The back of the queue

Andrew Hogan on how reform to damages based agreements has been left high and dry

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As 2017 opens, despite predictions that the Brexit process would absorb the attentions of lawmakers and divert scarce resources away from the dry and dusty terrain of costs reform to greener European pastures, there are a significant number of reform projects under way.

First, the misleadingly entitled 'Reforming the soft tissue injury (whiplash) claims process'; second, the (at time of writing) imminent and overdue consultation on fixed costs in clinical negligence claims; third, Jackson LJ's further report into fixed costs; and, fourth, the move to a digital bill of costs in October 2017.

But seemingly left high and dry, despite the flood waters of reform flowing, remains the vexed question of amending the current regime for damages based agreements (DBAs) prescribed by the Damages Based Agreements Regulations 2013 made under section 58AA of the Courts and Legal Services Act 1990.

DBA REFORM

That this reform is sorely needed is apparent to me from the increasing trickle of cases that come across my desk, where the shortcomings, failings and drafting infelicities of the current regulations are manifest. It is salutary also to note both that there are no decided cases on the Damages Based Agreements Regulations 2013, and also that the Law Society has produced no model DBA.

A few examples of some of the problems will suffice. As is well known, the government declined to give lawyers what they really wanted, which was a form of hybrid conditional fee agreement (CFA), whereby the lawyers would be able to recover costs from the losing party to litigation and a success fee, calculated as a percentage of the damages recovered by the client.

Instead the 'Ontario' model was adopted, whereby the client agrees to pay a percentage of the damages recovered, and then in turn is able to deduct from the payment, the amount of costs recovered from the other side and retained by his lawyer.

WHICH COSTS?

The first problem that this creates is a conceptual one: what costs are to be credited against the payment, if a client has entered into multiple DBAs, with for example a solicitor and counsel, or a DBA with a claims management company and a further CFA with a solicitor's firm? Is it the totality of the costs recovered from the other side? Or just the costs peculiar to each 'representative'? Given that claims management companies' 'costs' will not be generally recoverable from the other side to litigation, this creates real doubt as to the client's liability.

THE DBA CAP

Second, because the payment agreed under the DBA acts as a cap for the purposes of the indemnity principle on costs recoverable from the losing side per rule 44.18 CPR, the suitability of the DBA for litigation which takes a surprising turn, may change overnight.

For example, a £3,000 claim funded by a DBA with a provision for payment of 25% of damages recovered, would cap any recoverable costs at £750. This would be a good deal for a solicitor, if the case settles after a dozen letters have been written.

But it could prove an unfortunate bargain if proceedings need to be issued, fraud is raised as a defence, and a low-value case proceeds as a multi-track claim. Although the retainer may be capable of novation in such circumstances, should the client agree, a further layer of needless complexity will need to be addressed to ensure retainer issues are not problematic at the end of the case.

ISSUE OF TRUST

Third, do you trust your client? If the client has entered into a DBA, but as things get tougher in prosecuting the claim, then changes his mind and no longer wishes to proceed with the claim, he can end the DBA.

While the client can end the agreement, unless it concerns an employment matter, then the regulations give the solicitor no facility to send the client a bill for early termination. The regulations are silent as to the client's liability in those circumstances: but given that regulation 4 prescribes what payments can be made and the only payments that can be made, the solicitor is likely to be horribly exposed.

UNINTENDED CONSEQUENCES

An unintended consequence of the introduction of DBAs, which can be used by claims management companies (CMCs) as well as solicitors, and which apply to the provision of claims management services, is that they are being deployed to arguably circumvent the referral fee ban in personal injury litigation. The client enters into a DBA with the CMC, the CMC refers the case to a solicitor who enters into a CFA with the client, and no prohibited referral fee changes hands.

But a solicitor cannot ignore the presence of the DBA, or turn a Nelsonian blind eye to the client's agreement with the CMC, taking the view that this occurred before his instruction and is none of his business, but is under a duty to advise a client of the nature of the agreement and his obligations.

The sad cases of Beresford and Smith, where solicitors failed to do so and whose relationships with claims management companies were pored over and found wanting, are instructive and on point: the decision of the Solicitors Disciplinary Tribunal was upheld by the High Court: *Beresford and Smith v Solicitors Disciplinary Tribunal* [2009] EWHC 3155 (Admin).

Although the Solicitors Practice Rules have been swept away and replaced by the Solicitors Code of Conduct, I do not think it is the case that the regulatory requirements have eased in the years since this case: far from it, if anything the regulatory net is likely to tighten further both for solicitors and CMCs, which will shortly be regulated by the Financial Conduct Authority.

CJC REPORT

There are other flaws with the drafting of the regulations and the uses to which they might be put: these issues can be divided into drafting issues and matters of policy. These were addressed in a very interesting and useful report from the Civil Justice Council entitled *The Damages Based Agreements Reform Project: Drafting and Policy Issues*.

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The report was published in August 2015 and runs to 145 pages of closely argued text, dealing with the details of the confusingly named Damages Based Agreements Regulations 2015. These 'regulations', as the report makes clear in its introduction, are a set of draft regulations, provided to the report's working party, which were intended to be brought into force in 2015 subject to any revisions or amendments flowing from the working party's report.

In this respect, it is interesting to note what the working party recorded the then government as wishing to achieve in its terms of reference: 'In particular, the government's intention is "substantively to improve the regulatory framework without encouraging more litigation", and that the overriding objective is "to ensure that any changes we make do not encourage litigation which would not otherwise be taken forward. Given the similarities in substance between DBAs and CFAs, the government does not see DBAs are filling an access to justice gap — rather, they are intended to be an alternative form of funding, perhaps in niche areas of litigation."
In stating this, however, Lord Faulks acknowledged that it was a "complex issue", and that the government was keen to avoid, so far as was possible, the "unintended consequences" that may flow from the redrafting of the DBA Regulations.'

Reading that passage, one comes away with the conclusion that not only was the government of the day reluctant to reform DBAs for fear of the law of unintended consequences, but it had no interest in promoting DBAs as a form of mainstream funding, perhaps seeing the model as another unwelcome piece of fuel for the 'compensation culture'.

Accordingly, given the current zeitgeist, I suspect the excellent 2015 report will remain to gather dust on the shelf for quite a while to come. DBA reform, is, in Mr Obama's memorable phrase, 'at the back of the queue'.

Andrew Hogan is a barrister at Ropewalk Chambers in Nottingham; his blog can be found at www.costsbarrister.co.uk