Bar Council response to the Impact of the 'Jackson Reforms' On Costs and Case Management call for position papers

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Civil Justice Council's call for position papers on the Impact Of The 'Jackson Reforms' On Costs And Case Management.[1]

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. This position paper focuses on the Bar Council's policy positions on the current operation of Conditional Fee Agreements (CFAs) and Damages-based Agreements (DBAs); while considering briefly issues and concerns around costs budgeting and relief from sanctions. The Bar Council made strong representations to the MoJ as statutory consultee to the CFA and DBA regulations and to Parliament at the Motion to Approve debates. The Bar Council continues to believe that both the Conditional Fee Agreement Regulations 2013 and the Damages-based Agreements Regulations 2013 should be improved through an amendment Order or a new set of regulations.

5. The speed at which the Jackson reforms were implemented by the Ministry of Justice in 2013 have resulted in a civil litigation funding environment that is devoid of certainty in many areas, commercially unattractive and has real potential for mass satellite litigation. Implementation was far too rushed, with regulations laid in Parliament at the eleventh hour

[1] Civil Justice Council (2014) Call for Position Papers: The Impact Of The 'Jackson Reforms' On Costs And Case Management

largely in the absence of official announcements regarding policy changes. This left representative bodies, regulatory bodies and practitioners relying on rumour and conjecture when planning for wide scale changes to the civil litigation funding environment. Twitter was for many the key information source. The situation was wholly unsatisfactory. Such issues of significant public interest require proper and detailed attention.

6. That said, there is now an opportunity to reflect and learn. We feel this would be aided if there was a more communicative approach between the Ministry of Justice and statutory consultees[2] so that we can perform the check-and-balance Parliament expects and jointly improve the quality and workability of the regulations. This can only be achieved by trust and active engagement between all parties and the Bar Council is willing to play its full part in achieving this.

7. The Civil Justice Council conference on the Impact of the Jackson Reforms provides a good forum and context for initial discussions to take place. The conference is also extremely timely because the Bar Council is separately reviewing the effects of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) on the Bar, specifically looking at changes to the scope of civil and family legal aid and the civil litigation funding landscape. We are currently finalising a survey of the profession which will launch on 1 April 2014 and it will be open for three weeks. The survey results will form a critical evidence source for our larger "LASPO: One year on" project which is due to report its findings in September 2014.

Conditional Fee Agreements

8. During the parliamentary debates on the draft Conditional Fee Agreements Regulations 2013, the Bar Council had a number of concerns and called on the Ministry of Justice to amend the regulations by way of an amendment order. We believe that position remains correct.

Potential reduction to access to justice

9. The Conditional Fee Agreements Regulations 2013 place several limits on the level of success fee for different types, and stages, of civil litigation. These limits include VAT which has the potential to cause real problems for practitioners. For example, the VAT rate may be subject to variation after an agreement is entered into but before a bill is rendered. This introduces uncertainty into calculations and there is clearly the potential for counsel to breach a percentage limit due to the actions of HM Treasury.

10. There is also uncertainty in the drafting about whether the total limit applies to both the solicitor and counsel or whether there are separate limits for both lawyers. The Bar Council believes that in the interests of consumer protection the regulations should be amended so there is absolute clarity on this point.

[2] The Bar Council, the Law Society and the "designated judges" are statutory consultees for CFA and DBA regulations.

11. In terms of larger and more complex personal injury cases (for example serious brain injuries resulting from clinical negligence), the limit only applies to past losses which means that the risks of taking on such litigation (which is complex, difficult to predict, time consuming and involves significant disbursement) will not be properly compensated. Practitioners will simply not be able to take on such cases and could mean that claimants are denied access to justice. The perverse result of the limit therefore is that instead of protecting the damages recoverable by the worst hit claimants, the reform means that those claimants will get no representation and thus no damages at all. The Bar Council continues to believe that the success fee should not include VAT (and be reduced accordingly) and should not be limited to past losses in complex personal injury cases.

Transitional Conditional Fee Agreements

12. There was, and remains, ambiguity in the Conditional Fee Agreements Regulations 2013 as to whether the success fee payable to counsel can be recovered between the parties where a solicitor entered a CFA with their client before 1 April 2013, but counsel entered into a CFA with their client's solicitor after 1 April 2013. This has resulted in the seemingly unintended situation where the client will be able to recover the success fees for their solicitor but not the success fee for counsel. This situation affects not only the lawyers but also the lay client.

13. The Bar Council believe that there remains a real potential for mass satellite litigation on transitional CFAs which will use up court resources to remedy issues that could have been more efficiently resolved by Parliament. The Bar Council believes that all these areas of uncertainties should be clarified by an amendment Order rather than using the courts which will be piecemeal and more expensive to the taxpayer.

14. Nonetheless, the situation on how these transitional CFAs should be treated remains unclear and the Bar Council is forced to take the view that "the safest course" counsel should take is to enter into a new CFA agreement or be retained on the disbursement basis. Anecdotally, we understand that virtually all transitional CFAs are undertaken by counsel on a zero percent uplift basis. The Bar Council's survey looking at the impact of LASPO hopes to gain evidence of which solutions are used in practice.

