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Sea Change in the English Courts

Reforms to Litigation Funding in the Wake of the Jackson Report

By Stuart Adair

In late 2008, Lord Justice Jackson, a judge of the English Court of Appeal, was asked to carry out a review of civil litigation costs in England and Wales. His terms of reference were to review the rules and principles governing the cost of civil litigation and to make recommendations that would promote access to justice at proportionate cost. In December 2009, he published his final report (the "Jackson Report") and, on April 1, 2013, reforms based on that report came into force. This article reviews the various options now available to potential litigants to fund commercial proceedings in the courts of England and Wales and certain of the new procedures being introduced to control the costs of those proceedings.

It was not until 1990 that conditional or contingent fee agreements were finally permitted by the Courts and Legal Services Act 1990, although the statutory instrument required to bring that provision into force was not enacted until 1995.

The conditional or contingent fee caused much controversy in England in the 19th century. It was widely regarded as anathema for lawyers to have a financial stake in the outcome of litigation and such arrangements were held to offend the common law doctrines of champerty and maintenance. It was not until 1990 that conditional fee agreements were finally permitted by the Courts and Legal Services Act 1990, although the statutory instrument required to bring that provision into force was not enacted until 1995. Since then, the legislature has been concerned with widening and fine-tuning the funding options available to litigants as a means of coping with the increasingly high costs of litigation and the reduced availability of legal aid. The reforms introduced in the wake of the Jackson Report continue this process.

Although Conditional Fee Agreements ("CFAs") are commonly referred to as "no win no fee" agreements, they are, in fact, a funding arrangement under which legal representatives may receive either no fee at all or a reduced fee if they lose a case, but can charge an uplift (known as a "success fee") if they win. The success fee may be up to 100% of the legal representatives' basic fee and this figure remains unaltered by the reforms. CFAs providing that legal representatives will receive only a reduced fee in the absence of success are often referred to as "part CFAs." Prior to April 1, 2013, the success fee payable under a CFA was recoverable from the losing party in addition to the ordinary legal costs of the winning party. However, Lord Justice Jackson concluded that this imposed too great a burden on the defendant and that success fees paid under CFAs concluded after April 1, 2013 will no longer be recoverable.

Prior to April 1, 2013, neither solicitors nor barristers were permitted to charge fees which were (a) payable only if their clients wins and (b) calculated as a percentage of the sum recovered in the litigation. Lord Justice Jackson's review looked carefully at the use of contingency fees in a number of foreign jurisdictions, including, in particular, the United States and Ontario, Canada. The Jackson Report concluded that, subject to safeguards imposed by regulations, solicitors and barristers should be permitted to enter into contingency fee agreements based on, what he called, the "Ontario model."

The funding of litigation by third parties who have no interest in the dispute has traditionally been characterised in England as maintenance or champerty, and such funding arrangements have been held to be unlawful. However, in recent years there has been a sea change in the approach of the English courts.

The changes to the law permitting and regulating the use of contingency fee agreements were introduced by Section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Damages-Based Agreements Regulations 2013. As a consequence, since April 1, 2013, contingency fee agreements, known as "damages-based agreements" ("DBAs"), have been a method of funding available to litigants in England and Wales. However, to be enforceable a DBA must be in writing and must specify (a) the claim or proceedings to which it relates, (b) the circumstances in which the legal representatives' payment, expenses and costs are payable, and (c) the reason for setting the amount of the legal representatives' payment at the level agreed.

Successful claimants using DBAs are able to recover their costs from the defendant (*i.e.*, their lawyer's hourly rate, fee, and disbursements), but will have to pay any shortfall between these costs and the success fee due under the DBA from the damages recovered in the litigation. Different rules apply to different types of litigation, but in the context of commercial litigation the maximum payment recoverable by a lawyer from a claimant's damages is capped at 50%.

The funding of litigation by third parties who have no interest in the dispute has traditionally been characterised in England as maintenance or champerty, and such funding arrangements have been held to be unlawful. However, in recent years there has been a sea change in the approach of the English courts, which have become increasingly reluctant to find such funding arrangements to be unlawful or unenforceable on the grounds of maintenance or champerty. The key question is now whether the challenged agreement has a tendency to corrupt public justice. The mere fact that litigation services are to be provided in exchange for a share of the proceeds of the litigation is not by itself sufficient to justify such an agreement being held to be unenforceable. To avoid any suggestion of champerty, third-party funding agreements do not generally give funders any control of the litigation, although they have a right to express views and, ultimately, withdraw funding in accordance with the terms of the agreement. Third-party funders will usually only fund high-value claims and will generally insist, as a condition of funding, that litigants take out after-the-event ("ATE") insurance to cover themselves against the risk of an adverse costs order.

Parties to CFAs, DBAs and third-party funding arrangements will generally take out ATE insurance to cover themselves against the risk of having to pay their opponent's costs if they lose. Under the terms of ATE insurance policies, the insurers undertake to pay the defendant's costs if the claimant loses the case. Successful claimants were formerly able to recover the premiums paid for such policies from defendants, but Lord Justice Jackson found that this imposed too great a burden on defendants and, as a result of the reforms, claimants will not be able to recover the premiums paid on policies taken out after April 1, 2013.

In addition to reviewing the methods of funding litigation, the Jackson Report makes various recommendations in relation to the control of costs through the use of pre-action protocols, alternative dispute resolution, more efficient and cost-focused case management, and amendments to Part 36 of the Civil Procedure Rules ("CPR") designed to encourage settlement.

Lord Justice Jackson identified disclosure (referred to as "discovery" in the US) as being particularly problematic and found that the operation of the existing disclosure rules resulted in excessive costs. He concluded that standard disclosure should not always be the default position and recommended amending the CPR so that disclosure can be tailored to the particular requirements of a large commercial case or any case where standard disclosure is likely to result in disproportionate costs.

Pursuant to the recommendations in the Jackson Report relating to the control of costs, the case-management powers of the court have been expanded by the introduction of Rules 12 to 21 of Part 3 of the CPR. These new rules require that parties file and exchange cost budgets and also empower the court to make cost-management and cost-capping orders. Further, Part 31 of the CPR is to be amended to require the parties (a) to file and exchange reports detailing what relevant documents exist and the estimated cost of giving standard disclosure of them, and (b) to attempt to agree on proposals for disclosure to be ultimately approved by the court. The amended rules will also empower the court to make a disclosure order (selected from a menu of such orders), tailored to the requirements of the case. Such an order may provide for standard disclosure, disclosure on certain issues only, or even dispense with disclosure altogether.

The reforms introduced in the wake of the Jackson Report will widen the funding options available to litigants using the English courts through the introduction of DBAs, whilst seeking to reduce the burden that such funding options impose on unsuccessful defendants. Both CFAs and DBAs depend upon the appetite of the English legal profession for risk, but such risks are commonly mitigated by use of "part-CFAs" and/or a combination of "part CFAs" and third-party funding arrangements. The introduction of DBAs has been accompanied by procedural reforms, such as tailored disclosure orders, designed to monitor and control more effectively the costs of litigation in England and Wales.

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