

LAW SOCIETY CONFERENCE ON “COMMERCIAL LITIGATION: THE POST-JACKSON WORLD”

KEYNOTE SPEECH BY LORD JUSTICE JACKSON (lawsocspeech)

1. INTRODUCTION

1.1 It is daunting to make a keynote speech at a conference which has this title, but when the President of the Law Society asked me to do so I could hardly say no.

1.2 Plan for lecture. I shall first look at the reforms in general. I shall then look at two areas where things have gone wrong, namely damages-based agreements and enforcement of compliance.

1.3 Abbreviations.

“ATE” means after the event insurance.

“C” means claimant and “D” means defendant.

“CFA” means conditional fee agreement.

“CPR” means the Civil Procedure Rules 1998, as amended.

“DBA” means damages-based agreement.

“DBA Regulations” means the Damages-Based Agreements Regulations 2013.

“FR” means the Review of Civil Litigation Costs Final Report.

“LASPO” means the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

“PR” means the Review of Civil Litigation Costs Preliminary Report.

“QOCS” means qualified one way costs shifting.

“TPF” means third party funding.

2. THE REFORMS IN GENERAL

2.1 A popular misconception. Many commentators tend to talk about the Jackson reforms as if they only consisted of costs budgeting, revised funding rules and a new rule 3.9 concerning relief from sanctions. In fact the FR made 109 recommendations for reform. Most of those reforms have now been implemented and I understand from the MoJ that, in general terms, they are regarded as successful.

2.2 The reforms. The reforms cover the following areas:

- Increased docketing or allocation of cases to assigned judges.
- Development of standard directions for cases of common occurrence, available online.
- Earlier fixing of trial dates.
- Stricter enforcement of rules, practice directions and orders.
- Designation of five LJs to be involved in procedural appeals, in order to promote consistency.
- Rules to control excessive or disproportionate disclosure.
- Provisions to control and focus (a) factual witness statements and (b) expert reports.

- Introduction of concurrent expert evidence (“hot tubbing”) in appropriate cases.
- Numerous reforms to personal injury litigation, including QOCS, a 10% increase in general damages, banning of referral fees.
- Enhanced rewards for effective claimant offers under CPR Part 36
- Reversal by rule change of the much criticised *Carver v BAA plc*.
- Appointment of a judge in charge of the Mercantile Courts in order to promote cohesion and uniform practices within this group of courts, which deals with many SME disputes.
- Numerous procedural reforms within individual areas of litigation.
- Promotion of ADR.
- Revisions to pre-action protocols to prevent the generation of unnecessary pre-action costs.
- Creation of Costs Committee of the Civil Justice Council, chaired by a High Court judge
- Abolition of recoverable success fees and recoverable ATE premiums.
- DBAs to be permitted.
- Introduction of fixed costs in the Enterprise Court (formerly the Patents County Court) and in fast track personal injury cases (to be followed hopefully by fixed costs in non-personal injury fast track cases).
- Costs management and costs budgeting in multi-track cases.
- New definition of proportionate costs, which will operate as an overall cap on recoverable costs in assessment on the standard basis.
- New costs rules for appeals to the courts from ‘no costs’ jurisdictions.
- Provisional assessment.
- Changes to summary assessment (re work on documents)
- Revised and more streamlined procedures for detailed assessment.

2.3 A full review of the entire landscape of the reforms is not practicable in the limited time allotted. Nevertheless it is right at least to mention that most of the reforms are working satisfactorily before turning – as I must – to areas where things have been going wrong.

3. DAMAGES-BASED AGREEMENTS

3.1 The recommendation. In FR chapter 12, I recommended that contingency fee agreements or DBAs should be permitted for the reasons set out in that chapter and in PR chapter 20. The majority of commercial practitioners welcomed this recommendation, because it provided an additional means of funding litigation. If both lawyer and client wish to enter into a DBA, there is no good reason why they should not do so. It is possible to think of a range of cases where a commercial organisation might wish to pursue a claim at no cost or low cost and, in return for such advantageous terms, would be willing to forego a percentage of the damages recovered.

3.2 Reform implemented but never used. Section 45 of LASPO duly permitted the use of DBAs, subject to regulations. Both LASPO and the DBA Regulations came into force on the same day. Little use has been made of these provisions. Indeed

almost no-one ever enters into a DBA. In particular:

(i) There is a strong fear that, because of the indemnity principle, the other side will advance technical arguments of the kind that gained popularity (some would say notoriety) during the ‘Costs War’ over CFAs.

(ii) In larger cases solicitors and clients wish to enter ‘no win – low fee’ DBAs, but there is a fear that these would fall outside the current DBA Regulations.

3.3 Problems with the regulations. I do not know who drafted the DBA Regulations and I certainly do not wish to be critical of any particular individuals. The fact remains, however, that the regulations as drafted give rise to a large number of problems. Professor Rachael Mulheron discussed those problems in her article “The Damages-Based Agreements Regulations 2013: some conundrums in the ‘Brave New World’ of funding”.¹ If the common law ‘indemnity principle’ is abrogated, as recommended in FR chapter 5, some of those problems will melt away.