15. The existence of a Transitional CFA also gives rise to a number of other uncertainties:

a. Whether a pre-1 April 2013 CFA is enforceable if it is assigned to a colleague in Chambers after 1 April 2013 under the terms of the original CFA.

b. The position of the general uplift in damages if one party (the solicitor) is able to retrieve their uplift from the other side and the other party (the barrister) must be paid their uplift from the client.

16. We are therefore in the position where these uncertainties will continue until they are tested in the courts or there is clarity through amended regulations. The Bar Council continues to believe that these issues should be clarified for the benefit of both clients and lawyers as soon as possible by amending the regulations rather than using the courts.

Damages-based Agreements

17. During the parliamentary debates on the draft Damages-based Agreements Regulations 2013, the Bar Council had a number of concerns and called on the Ministry of Justice to amend the regulations by way of an amendment order. Again, we believe that position remains correct.

18. Indeed, the Bar Council's current stated position on DBAs is that they should not be used and we have refrained from releasing a Model DBA Agreement because we believe that the Damages-based Agreements Regulations are not fit for purpose, are potentially unenforceable and are commercially unattractive for a number of reasons (some of which are identified below).

Hybrid agreements

19. The Damages-based Agreements Regulations 2013 do not allow for hybrid agreements which are agreements where solicitors are able to agree that they should receive some costs if the defined "win" does not occur rather than none at all. In CFAs the law permits discounted CFAs (or hybrids) so that lawyers can discount their rates in lost cases but charge normal rates plus a success fee if they win. The DBA regulations do not allow similar flexibility. The current policy of disallowing hybrid agreements for DBAs goes against Jackson LJs original recommendations and we believe this is one of the key reasons why the take-up of DBAs is so low. Again, we will seek to evidence this through the forthcoming survey looking at the impact of LASPO but, so far as we understand, take up by counsel is very low, if at all.

Termination

20. The DBA regulations do not contain any provisions on termination. We believe that the current drafting prohibits a lawyer from agreeing that, if the DBA is terminated, the client can be billed for base costs or indeed on any other basis than awaiting the outcome of the case.

Recoverability of interlocutory costs

The indemnity principle has specifically been retained in relation to DBAs. Under a CFA, it is normal to include a provision that the client is liable for any base costs which are awarded at an interim hearing (with the success fee to come on top if the client ultimately wins the claim). This enables the solicitors to put in a costs schedule for an interim hearing. Under the current regulations that cannot be done, because the client must be liable for the whole of the payment or nothing (apart from expenses). That means that the client's solicitor cannot say that the client is liable for the costs of any interim hearing and therefore cannot put in a certified costs schedule.

21. Indeed, the provisions in the Civil Procedure Rules limiting costs recoverable inter partes are expressly contrary to the specific recommendation of Jackson LJ.[3] Inter partes costs should have remained coverable on the conventional basis if Jackson had been followed.

Counterparty to a Damages-based Agreement

22. There is uncertainty as to who the counterparty to a DBA with counsel should be. The wording the regulations suggests that the counterparty should be the lay client. This would mean that counsel can charge a percentage of damages in addition to that charged by the solicitors. The Bar Council believes this undermines the limits imposed in the regulations.

Relief from sanctions

23. The Court of Appeal decision in *Mitchell v News Group* on the approach to relief from sanctions has caused much comment and concern. The Bar Council shares these concerns. It is to be hoped that, at the very least, the boundaries of what will and will not amount to "a trivial breach" and a "good reason" can be quickly established without a large amount of expensive satellite litigation. In addition, however, we question whether the courts have necessarily struck the right balance, including in the wide variety of situations in which the approach in Mitchell is now being applied.

24. Although with *Mitchell* the Court of Appeal have clearly signalled their approach, concerns have been further expressed at the approach of some first instance judges who seem prepared (and see themselves as having either been told or encouraged by the Court of Appeal) to put parties in a situation of, in effect, winning or losing litigation on the basis of breaches of orders or rules, and to do so in situations in which many regard this as a disproportionate response or outcome. Other first instance judges are finding themselves constrained to reach decisions which they clearly do not feel to be right. Parties and their legal teams are also now feeling obliged to take uncooperative stances, or at least regarding themselves as being justified in so doing, in situations in which there must be a real risk that the resulting argument over relief from sanction, and the significant costs being incurred in that regard (including at the behest of professional indemnity insurers), risk not just injustice, but also bringing the civil justice system into disrepute.

25. The Bar Council suggests that there should be further consideration and clarification of the balance between the need to do justice (the "justly" element of the overriding objective) and the need to enforce compliance with rules, orders and practice directions.

Costs budgeting

26. It is too early for the profession to have reached conclusions on the impact of costs budgeting more widely, other than to express a degree of concern at the potential imbalance between the significance of the issue for the parties and the way in which the exercise is being conducted in practice in many courts, but we can note concerns at the relationship

[3] See page 133 at 5.1 (i) of Jackson LJs final report

between costs budgeting and the approach in Mitchell, as exemplified by the outcome in the Mitchell case itself.

27. The Bar Council is also concerned over the growing tension in reconciling the overriding objective of doing justice between the parties, including accessing the costs that genuinely need to be spent in preparing a case, and the requirement that the costs should be proportionate to the dispute.

Bar Council
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