provide accurate figures for brief fees, refreshers, conferences and opinions in advance for inclusion in the budget exchanged with the other side and revealed to the court.

Costs capping orders

34. New provisions will be added in CPR Part 3.19 to 3.21 which will formally enshrine the power (first "discovered" and explained by the Court of Appeal in KING V TELEGRAPH [2005] 1 WLR 2282) to make orders capping a party's recoverable costs

in advance. There will be a new Practice Direction 3F, paragraph 1.1 of which states that the court will make a costs capping order "only in exceptional circumstances".

A new proportionality test

35. CPR Part 44.3(2) and (5) will be amended to enshrine a new test for the assessment on the standard basis of recoverable costs.

36. In an assessment on the standard basis, in order to be recoverable, costs must now be not only reasonably incurred and reasonable in amount but also "proportionate to the matters in issue". As the new rule makes clear, costs which are reasonable in amount and reasonably incurred may nevertheless be disallowed if they are or were disproportionate.

37. In order to be "proportionate" the costs incurred must bear a reasonable relationship to: the sums in issue in the proceedings; the value of any non-monetary relief; the complexity of the litigation; any additional work generated by the conduct of the paying party; any wider factors, such as reputation or public importance.

38. These new provisions apply to proceedings commenced on or after 1st April 2013.

DAVID HOLLAND QC
LANDMARK CHAMBERS
8TH MARCH 2013