3.4 Government review and the need for consultation. The Government is currently reviewing these issues and considering what amendments may be required to the DBA Regulations. I express the hope that these deliberations will result in effective revisions. It goes without saying that the profession should be properly consulted and given an opportunity to comment on any draft amended rules. Practitioners may well spot glitches in the draft rules which others have overlooked. Unlike the CPR, the DBA Regulations are not made by the Rule Committee (which contains a cross-section of judges and practitioners).

3.5 Indemnity principle. It would be immensely helpful if the indemnity principle were abrogated. This is a rule of common law, to which there are now numerous exceptions. It no longer serves any useful purpose. It has given rise to a host of problems, as well as much futile satellite litigation. I have recommended that the rule be abolished and set out the case for abolition in FR chapter 6. The Government did not initially accept that recommendation. Perhaps further consideration might now be given to the issue at the same time as reviewing the DBA Regulations?

3.6 Hybrid DBAs. The most controversial issue of all is whether hybrid DBAs should be permitted. In this context, “hybrid DBA” means an agreement under which the client pays its lawyers a low fee if the action is lost and a percentage of the winnings if the action is won. As I understand it, the Government will need to be persuaded that there is a need for hybrid DBAs. In my firm view there is such a need. I reach this conclusion for eight reasons.

3.7 First reason. DBAs are particularly suited to commercial litigation. It may not be practical for lawyers to undertake a long commercial action on the basis that they will recover no payment for their labours if the case is lost. On the other hand, they may well be willing to work for (a) reduced fees in the event of defeat and (b) a share of the winnings if the case is won. If that is what both lawyers and clients want, why should they not be allowed to proceed on that basis?

3.8 The answer is that there is no reason of either principle or practicality why that should not be allowed. The old argument that lawyers should not be allowed to act on

¹ (2013) 32 Civil Justice Quarterly 241-255

a speculative basis fell away twenty years ago when CFAs were permitted.

3.9 Second reason. Between April 2000 and April 2013 the CFA regime was an instrument of injustice and, on occasions, oppression. It meant that one party litigated at massive costs risk, while other party proceeded at no or minimal costs risk. None of those objectionable features are present in hybrid DBAs. The presence or absence of a hybrid DBA makes no difference to the position of the other party. The amount of costs which a successful party recovers from his adversary will be precisely the same, regardless of whether the successful party has an ordinary DBA, a hybrid DBA or no DBA. The means by which a litigant chooses to fund his legal costs is his own business. It should not concern his opponent.

3.10 Third reason. Hybrid DBAs are allowed in Canada. Section 28.1 (2) of the Solicitors Act in Ontario provides:

“A solicitor may enter into a contingency fee agreement that provides that the remuneration paid to the solicitor for the legal services provided to or on behalf of the client is contingent, in whole **or in part**, on the successful disposition or completion of the matter in respect of which services are provided.”

3.11 The phrase “in part” (which I have highlighted) expressly contemplates that some DBAs will be on a ‘no win low fee’ basis. I understand from practitioners that such hybrid DBAs are not regarded as problematic. They work perfectly satisfactorily. No-one suggests that this particular form of DBA is encouraging speculative litigation or unmeritorious claims.² On the contrary the effect of the regime has been substantially to extend access to justice.

3.12 Fourth reason. I strongly suspect that hybrid DBAs operate in many other jurisdictions, but I have not had the chance to research this. In the Netherlands, for example, hybrid DBAs are the only ones which are permitted. In that jurisdiction contingency fee agreements must include a provision that the client pays some portion of the legal costs in the event of losing.

3.13 Fifth reason. CFAs may be either in the form ‘no win no fee’ or in the form ‘no win low fee’. It is illogical that DBAs do not have similar flexibility.

3.14 Sixth reason. Third party funding (“TPF”) proceeds on the basis that the funder meets **some or all** of the litigation costs if the action fails and receives a share of the winnings if the action succeeds. In other words TPF is allowed on a hybrid basis. It is illogical that DBAs (in which the lawyers act as funders) are not allowed on a hybrid basis. Indeed it is worse than illogical. DBAs are a more efficient form of funding than TPF, because only two entities (rather than three) have a stake in the litigation. Therefore the law should not be sidelining DBAs in favour of TPF.

3.15 Seventh reason. I understand that there may be a fear that hybrid DBAs will encourage weak and speculative claims. Quite the opposite is the case. If both the

² I know of one Canadian judge who suspects that contingency fees generally may encourage questionable claims, although he says that there is no evidential basis for this. More importantly, there is no suggestion that hybrid agreements are relevant to this issue.

client and the lawyer are “investing” in the case, they will not do so unless the chances of success are more than even. No hard nosed finance director will be able to justify to his board ‘taking a punt’ on a weak case.

3.16 Eighth reason. The eighth reason is a simple one. Permitting hybrid DBAs would promote access to justice. Following the abolition of recoverable success fees, it is important to open up as many other options for funding as possible.

3.17 Australian report. In Australia CFAs are allowed on either a ‘no win no fee’ or a ‘no win low fee’ basis. In April 2014 the Australian Productivity Commission produced a well reasoned interim report proposing that lawyers in such cases should be entitled to receive a share of the damages as an alternative to an uplift on fees: see pages 529-532.

3.18 Where does the opposition come from. I suspect that the real opposition to hybrid DBAs comes from those who oppose DBAs in principle. Many large organisations who are on the receiving end of claims find the notion of DBAs abhorrent. See for example PR page 99, paragraph 2.3. Understandably, a regime which prevents people bringing meritorious claims suits their interests. A set of DBA Regulations which no-one uses is admirable from that viewpoint.

3.19 Standing firm against powerful vested interests. In introducing the 2013 civil justice reforms the MoJ, Parliament and the rule makers resisted the pressures from many powerful vested interests on the claimant side, which were keen to hang onto recoverable success fees and other similar arrangements. They also resisted the pressures from those insurers who opposed the increase in general damages and the ATE reforms. Now it is equally important that those in authority stand up to powerful vested interests within the ‘big business’ camp.

3.20 The way forward. If commercial lawyers wish to see the DBA Regulations reformed and such reforms to include provision for hybrid DBAs, it would be sensible to form a working group:

- (i) to analyse the numerous matters of detail on which there is concern and
- (ii) to assemble the evidence and make out a case for hybrid DBAs.

It may be sensible to investigate the position overseas in greater detail than I have done in this paper and to undertake some market research. If recommendations for reform are to carry weight, they need to be evidence based.

4. COMPLIANCE

4.1 The pre-2013 problem and the Law Society’s submissions. One significant problem pre-2013 was that parties were not complying with court orders, often for no good reason, and they were getting away with it. The Law Society neatly distilled the issue in its written submissions to the Costs Review dated 31st July 2009:

“The Law Society considers that the overriding objective is not applied as rigorously or as consistently as it should be.

The most infrequently applied rules are those that are available to control the progress of a case. Lord Woolf introduced a number of

ways in which this could be achieved (most notably CPR Parts 1.1, 1.4 and 3.1), but the experience of practitioners suggests that in practice these are not used fully or at all. Therefore we question whether further rules would bring any benefit unless they are applied fully. We suggest there needs to be a change in the attitudes of the judiciary and court users so that court rules are fully complied with and applied in practice. The unhelpful practice of ‘local practice directions’ which has developed in some courts should be abolished and strictly policed.”

4.2 Other similar views. Other stakeholders and commentators made similar observations. I concluded that the culture of non-compliance which had gripped the civil justice system was one of the (many) causes of high litigation costs: see FR chapters 4 and 39.

4.3 Recommendation 86. Recommendation 86 of the FR specifically addressed the problem:

“The courts should be less tolerant than hitherto of unjustified delays and breaches of orders. This change of emphasis should be signalled by amendment of CPR rule 3.9. If and in so far as it is possible, courts should monitor the progress of the parties in order to secure compliance with orders and pre-empt the need for sanctions.”

4.4 Not controversial. Recommendation 86 was one of the least controversial recommendations in the report. This was because there was general agreement among many consultees that there was a need to tighten up compliance.

4.5 Importance of the recommendation. The recommendation was important for two separate reasons:

- (i) Non-compliance was one of the causes of high litigation costs, as stated above.
- (ii) As the Law Society had pointed out, the new rules recommended by the FR (and subsequently enacted) would not bring their expected benefits unless people actually complied with them.

4.6 Amended rule 3.9 (1). The Rule Committee implemented recommendation 86 by amending CPR rule 3.9 (1) to read as follows:

“(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost;
and

(b) to enforce compliance with rules, practice directions and orders.”

4.7 Over-zealous application. Unfortunately, following the introduction of this rule, a series of judicial decisions attached such a high degree of weight to factor (b) that the cure was worse than the original disease. Litigants were being denied access to

justice for breaches which were of little consequence. Satellite litigation was driving up costs.

4.8 Recent re-adjustment. What is in fact required is a half way house between the unacceptable pre-2013 culture of non-compliance and the new age of formalism which some believed that rule 3.9 had ushered in. Hopefully the majority decision of the Court of Appeal in *Denton v White* [2014] EWCA Civ 906 achieves that balance.

4.9 My own view as to the correct construction of rule 3.9 is set out in my partially dissenting judgment at paragraph 85. Nevertheless I loyally accept that the majority judgment in *Denton* sets out what must now be accepted as the correct construction of that rule.

4.10 Do not slip back into old ways. It is very important that in the euphoria with which some have greeted *Denton*, we do not slip back into the 'old' culture of non-compliance against which the Law Society and others rightly protested.

4.11 Conclusion. In this paper I have addressed two areas of particular interest to commercial lawyers where things have gone wrong in the course of implementation. As to DBAs, the problem remains outstanding and now needs serious attention. As to rule 3.9 and compliance, I believe that the courts have satisfactorily addressed the problem³ without the need for further rule change.

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³ See for example the sensible decision of Warby J on this issue in *Yeo v Times Newspapers Ltd* [2014] EWHC 2853 (QB) at [140] to [148].